IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee

v.

HOWARD ELLIOT HOROWITZ,

Respondent/Appellant.

Supreme Court Nos. 87,415, 87,806 and 87,913

The Florida Bar File Nos. 96-50,376(17G); 95-51,621(17G) and 94-50,585(17G)

ANSWER BRIEF OF THE FLORIDA BAR

On Appeal from
A Report of Referee

LORRAINE C. HOFFMANN, #612669
Bar Counsel
The Florida Bas
5900 N. Andrews Avenue
Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN T. BERRY, #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

CASES PAGES

TABLE OF CITATIONS (continued)

CASES **PAGES**

THE FLORIDA BAR'S SUPPLEMENT TO APPELLANT'S STATEMENT OF THE CASE

Respondent correctly stated that he failed to file answers to the three (3) complaints which The Florida Bar filed against him, and which were ultimately consolidated into the case now before the Court. Accordingly, defaults were granted in each of the original three cases. However, it is also important to note that the defaults were not the result of respondent's inability to respond to the bar's complaint. To the contrary, they were the result of his express design. During the final hearing before the duly appointed referee, respondent explained his reasons for failing to file answers as follows : "my purpose in having the defaults entered was that I recognized that I had committed said transgressions and that I was not simply going to interpose an answer that would frame some false pleadings." [Final hearing transcript, p. 17, l. 1-4.] It should also be expressly noted that respondent never moved to vacate the default judgements.

Respondent also pointed out, in his statement of the case, that he did not appear before the grievance committee prior to two (2) of the probable cause findings. The bar is not aware of respondent's purpose in making such a statement, as he has claimed

no violation of due process and such an appearance is neither mandated nor guaranteed by the Rules Regulating The Florida Bar.

Respondent has also advised this Court that he was not represented by counsel "either before the Grievance Committee or before the Referee." Again, the bar is not aware of respondent's purpose in advancing this point as respondent has not alleged that he was denied the right to counsel at any time. Further, there is no reference in the record that respondent requested a continuance or any other remedy, at any relevant time, in order to retain counsel.

Finally, respondent advised the Court that he "timely filed his Notice of Appeal." He did not here inform the Court, however, that he failed to timely file his initial brief. After the bar served its motion to dismiss, respondent's counsel filed a notice of appearance, a motion for enlargement of time in which to file an initial brief, and a notice of filing an exhibit (which was outside of the record on appeal). The bar filed a motion to strike this exhibit, and a renewed motion to dismiss respondent's appeal. Respondent filed a responsive pleading and the Court granted him an abbreviated enlargement of time in which to file an initial brief. The Court has not yet ruled on The Florida Bar's motion to strike respondent's exhibit, which was outside of the record on appeal.

THE FLORIDA BAR'S SUPPLEMENT TO APPELLANT'S STATEMENT OF THE FACTS

Respondent's statement of the facts contains, in its initial paragraphs, an incomplete recitation of The Florida Bar's charges against respondent in each of the three (3) cases which were consolidated into the instant case. As the full litany of the bar's charges against respondent is set forth, with particularity, in the bar's complaint in each of these three (3) cases, and because it is reiterated in the report of referee which precipitated this appeal, there is no need to restate these charges here.

Respondent has also provided the Court with an incomplete and partially incorrect explanation of the history of the three (3) cases which were consolidated for trial. Turning first to what respondent has called "the first case, (Case Number 87,415)," it is important to note that it was only *after* the grievance committee found probable cause and the bar filed a complaint in the Supreme Court of Florida that the matter was placed before a referee. The grievance committee did not (and has no authority to) refer the matter to a referee. This same point of clarification is addressed to what respondent has called "the second case, (Case Number 87,806)" and "the third case, (Case Number 87,913)." Further,

with regard to the "third case," The Florida Bar simply disputes but does not comment upon respondent's claim that he advised the grievance committee chair that he was "severely depressed and was undergoing therapy **and** treatment for his condition," as all such issues are outside the record on appeal.

Finally, although respondent advised this Court that **he** testified, at the final hearing , that he was depressed and "under the care of a physician," it is important to note that he produced no evidence of such condition and/or care until ***after*** he filed his notice of appeal. This is despite the referee's clear invitation that he do so, and respondent's own promise that he would. See final hearing transcript, **pp.** 26-27.

SUMMARY OF THE ARGUMENT

The Report of Referee is complete, accurate and correct. It is well supported by the facts and by the evidence, which contains nothing to support respondent's claim that his misconduct was proximately caused by a mental disability or depression. Indeed, in his testimony before the referee, respondent admitted that he knew and understood the nature of his misconduct. Respondent should be disbarred.

ISSUE I

THE REFEREE DID CONSIDER RESPONDENT'S MENTAL STATE IN RENDERING HIS RECOMMENDATION AND REPORT

This cause came before the referee for final hearing on sanctions after the entry of default judgments in all three of the underlying (now consolidated) cases. Respondent appeared before the referee not to move to vacate the default judgments entered against him, but to argue mitigation. In so doing, he admitted his misconduct, expressly advised the referee that he understood and appreciated the nature of his misconduct, alleged that he was undergoing treatment by a "clinical psychiatrist" and advised that he had, throughout the subject period of time, continued to practice quality law. Respondent addressed the referee as follows:

> . . . my purposes in having the defaults entered was that I recognized that I had committed said transgressions. . . I recognize that I have fallen far short in instances of dealing with my clients and I'm somewhat aghast to sound as if the Bar is claiming that I'm keeping my head in the sand without recognizing the harm that I've done. Quite the contrary, I do recognize that and I've repeatedly told the Bar I understand what has transpired and how in certain instances I've fallen short.

Final hearing transcript, p. 17, l. 1-11.

In explaining the cause of his misconduct, respondent did not claim, as he did in his appellate motion to supplement the record, that he was suffering from a disease which impaired his judgment and functioning ability. He did not characterize himself, as he did in his notice of filing an appellate exhibit [outside the record], as "incapable of representing himself to the Bar as his judgment was impaired and [he] maintained a self-destructive posture." Instead, in the proceeding below, he advised the referee that he had been sued for legal malpractice and had, thereafter, been forced into personal bankruptcy. As a result of these stressors, respondent told the referee, he sought the help of a "clinical psychiatrist." In describing his treatment, current condition, and mental abilities, respondent testified as follows:

> **MR. HOROWITZ:** Approximately three to four years ago, I was hit with a malpractice action, and it sounds rather innocuous to most people; to myself that was the first time I have ever been accused of malpractice in all my years of experience and this was after a trial that I handled for four days, after representing the clients for about five years. Ultimately the client sued me for malpractice . . . and, frankly, the cumulative actions of that malpractice action first threw me into having to file for personal bankruptcy. , . I took no actions to protect myself.
>
> **THE REFEREE:** Did you defend this suit?

> **MR. HOROWITZ: No.** I did not have insurance, and I did not have any - - I did not take any actions to represent myself. I did not notify any members of my family to that effect. I did nothing, absolutely nothing. The net effect of all this, of those difficulties with the bankruptcy and the malpractice was I placed myself under the care of a clinical psychiatrist who has been treating me for depression since approximately 1993, **and** I'm still under her care. I have been attempting to remake my career. . .
>
> I acknowledge the harm that I've done to clients in not acting promptly on their behalf; but, on the other hand, I also recognize that I am capable of providing not just adequate representation, but, in many instances, fine representation to clients in need and have done so during that time. . .

Final hearing transcript, pp. 17-19.

Based on the foregoing colloquy, it is abundantly clear that the referee considered and closely scrutinized respondent's mental state -- to the extent possible without the introduction of actual evidence as to same. Pursuant to the holding in The Florida Bar v. Graham, 605 So. 2d 53 (Fla. 1992): "Absent ***evidence*** [emphasis provided] casting doubt on a lawyer's culpability, such as ***evidence*** [emphasis provided] of mental or substance abuse problems, a lawyer is held fully responsible for any misconduct." Graham, at 56. Notwithstanding his argument that the referee failed to consider his mental state in the proceedings below, respondent has

acknowledged, by his pleadings on appeal, that he failed to provide the referee with evidence (which he now deems to be) crucial to such consideration. This has been demonstrated by respondent's attempt, on appeal, to supplement the record with evidence of alleged mental and/or emotional problems which may (or may not) have affected his ability to practice law. This evidence, which respondent offered for the first time in his appellate notice of filing, was clearly known to him and available to him during the final hearing below, as evidenced by respondent's own testimony on the subject.[1] Further, again based on respondent's own testimony at the final hearing, [2] it is abundantly clear that respondent made a calculated and intentional choice not to file answers to the bar's complaints, not to avoid the entry of default judgements, and not to produce the subject evidence in the proceedings below. In this way, he could be certain that The Florida Bar would have no opportunity to test, examine or verify such evidence. If respondent is successful in supplementing the record on appeal in this way, with stale evidence cloaked in indignant righteousness -- but snuck in through a back door, respondent will have defeated one of

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[1] "I placed myself under the care of a clinical psychiatrist who has been treating me for depression since approximately 1993, and I'm still under her care. " See final hearing transcript, p. 18, l. 23-25.

[2] "... my purposes in having the defaults entered was that I recognized that I had committed said transgressions. . .," See final hearing transcript, p. 17, l. 1-3 .

the most basic tenets of American jurisprudence and Florida law. See Permenter v. Bank of Green Cove Springs, 136 So. 2d 377 (Fla. 1st DCA 1962), at 379: "It is fundamental to appellate review that this court may not go beyond the record lodged here, except as to matters of which the court takes judicial notice"; Seashole v. F & H of Jacksonville, Inc., 258 So. 2d 316 (Fla. 1st DCA 1972) [motion to supplement the record with affidavits and correspondence not before the trial court denied]; Coca Cola Bottling Company v. Clark, 299 So. 2d 78 (Fla. 1st DCA 1974), at 82: "An appellate court, reviewing a post-trial judgement. . . may only consider that which was properly part of the trial record"; Altchilder v. State Dept. of Regulation, 442 So. 2d 349 (Fla. 1st DCA 1983), at 350: "When a party includes in an appendix material or matters outside the record, or refers to such materials or matters in its brief, it is proper for the court to strike same"; Patterson v. Weathers, 476 So. 2d 1294 (Fla. 5th DCA 1985) at 1296: "It is fundamental than an appellate court cannot reverse a trial court on the basis of facts which were not presented to the trial court, and therefore are not part of the record on appeal"; Fine v. Carney Bank of Broward County, 508 So. 2d. 558 (Fla. 4th DCA 1987) [affidavit, which was not considered by the lower court, was not properly before appellate court for review]; Thornber v. City of Fort Walton

Beach, 534 So. 2d 754 (Fla. 1st DCA 1988), at 755: "It is inappropriate and will subject movant to sanctions to inject matters into the appellate proceedings which were not before the trial court"; Agency for Health Care Administration v. Orlando Regional Healthcare System, Inc., 617 So. 2d 385 (Fla. 1st DCA 1993), at 389: "It is basic that an appeal asserting error on the part of a lower tribunal can only be based on evidence presented to that lower tribunal," See also Arnowitz v. Equitable, 539 So. 2d 605 (Fla. 3d DCA 1989); Rosenberg v. Rosenberg, 511 So. 2d 593, 595 n. 3 (Fla. 3d DCA 1987), rev. denied, 520 So. 2d 586 (Fla. 1988), Barton v. Keyes CQ., 305 So. 2d 269, 270 n. 1 (Fla. 3d DCA 1974), and Florida Livestock Board v. Hygrade Food Prod. Corp., 141 So. 2d 6, 7 (Fla. 1st DCA 1962).

As the foregoing line of cases makes clear, respondent's appellate exhibit must be stricken. Absent this improper evidence, and based upon the colloquy set forth in the final hearing transcript at pages 17-23 (which establishes a basis of competent, substantial evidence), there is no question that the referee considered all of the applicable evidence presented[3] regarding

[3] which consisted solely of respondent's testimony at fmal hearing

respondent's mental state. As this Court held in The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994):

> A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support [citation omitted]. Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee's findings of fact should be upheld if they are supported by competent, substantial evidence [citation omitted]. On review, this Court neither reweighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings [citation omitted].

Marable, at 442.

Finally, this Court has also determined that in bar disciplinary proceedings, the report of referee will be upheld unless the party seeking review meets his/her burden of proving that the referee's findings are clearly erroneous or lacking in evidentiary support. See The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994), and The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991). As respondent has not met this burden of proof, and because the referee's findings are based on competent, substantial evidence, the referee's findings must be upheld.

ISSUE II

DISBARMENT IS WARRANTED

In his initial brief, respondent presents a sprinkling of inapposite cases which bear little if any relevance to the instant case. In the instant case, the referee found respondent guilty of multiple violations of nearly twenty (20) of the Rules Regulating The Florida Bar. These rule violations include findings of incompetence, fraud, deceit, dishonesty, misrepresentation, excessive fees and trust account violations. Respondent violated other rules because he lied to or willfully and intentionally refused to respond to the clients who trusted him, as well as to The Florida Bar. He testified at the final hearing in this cause that he ***purposefully*** failed to respond to the bar's formal complaints, as filed in the Supreme Court of Florida.

Notwithstanding his failure to file answers, however, respondent has admitted to the misconduct with which he has been charged. Yet, paradoxically, he has also opposed disbarment as being too "harsh", while providing no real argument as to the appropriate penalty to be imposed in a case of this magnitude.

In considering discipline in this case, the Court **may** be guided by a discussion of other, similar cases where respondents have been stridently disciplined despite their claim of significant

mitigating factors such as mental problems and/or substance abuse. In The Florida Rar v. Clement, 662 So. 2d 690 (Fla. 1995), respondent was found guilty of violating numerous Rules Regulating The Florida Bar. In opposing the bar's recommendation that he be disbarred, Mr. Clement argued that he was suffering from manic-depression (or bi-polar disorder)when the misconduct occurred, and therefore he could not distinguish right from wrong. In support of Mr. Clement's position, his psychiatrist testified about his patient's ability to distinguish between right and wrong. The referee rejected the psychiatrist's opinion and recommended disbarment. Mr. Clement appealed. In upholding the referee's recommendation of disbarment, the Court stated that:

> First, a referee's findings of fact should be upheld when supported by competent, substantial evidence. ***The Florida Bar v. weed, 559 so.*** 2d 1094, 1096 (Fla. 1990). We find that the record supports the referee's findings on [the psychiatrist's] testimony regarding Clement's ability o distinguish right from wrong. . . The referee was in the best position to **assess** [the psychiatrist's] demeanor and creditability and found that he was unworthy of belief.

Clement, at 696.

In that case, unlike the instant one, the respondent had produced **actual** evidence of mental problems, and serious depression. Still, this Court found that such problems, even if they existed,

did not mitigate sufficiently to dislodge the referee's firm recommendation of disbarment. In the instant case, the "evidence" of depression is far less substantial, as is the nexus between such depression and the serious misconduct proven. Other cases in which respondents were disbarred, despite showings of mental problems and/or addictions, include The Florida Rar v. Shuminer, 567 So. 2d 430 (Fla. 1990) [disbarment warranted for misappropriation of client funds, despite evidence that respondent had been chemically dependant on alcohol and cocaine at the time of the violations]; and The Florida Rar v. Golub, 550 so. 2d 455 (Fla. 1989) [disbarment for misappropriation, despite alcoholism and a voluntary, self-imposed suspension for the three preceding years].

Another such case, which bears a significant similarity to the case at bar, is The Florida Bar v. Setien, 530 So. 2d 298 (Fla. 1988). In that case, the respondent was disbarred for neglecting client matters, failing to communicate with clients and issuing bad checks. In mitigation of his misconduct, the respondent argued that he had a drug and alcohol dependency. He further argued that his dishonesty was a symptom of his cocaine addiction. In rejecting Mr. Setien's argument against disbarment, this Court stated:

> Many of these allegations [as to mitigation] explain Setien's behavior, but they do not excuse it. This information was put before the referee, who either rejected it or did not consider it sufficient compared with the conduct involved. There is nothing in the record that the referee is required to consider in terms of mitigation, and we are unwilling to reweigh the evidence submitted.

Setien, at 300.

In the instant case, respondent's mitigating testimony was appropriately considered by the referee. As did the Setien referee, he "either rejected it or did not consider it sufficient compared with the conduct involved." In light of the foregoing, this Court should not reweigh the evidence before it; it should approve the referee's report and impose the recommended discipline of disbarment.

CONCLUSION

As the referee in this cause made findings of fact based on competent, substantial evidence which included respondent's mental state, and because his recommendation as to discipline is appropriate under the case law and the Florida Standards for Imposing Lawyer Discipline, as set forth in The Florida Bar's trial memo of law, the referee's report should be approved and respondent should be disbarred.

Respectfully submitted,

LORRAINE C. HOFFMANN No. 612669
Bar Counsel
The Florida Bar
5900 N. Andrews Ave., Suite 835
Ft. Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief of The Florida Bar have been furnished by regular U.S. mail and by Certified Mail #P 227 921 330, return receipt requested, to Roger R. Stanway, Attorney for Appellant, 2122 Hollywood Blvd., Hollywood, FL 33020 on this 25th day of February, 1997.

LORRAINE C. HOFFMANN