IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL H. WEISSER

Respondent.

_____/

Supreme Court Case
No. 87,035

On Petition for Review

REPLY BRIEF OF RESPONDENT

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SYMBOLS AND REFERENCES

For the purposes of the Respondent's Reply Brief on Appeal, the Report of the Referee will be referred to as (ROR p.), The Florida Bar's Answer Brief will be referred to as (AB p.) and Respondent's Initial Brief will be referred to as (IB p.).

SUMMARY OF ARGUMENT

Respondent's defense is predicated upon the following factors: a) this case involves a single incident of the purported unlicensed practice of law, b) it involves a single client [Respondent's son], c) there was no dishonest or selfish motive on the part of the Respondent, d) there was no injury to the client or to the public, e) the Referee lost his objectivity , f) the Respondent was denied a fair and impartial hearing, f) the case law cited by the Referee in his Report and relied upon by the Bar for the proposition that disbarment is appropriate in this case are factually distinguishable and inapplicable to the case at bar, g) the Referee's findings of fact are not supported by the record, and h) the Referee's recommended discipline was clearly excessive. Accordingly, the facts of this case, as well as the case law, do not support the Referee's recommendation of disbarment.

ARGUMENT

THE TEN YEAR DISBARMENT RECOMMENDED

IS CLEARLY EXCESSIVE

The Bar asserts that the Referee properly cited the cases of The Florida Bar v. Winter, 549 So.2d 188 (Fla. 1989), The Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990), The Florida Bar v. Jones, 571 So.2d 426 (Fla. 1990), and The Florida Bar v. Dykes, 513 So.2d 1055 (Fla. 1987) "...in regard to general principles and/or generally similar conduct which Respondent failed to negate. (AB p.9). Interestingly, the Bar fails to define or explain just what the general principle is that these cases are supposed to embody.

In its Answer Brief, the Bar accuses the Respondent of doing, "everything possible to obstruct the truth through his testimony as well as unfounded pleadings". (See AB p. 9) In support of this proposition, the Bar cites in footnote 1 that the Respondent sought a recusal of the Referee, filed a renewed motion to recuse, a supplement thereto, and ultimately filed an unsuccessful writ of prohibition. The Bar characterizes these acts as "unfounded pleadings" and as "frivolous". The Respondent has contended that the Referee's Recommended Discipline was excessive and that he had lost his impartiality due to Respondent's actions. Footnote 1 of the Report elucidates Respondent's position. The Referee did not file his Report until after the Respondent had filed his motions to recuse and writ of prohibition. The ten year disbarment as the recommended discipline appears to be a human reaction to the attacks by the Respondent on the Referee's integrity. It can be argued, based on the record that the Referee was biased against the Respondent and that this bias tainted his judgment in reaching a decision as to discipline which was clearly exesscive. This was a violation of Respondent's right to a fair and impartial trial as

protected by the U.S. Constitution and the Constitution of the State of Florida.

With respect to conduct, these cases are not remotely analogous to the case at bar. In the Winter case, the Respondent was found guilty of twenty-one (21) separate counts of engaging in the practice of law after resigning from the Bar. Winter's twenty-one (21) separate counts of practicing law were certainly more egregious than Mr. Weisser's single act of unauthorized practice of law in representing his son. Additionally, Winter had permanently resigned from the Bar as a result of past disciplinary judgments. In the instant case, Respondent's resignation was for only three and a half years from June 9, 1988.

This court construed the Winter case in the case of The Florida Bar v. Neckman, 616 So.2d 31 (Fla. 1993). There, this court distinguished the holding in Winter and specifically stated that "...we do not believe that the Winter case stands for the proposition that the unauthorized practice of law by such a person [referring to a resigned attorney] always requires disbarment". Id. This is the same proposition that Respondent has been arguing should be the guiding principle in this appeal.

In the case of Bauman, the Respondent, who was under suspension for prior misconduct, "engaged in at least five distinct acts of practicing law, and willfully, deliberately, and continuously refuses to abide by an order of this Court." In particular, the Respondent was "held in contempt by a circuit judge for holding himself out as an attorney". Subsequent to the contempt citation, he again represented clients in court. Clearly, there is no resemblance in the conduct of Bauman to the conduct of Weisser.

In the case of Jones, the Respondent, who was under suspension, "knowingly misrepresented his compliance with the suspension order" and engaged in the unauthorized

practice of law on numerous occasions" by appearing in court, preparing interrogatories, preparing and signing summons, pleadings, and financial affidavits for multiple clients. In the case at bar there were no multiple clients, the only client Mr. Weisser represented was his son, in a single case.

In theDykes case, the Respondent was disbarred for ten years for failing to notify a client of his suspension and acting as a personal representative while suspended. However, Dykes is readily distinguishable from the instant case in that there, the Respondent was also found guilty of misappropriating the funds of an estate with the intent to convert the funds to his own use. Further, Respondent had also been found guilty of willfully disregarding a court order to turn over the assets of the estate to a successor personal representative. These are two acts, which standing alone, warrant disbarment.

In short, the cases cited in the Referee's Report and relied upon by the Bar as authority for the proposition that disbarment is the appropriate sanction when a suspended attorney engages in the unauthorized practice of law fails to take into consideration the underlying facts of each case and are easily distinguishable from the case at bar. The Neckman case has made this point abundantly clear and is the authority Respondent suggests that this Court follow. It is disingenuous for the Bar to rely upon these cases for the desired result of disbarment, without consideration for the facts upon which they are predicated. The misconduct committed by the Respondents in these cases was far more egregious than the misconduct of Mr. Weisser, and bears no resemblance to the instant case. There is no general principle, no matter how creative one is, that can be gleaned from these cases and applied to the case at bar, that results in disbarment.

Throughout its Answer Brief, the Bar places a great emphasis on aggravating factors and

accuses the Respondent of ignoring them in his Initial Brief. The Bar seems to be asking this Court to disregard the factual basis of all the cases cited in the Referee's Report and factually distinguished in Respondent's Initial Brief, and to give disproportionate weight to the aggravating factors that the Referee found. (AB p.6). In fact, the Bar states that [aggravating factors] "...must bear substantial weight in determining Respondent's future as an attorney". (AB pp.6-7). The Bar even acknowledges the factual disparity of these cases, but goes on to state that "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". (AB pp.10-11). The Bar asks this Court to treat Mr. Weisser the same way it has treated suspended attorneys who have engaged in numerous instances of the unauthorized practice of law with multiple clients, who have misappropriated client and escrow funds, who have obtained the home of a client's mother through false representations, who have engaged in bank fraud and embezzled over $300,000.00, who have failed to hold monies as instructed by clients and issued worthless checks, and to disbar him for ten years. (See IB pp. 16-17).

The purpose of the Florida Standards for Imposing Lawyer Sanctions is to set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among the jurisdictions. *See* Florida Standards for Imposing Lawyer Sanctions 1.3.

If we apply this reasoning to the case at bar we must consider all the relevant factors which include the facts that a) this was the only incident since Respondent's resignation from the Bar on May 9, 1991, b) it was a single incident of the unauthorized practice of law, c) there was a single client [his son], d) there was no injury to the client, e) there was no injury to the public, f) there was no dishonest or selfish motive, g) the Respondent was basically representing himself and it appears that the Referee lost all objectivity after Respondent's motions to recuse and petition for writ of prohibition.

We suggest that the Court consider the appropriate weight for all relevant factors in light of the stated goals of lawyer discipline. The goal of lawyer discipline is to "... protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly". Florida Standards for Imposing Lawyer Sanctions 1.1. In light of this stated goal, it is fair to say that Respondent's disbarment will not serve to "protect the public and the administration of justice". Respondent's representation of his son in a single case and the aggravating factors found by the Referee should not be given the unreasonable weight given by the Referee, particularly in light of the fact that there was no dishonest or selfish motive and the factors cited above.

Finally, in order to maintain consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among the jurisdictions, the Referee's Report must be rejected. The case law cited by the Referee in his Report must be distinguished from the case at bar if there is to be any consistency in the imposition of disciplinary sanctions.

Throughout its entire Answer Brief the Bar does not once mention the mitigating factors

which the Referee found. The Referee in fact found, as a mitigating factor, that under Standard 9.3, the Respondent had an "absence of dishonest or selfish motive". (ROR p.9). Thus, the Bar asks this Court to disregard the facts in disbarment cases ruled upon by this court in the past and simply look at them for the proposition that "the unauthorized practice of law by suspended attorneys always requires disbarment", reject the mitigating factors and give "increased weight" to aggravating factors. (AB p.10).

As far as the other ten cases cited in the Referee's Report and distinguished in Respondent's Initial Brief, the Bar has failed to discuss them in its Answer Brief. The only reference to the cases is a conclusory statement that "the cases cited by Referee are totally consistent with the Florida Standards applicable to this pending matter". (AB p.11).

An important factor that the Bar seems to have overlooked throughout these proceedings has been the fact that the Referee found that Respondent was not motivated by a dishonest or selfish motive, as a mitigating factor. This finding explains the fact that Respondent, although his conduct may have been in error, was merely demonstrating the love of a father for his son. He wanted to protect his son, not necessarily out of a pecuniary motive, but rather as a matter of principle. The underlying case was a County Court matter that would not have any impact on the Respondent financially. Respondent had the means and could easily have hired an attorney to handle the underlying case. His emotional investment in the case far outweighed any *de minimis* financial gain. Thus, it is illogical for the Bar to assert that Respondent was motivated "by his son's financial gain." (AB p.11). This assertion runs contrary to the facts, to the Referee's finding that there was no dishonest or selfish motive, and to common sense.

The Bar has taken the position in this case that disbarment is the appropriate sanction and

the Referee so found. This mind set seems to ignore the fact that Respondent was already suspended from the practice of law. Even if there had been no disbarment, before he could ever practice again, he would have to go through the reinstatement process which would require a Referee Trial. At the Referee Trial, he would have the burden of proving his fitness to practice law in terms of integrity as well as professional competency by the standard of "clear and convincing" evidence. The trial would place special emphasis on the protection of the public and The Florida Bar in determining Respondent's fitness to resume the privilege of practicing law. Respondent would have to establish conduct to justify the restored confidence of the public generally, the restored confidence of his professional contemporaries and the restored confidence of the Supreme Court. In re Dawson, 131 So.2d 472 (Fla.1961); Petition of Wolf, 257 So.2d 547 (Fla. 1972).

Even if he is successful in the Referee Trial for reinstatement and the Referee finds that he is fit to resume the practice of law, he would no doubt have to sit for a portion of the Bar examination. Further, reistatement is not final until the Supreme Court approves the Referee's Findings of Fact and Recommendations, providing the Bar the opportunity to file a Petition for Review.

Respondent is currently 57 years old. With a ten year disbarment he might be able to resume practice at the age of 70, if he were to be permitted by the Florida Board of Bar Examiners.

The Bar, the public, and the Respondent would have been better served had the parties simply entered into an agreement for a cease and desist order which would be the normal and customary procedure for this type of case.

In the Neckman case, which contained facts which were far more egregious than the case at bar, this Court affirmed the Referee's recommendation of a private reprimand. The facts and circumstances of this case do not merit disbarment. None of the authority cited in the Referee's Report and by the Bar justify the discipline of disbarment, considering the fact that from May 9,1991, the date of Respondent's resignation from the Bar until the filing of the instant action, there was just one instance of unauthorized practice of law.

CONCLUSION

In view of the Florida Standards for Imposing Lawyer Sanctions, together with the authority cited herein, the Referee's Disciplinary recommendation of disbarment should be rejected by this Court, and in its place, this Court should fashion a more appropriate form of discipline.

Respectfully submitted,

_____

RICHARD B. MARX
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the original and seven copies of Respondent's Initial Brief was sent via U.S. Mail to Sid White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32399; and a copy was sent to Billy J. Hendrix, Esq., Branch Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this_____of December 1997.

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