IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

MICHAEL HARRIS WEISSER,

Respondent.
_____/

Supreme Court Case
No. 87,035

The Florida Bar Case
No. 96-70,226(11P)

On Petition for Review

ANSWER BRIEF OF COMPLAINANT

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SYMBOLS AND REFERENCES

For the purposes of the Bar's Answer Brief on Appeal, the Florida Bar will be referred to as the Bar. Respondent will be referred to as Respondent. Report of Referee will be cited as

follows (ROR p.). The Florida Bar's Memorandum of Law Regarding Discipline will be cited as (Fla. Bar memo, pps 12-13).

STATEMENT OF THE CASE AND FACTS

While Respondent's brief is commendable for some forthright admissions, it is, nevertheless, seriously deficient in regard to the Statement of the Case and Facts. The deficiencies include the absence of any reference to the Referee's findings concerning aggravating factors. The Referee's findings in that regard

follow:

> 4. Under Standard 9.22, I find the following aggravating factors:
>
> (a) prior disciplinary offenses;
> (c) a pattern of misconduct;
> (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
> (g) refusal to acknowledge wrongful nature of conduct; and,
> (i) substantial experience in the practice of law.
>
> (ROR, p.9)

The prior disciplinary offenses (a), included demanding fees from a client to pay for proceedings required to extricate Respondent from his own actions. The Florida Bar's Memorandum of Law Regarding Discipline, p.11.

In regard to factor (g), refusal to acknowledge wrongful nature of conduct, the Referee found that Respondent's characterization of his resignation as voluntary and non-

disciplinary was fallacious. The Referee stated:

> It is clear that Respondent's resignation was pursuant to Rule 3-7.1(2) of the Rules of Discipline, in effect in 1991, which provided for resignation during the progress of disciplinary proceedings, was a resignation for disciplinary reasons.
>
> (ROR, p.2)

In regard to other issues, Respondent testified that he had not received an order addressed to him as an attorney by the Court (see footnote 3, below), and that he may have been

negligent, but he did not intentionally act as an attorney (see footnote 4). He also claimed that he was merely representing the interests of his unemancipated minor son (see footnote 5).

The Referee responded to those respective positions in the following three footnotes:

> 3. Although Respondent testified that he did not receive, or does not remember receiving this order, I find this testimony to be untruthful.
>
> 4. I find Respondent's testimony in this regard to constitute evidence of his failure to acknowledge the wrongful nature of his conduct and will be considered as an aggravating factor in determining the appropriate discipline.
>
> 5. I find this testimony by Respondent before this Referee and similar statements to Judge Breger in the underlying case to be material misrepresentations. At the time the

> underlying case was filed, Respondent's son was 18 years old, and was neither a minor nor unemancipated. Respondent's misrepresentations will be considered as aggravating factors in determining the appropriate discipline.

The Referee added: "I find Respondent's testimony, in general, to lack any credibility and in some instances to be less than truthful." (ROR, p.4)

In regard to Respondent's prior disciplinary record, the Referee recognized Respondent's 1988 suspension for six months for "intentional and unconscionable" conduct, and the 1991 disciplinary resignation.

All of the foregoing findings were omitted by Respondent in

the Statement of the Case and Facts. In addition to the foregoing omissions, the Respondent provides an inaccurate account of the process of determining the proper discipline. He contends that: "The Referee did not hold a hearing to consider the issue of discipline, but simply issued his report." (R's brief, p.3) In fact, both sides briefed the Referee regarding the appropriate discipline. The Florida Bar served its memorandum of law on October 4, 1996. The Respondent's memorandum of law was served on October 10, 1996.

SUMMARY OF ARGUMENT

Respondent argues that disbarment is inappropriate by asserting the existence of factual differences between this case and cases cited by the Referee. The effort is initially flawed because the Respondent ignores all of the aggravating factors which were found to exist in this case.

Any factual comparisons would have to deal with the very serious and uncontradicted finding, among other, that the Respondent was "less than truthful". Also uncontradicted is the finding of a prior disciplinary offense of demanding fees from a client for legal proceedings occasioned by Respondent's own conduct. The Referee also found that Respondent had engaged in a pattern of misconduct, had refused to acknowledge the wrongful nature of his conduct, and had substantial experience in the

practice of law.

All of the foregoing aggravating factors were ignored by the Respondent. Any factual comparisons must take those factors into consideration.

Second, the Referee cited cases in support of general propositions which the Respondent is unable to dispute. The cases, viewed in the context of the Referee's report, were not presented to establish factual identity to substantiate

particular sanctions.

Third, it is clear from the applicable Florida Standards for Imposing Lawyer Sanctions that disbarment is an appropriate sanction under these circumstances. The proper sanction in this case should include the weight of enhancement due to the aggravating factors.

ARGUMENT

THE RESPONDENT HAS FAILED TO DEMONSTRATE ANY ERROR IN REGARD TO DISBARMENT AS THE RECOMMENDED DISCIPLINE

Respondent states as his heading in the Argument portion of his brief that the ten year "suspension" is excessive and illogical. Respondent, of course, is referring to the recommendation of disbarment. The Respondent has failed to demonstrate that the recommendation constitutes error.

Respondent attempts to support his argument by distinguishing the facts in cases cited by the Referee. Three factors should be noted in regard to those cases. First, Respondent fails to consider any of the aggravating factors contained in the report when arguing alleged factual distinctions. Second, the cases cited by the Referee are applicable to the extent that they reference general principles or generally similar behavior. Third, the Respondent's discipline is not dependent upon case law alone insofar as the Referee correctly relied upon applicable standards as well.

Obviously, all of the bases for discipline must be considered before the supporting authority can be evaluated. Those bases include aggravating factors of considerable consequence, factors which must bear substantial weight in

determining Respondent's future as an attorney.

A fundamental finding in the Referee's report is that the

Respondent has a habit of not telling the truth even while under oath. No challenge to that finding was presented in the Respondent's brief. Rather, the brief recognizes other misconduct, namely behavior which was described as "ill advised". (p.7, R's brief).

The basis for the Court's conclusion is obvious from the record. For example, note the following questions and the answers of the Respondent:

> Q. Yes, Plaintiff's witness list. Who prepared that?
>
> A. (After examining) (No response.)
>
> Q. I'm sorry?
>
> A. I believe that I directed it to be prepared.
>
> Q. You directed it to be prepared. What's the date of mailing on the second page, June 12, 1995?
>
> A. Yes.
>
> Q. At the top of the front page, does it not say, "Comes now the Plaintiff and files a witness and exhibit list in compliance with the Court's uniform order setting cause for trial?
>
> A. Yes.
>
> Q. Do you have a copy of that order setting cause for trial in your files?

> A. No.
>
> Q. Why not?
>
> A. I don't know why not.
>
> . . . . . .
>
> Q. Why would you prepare a witness list if you

don’t have an order requiring you to, dated June 12th just before the June 19th proposed hearing? Why would you do that, Mr. Weisser, if you did not have this order requiring you to?

A. I think it was the proper thing to do.

Q. Just out of the blue, you would do it?

A. Not out of the blue.

Q. An site (sic.), “In compliance with the Court’s uniform order setting cause for trial.”

A. (No response).

Q. Mr. Weisser, isn’t it true that this document is not in your file because you took it out?

A. That’s wholly untrue. Why would you make a statement like that?

Q. Well, I’m asking you. I didn’t make a statement. I’m asking you. Isn’t that why it’s not in there?

A. That would be a lie.

Q. Then where is this order in your file when you are referencing it in your witness list?

MR. SHUPACK: Objection. That’s argumentative, Your Honor.

THE REFEREE: Well, if he can answer it, fine. If he can’t, then he can’t.

THE WITNESS: I don’t have in my file the order of the Court.

BY MR. HENDRIX:

Q. Why?

A. I can’t explain why.

(Tr. 46,48,49)

It is axiomatic that an attorney who has no regard for the

truth should not be practicing law. Respondent has done everything possible to obstruct the truth through his testimony as well as unfounded pleadings.[1] He has repeatedly denied that there was any significance to his disciplinary resignation, by portraying it as non-disciplinary and a purely voluntary act. That frivolous position was denied by the Bar attorney who handled the resignation and rejected by the Referee by referring to the clear language of Rule 3-7.1(2).

In addition, the Referee properly cited the Winter, Bauman, Jones and Dykes cases in regard to general principles and/or generally similar conduct which Respondent is unable to negate. The pertinent portion of the Referee's Report follows:

> I find that Respondent intentionally and contemptuously engaged in the practice of law in representing his son, Jason Weisser in a litigation matter pending before the County Court in and for Dade County, Florida. I also find that Respondent intentionally and contemptuously held himself out as a licensed, practicing attorney in the State of Florida.
>
> In The Florida Bar v. Bauman, 558 So. 2d 994(Fla. 1990), the Supreme Court stated, "we can think of no person less likely to be rehabilitated that someone like the Respondent, who willfully, deliberately and continuously refuses to abide by an order of this court." See also The Florida Bar v. Jones , 571 So. 2d 426(Fla. 1991)(disbarring an attorney for continuing to practice during his suspension and submitting a false

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[1] Procedurally, Respondent sought to obtain recusal of the Referee. When that effort failed, Respondent filed a renewed motion for recusal, and filed a supplement thereto. He also filed an ultimately unsuccessful writ of prohibition when the previous pleadings were denied.

> affidavit with the Bar stating that he was in compliance with the notification requirement of the suspension order.); The Florida Bar v. Dykes, 513 So. 2d 1055 (Fla. 1987)(disbarring an attorney for ten years for failing to notify a client of his suspension and acting as a personal representative while suspended.)
>
> (ROR, p.6)

Respondent's factual distinctions regarding the foregoing cases simply ignore the remainder of the Report. The cases which Respondent seeks to distinguish must be given increased weight due to the number and seriousness of the aggravating factors. That is, while the conduct related to the rule violations may be

more egregious in some of the foregoing cases, the conduct in this case must be given similar weight in view of the aggravating factors.

Hence, Respondent's reliance upon The Florida Bar v. Neckman, 616 So. 2d 31 (Fla. 1993) as the case which allegedly governs, is not sustainable. Neckman does not include any of the aggravating factors found by the Referee in this case, and those findings regarding the aggravating factors have not been challenged by the Respondent.

In addition, the Referee found that there were four mitigating factors in Neckman: (1) that there was an injury caused by Neckman, (2) that Neckman was not motivated by financial gain, but a desire to help friends, (3) that the violations were unrelated to prior misconduct and (4) that

Neckman's rehabilitation and treatment were progressing rapidly.

Factor (4) is not relevant to this case and opposite findings pertain to factors (1) and (3) in this case. Presumably, in relation to factor (2) Respondent, Weisser was motivated by his son's financial gain.

In addition the cases cited by Referee are totally consistent with the Florida Standards applicable to this pending matter. Standard 8.1 of the Rules of Discipline provides that

disbarment is appropriate when the Respondent:

> (a) Intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system or the profession;
> or
> (b) Has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.

Respondent has clearly engaged in conduct similar to that which was involved with his resignation. As the Bar pointed out in its memorandum regarding discipline:

> On or about May 7, 1990 the Bar filed yet another Petition for Rule to Show Cause against Respondent, a copy of which is attached hereto as TFB Exhibit 7, alleging that Respondent was holding himself out as an attorney in violation of the Supreme Court's orders in Case No. 69,937 and 74,986. Through counsel, Respondent responded to the Bar's Petition.
>
> On or about April 15, 1991 Respondent submitted his Petition for Leave to Resign, a copy of which is attached hereto as TFB Exhibit 8, pursuant to Rule 3-7.12 of the Rules of Discipline, setting out therein that

> there wee two disciplinary matters pending against him, including the Bar's Petition for Order to Show Cause dated May 9, 1990 (Case No. 90-71,537(11N), concerning allegations of violations of the Supreme Court's Orders in Case Nos. 69,937 and 74,986.
>
> On May 9, 1991, the Supreme Court's order was entered approving Respondent's Petition for Resignation with an effective date of July 8, 1988.

> It is clear that the instant case is not Respondent's first Bar matter relating to either intentional misconduct or allegations of violating prior orders of the Supreme Court. The misconduct in this matter was intentional and involves allegations of violating an order of the Supreme Court.
>
> (Fla. Bar memo, pps 12-13)

Standard 9.1 states that aggravating (and mitigating) factors may be considered in deciding what sanction to impose. Standard 9.2 declares that aggravating factors may justify an increase in the degree of discipline imposed. The five significant aggravating factors found by the Referee, unchallenged by the Respondent, combined with the underlying offense of practicing while suspended, justify disbarment.

CONCLUSION

Based upon the foregoing the Referee's recommendation should be affirmed and the Respondent should be disbarred.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Bar's Answer Brief was mailed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a true and correct copy was mailed to Richard B. Marx, Attorney for Respondent, 1221 Brickell Avenue, Suite 1010, Miami, Florida 33131 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this ____ day of December, 1997.

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