IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GREGORY GLEN SCHULTZ,

Respondent.

CASE NO. 87,298

TFB NO. 95-11,133(6E)

REPLY AND CROSS-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, Gregory Glen Schultz, will be referred to as "Respondent."

"RR" will refer to the Report of Referee in Supreme Court Case No. 87,298, dated September 3, 3996.

"TR-1" will refer to the Transcript of the final hearing in the disciplinary case styled THE FLORIDA BAR v. GREGORY GLEN SCHULTZ, Case No. 87,298, dated July 19, 1996.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar.

STATEMENT OF THE CASE AND OF THE FACTS

The referee issued his report on September 3, 1996. At the September, 1996 meeting of the Bar's board of governors (which meeting ended on September 20, 1996), the board voted to petition for review of this case. Pursuant to Rule 3-7.7(c)(1), Rules of Discipline, both parties had until October 7, 1996 to file a petition for review. By letter dated September 20, 1996, the Bar advised Respondent of that deadline, and of its intention to seek review.

The Bar filed a petition for review on or before October 7, and thereafter timely filed an initial brief. Respondent faxed a petition for review on October 7, and thereafter, on November 18, filed a brief titled 'Initial Responsorial Brief in Support of Petition for Review." Though Respondent missed the 30-day deadline for filing his brief, the Bar shall, upon advisement, treat that brief as a cross initial brief. Accordingly, this brief is the Bar's reply and answer to Respondent's cross initial brief.

The Bar incorporates the Statement of Facts contained in its initial brief, and herein responds to Respondent's arguments and alternate version of facts as set forth in the cross initial brief.

SUMMARY OF THE ARGUMENT

In his cross initial brief, Respondent propounds a version of facts that differs substantially from the referee's findings. Respondent has failed to show that any specific finding is clearly erroneous, or wholly lacking in evidentiary support. On cross appeal, Respondent essentially argues that the referee's determinations as to the credibility of witnesses were clearly erroneous, and must be reversed. The record of this case clearly supports the referee's findings and does not supply the necessary foundation for this Court to overturn the referee's findings regarding witness credibility.

In contrast, the Bar's statement of facts is consistent with the record and the referee's findings in all material respects, and for the most part reflects the published findings. Respondent seeks reversal of those findings almost in their entirety. For such a reversal to occur, this Court must reweigh the evidence, then reject the published findings as lacking any support in the record. The record provides ample support for each finding; accordingly, the Court must uphold the referee's findings as a matter of law.

Respondent argues that the stop payment order which he placed on the subject check was not fraudulent conduct, but a

legitimate self-help remedy. Respondent fails to credibly argue that the referee's rejection of that particular defense was clearly erroneous. He reprises this discredited defense by relying on the testimony of Bridgett Kenny. Ms. Kenny's testimony on a crucial point -- the circumstances surrounding Respondent's drafting of the fraudulent check -- was impeached not only by the complaining witness, Kenna Van Nortwick, but by Respondent himself. Ms. Kenny's impeached testimony, and proven lack of credibility, does not further Respondent's appeal in any substantive way.

Perhaps most significantly, Respondent admits in his cross initial brief that, had he issued checks with the knowledge that he had insufficient funds to cover them, such conduct would be patently fraudulent. Yet, if one takes at face value his own testimony and bank records, he admits that he did write and deliver checks when he knew his account had insufficient funds to cover them. Thus, should one credit his testimony, Respondent admits to a further fraud in this case; if one disbelieves him, his conduct is both fraudulent and perjurious.

The record shows that Respondent gave false testimony and submitted fabricated documents in support of a defense that was deemed incredible. Disbarment is the appropriate sanction.

ARGUMENT

I. **THE REFEREE'S FINDINGS OF FACT ARE NOT CLEARLY ERRONEOUS.**

A. The Referee's Implied Findings Regarding Witness Credibility Are Not Clearly Erroneous.

Respondent argues several facts not found by the referee. He argues that the referee's failure to find facts favorable to Respondent's cause is clearly erroneous, and wholly without support in the record. Specifically, Respondent desires this Court to accept the testimony of his witnesses, Bridgett Kenny and Sydney Mawby, who appeared voluntarily at the final hearing, at Respondent's request. Respondent's initial brief at 2-3[1]; see TR-1 at 103; 119.

It is well-settled that this Court will not overturn a referee's determination as to the credibility of witnesses, unless clearly erroneous or lacking in evidentiary support. The Florida Bar V. Stalnaker, 485 So. 2d 815 (Fla. 1986). The record of this case, as discussed in the Bar's Initial Brief, and further presented and discussed herein, contains ample support

---

[1] Respondent's cross initial brief contains no page numbers. The page references made herein to that brief result from assigning page number "1" to the page of the brief identified by the heading "Statement of Facts and Case," and by thereafter assigning respective page numbers.

for the referee's findings regarding credibility and guilt.

It is clear from the record and the report of referee that the referee did not credit the testimony of Ms. Kenny or Mr. Mawby, though no such finding was expressly made, either orally or in the report. Ms. Kenny was examined by Respondent in a highly leading manner on direct. See generally TR-1 at 83-89. Further, Ms. Kenny's responses to Respondent's leading questions could lead to the conclusion that she was coached or rehearsed. See generally id. Perhaps Ms. Kenny's ability to recount specific details of mundane phone conversations, which she supposedly overheard two years ago, failed to impress the referee as to her general credibility or truthfulness. The Court will likely never know and does not need to find out the precise reason why her testimony was not credited by the referee. In any event, Ms. Kenny's testimony was undermined by the fact that her testimony on a crucial point -- the events surrounding Respondent's issuance of the fraudulent check for $2,000.00 on September 16, 1994 -- stood in direct conflict with the statements of both the complaining witness, Kenny Van Nortwick, and of Respondent himself.

Ms. Kenny stated that she overheard a telephone conversation between Van Nortwick and Respondent which took place on September

16, 1994. Ms. Kenny testified that Van Nortwick and Respondent discussed a dispute over billing, and that she personally saw Respondent draft the subject fraudulent check in his office; moreover, she knew that the amount of the check was $2,000.00. She further testified that Respondent post-dated the subject check for December, 1994, i.e., some three months into the future. Ms. Kenny's testimony on direct is recounted here for the Court's convenience:

BY MR. SCHULTZ:

Q: Did Mr. Schultz cut a check in the office for $2,000?

(An objection was made and withdrawn)

A: Yes, I did see him. He wrote a check. And, as I understand it, he was going to drop it off to her.

Q: Was that for the $2,000 or a different check?

A: No, it was for $2,000. And it was to be dated in December and for further discussion on billing reconciling and so on.

(TR-1 at 102).

In contrast, Van Nortwick testified that Respondent wrote the subject check in her travel office, in front of her. See TR-1 at 32. Further, it was at her office that Van Nortwick told Respondent he could 'round off" the amount due to an even

$2,000.00. Id. As for the phone call occurring between them earlier that day, Van Nortwick testified:

Q: [D]uring the telephone conversation that you had [with] Mr. Schultz when he was ordering the ticket, did he mention at any time that he was disputing your billing practices or your ticketing practices?

A: No.

Id. Thus, Ms. Kenny's testimony directly conflicts with Van Nortwick's in virtually every material respect regarding the events surrounding Respondent's issuance of the subject fraudulent check.

For his own part, Respondent impeached his own witness, and agreed with Van Nortwick, when he stated that he did not draft the subject check in his office, but at Van Nortwick's travel office. Referencing the interaction between himself and Van Nortwick on September 16, 1994, Respondent testified:

A: I went to her place with checks in my hand, but not with the intent to pay her, no.

Q: So you actually had some checks in your hand?

A: I always carry checks with me.

Q: So they were blank?

A: Yes.

* * *

Q: Okay. So you then wrote the check out?

A: In her presence, yes.

(TR-1 at 173-74).

As is discussed in the Bar's Initial Brief, the referee credited Van Nortwick's testimony in all material respects. Thus, by implication, the referee found Ms. Kenny's testimony not to be credible at least insofar as her testimony conflicted with Van Nortwick's. Moreover, the fact that Respondent impeached his own witness on a crucial material fact could cause the referee to have serious doubts regarding Ms. Kenny's truthfulness and motives. Her responses betrayed a more detailed knowledge of Respondent's theory of defense than she could possibly have had at the time, or could have reasonably been expected to recall two years after the fact. Thus, her testimony not only enhances Van Nortwick's established credibility, it does nothing to further Respondent's argument that the referee's findings were clearly erroneous.

Respondent's other witness, Sydney Mawby, offered testimony that was similar to Bridgett Kenny's in several respects, and Respondent seeks to rely on these similarities. Both testified as to a supposed ticketing error committed by Van Nortwick in her

capacity as Respondent's travel agent. See TR-1 at 94-95; TR-1 at 107-08. At trial, Respondent defended his fraudulent conduct in stopping payment on the subject check by referencing this alleged ticketing error, and arguing that he was entitled to set-off the total amount due. However, the referee refused to credit this defense, and specifically found that, prior to the stop-payment episode, Respondent had never communicated to Van Nortwick any dissatisfaction with her ticketing or billing practices. RR at 2.

Like Ms. Kenny, Mr. Mawby testified that he overheard a telephone conversation between Van Nortwick and Respondent in which Van Nortwick stated that she needed a "replacement" check for a previous check by which Respondent allegedly had attempted to make payment of his outstanding bill. Compare TR-1 at 109 and TR-1 at 84. The referee did not specifically credit any of Mawby's testimony. Because the referee found that Respondent never communicated to Van Nortwick any dissatisfaction over her supposed ticketing errors, the referee apparently deemded Mawby's testimony regarding such errors to be irrelevant or insubstantial, which comports with his duty as the trier of fact to resolve issues of credibility.

In essence, Respondent argues in his cross initial brief that Van Nortwick's testimony should not be believed. For

example, Respondent used the testimony of both Ms. Kenny and Mr. Mawby to bolster his defense that he attempted in good faith to pay the subject debt. The Bar's position is that Respondent's physical evidence of the attempted payments, the tissue carbons of putative checks 1779 and 1782, are fabrications. Van Nortwick testified that she never received either purported check and neither were cashed.

Respondent's own bank records for the relevant time period support Van Nortwick's credibility, because they document Respondent's inability to pay for the four airline tickets that comprise the subject debt. Van Nortwick testified that Respondent represented to her that he could not pay for them when ordered, and that she carried Respondent's debt on her books from April, 1994, until mid-September, 1994, when she demanded payment, and Respondent complied by tendering the fraudulent check. The reconstruction of Respondent's daily balance in his checking account, as presented in the Bar's Initial Brief at pages 30-31, show clearly and convincingly that Respondent did not, in fact, have the ability to pay during the relevant time. Thus, Respondent's own bank records support Van Nortwick's credibility.

As is discussed in the Bar's Initial Brief, the reconstruction of Respondent's daily account balance also proves that his issuance of the two putative checks was fraudulent because he knew he did not have funds to cover them when written. (Of course, this is an admission only if one believes that he wrote and delivered those two checks, as he testified he did; the Bar contends he did not.) Respondent reiterates this admission in his cross initial brief, and further acknowledges that 'if a lawyer tendered worthless checks knowingly (sic) there was insufficient funds in the account," the lawyer should rightfully be disciplined for engaging in fraudulent conduct, even absent proof of the lawyer's actual and subjective intent. Respondent's cross initial brief at 12.

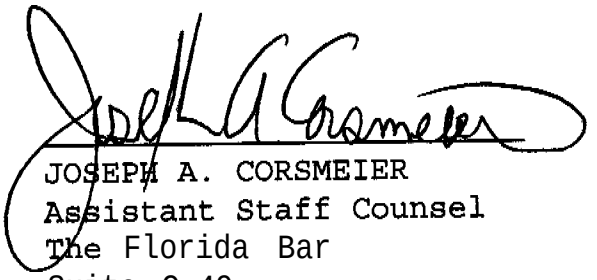
Through Respondent's own testimony and documentary evidence, he admits to a fraud. To someone in Respondent's situation, that admission must indeed be preferable to confessing that he lied under oath about tendering those checks, and about fabricating evidence of them. Thus, if one accepts Respondent's assertions, in addition to the referee's finding that he defrauded Van Nortwick by stopping payment on the subject check, he defrauded her on two previous occasions by delivering checks knowing that they were backed with insufficient funds. Therefore, Respondent

either perjured himself and produced fabricated documents or he has admitted, according to his own statements, that he committed a fraud upon Van Nortwick by issuing worthless checks to her.

CONCLUSION

For the reasons stated in the Bar's Initial Brief and herein, this Court should disbar Respondent for his underlying fraudulent conduct, for testifying falsely under oath, and submitting fabricated evidence during the disciplinary process. In addition to the disbarment, Respondent should be required to make restitution to Ms. Van Nortwick, as prescribed by the referee.

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 Reply and Cross-Answer Brief have been furnished by Regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies have been furnished by Regular U.S. Mail to Jay A. Hebert, Esq., Counsel for Respondent, at The Hebert Law Group, P.A., Suite 1, 13560 - 49th Street North, Clearwater, Florida 34622; and to John T. Berry, Esq., Staff Counsel, The Florida Bar, 6 0 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 13th day of December, 1996.

JOSEPH A. CORSMEIER
Assistant Staff Counsel