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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER 87,463

BRIAN JAY GLICK,

Respondent.

RESPONDENT'S REPLY BRIEF

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ARGUMENT

Respondent hereby replies to the Bar's arguments in the same manner in which they were presented. At the outset, Respondent would point out that while a referee's report carries a strong presumption of correctness, that presumption is rebuttable. A referee's findings of fact can be reversed for a lack of competent and substantial evidence of deliberate misconduct. See, e.g., The Florida Bar v Catalano, 644 So.2d 86 (Fla. 1994). Respondent argues that there was no clear and convincing evidence to support the referee's findings as to Counts V (the alleged misrepresentation to the Bar).

This Court has wide latitude in reversing a referee's conclusions of law and recommendations as to discipline. The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978). Respondent urges this Court to rule that the referee improperly concluded that the conduct in Count III warrants discipline. Finally, Respondent argues that this Court should reject the referee's recommended discipline and substitute therefore and admonishment for minor misconduct.

1. In reply to the Bar's statement of facts.

While the Bar argues that Respondent "refused" to communicate with Mrs. Schiller, the only testimony supporting that argument is that she had been calling and writing letters to Mr. Glick "for five years". TR 24. While Mrs. Schiller testified that she was never able to reach Mr. Glick, she admitted she was usually able to talk to his secretary, Monica. The actual predicate to the

grievance was her unsuccessful attempt to make an appointment with Mr. Glick in August 1995. TR 24. Mr. Glick's unrebutted testimony at final hearing was that no meeting took place in August 1995 because he was on vacation. TR 78.

There is no evidence that Mr. Glick wilfully "refused" to communicate with Mrs. Schiller. His secretaries communicated with her. More important, however, is the fact that Mrs. Schiller gave no dates for her inquiries prior to August 1995. The long time span covered by her testimony, i.e., five years, goes back to 1990 when the case was progressing normally. Respondent clearly was not trying to cover anything up at that point in time. Mrs. Schiller also admitted that her husband was sick, ultimately passing away, during part of the period of time. Communications bogged down during that time frame due to Mr. Schiller's illness.

The Bar has no evidence to support its speculation that Respondent refused to communicate with Mrs. Schiller during the period beginning February 1993 and in August 1995 so she would not find out about his neglect.

The Bar intimates, while later conceding that there was no impropriety in it, that Respondent's settlement with Mrs. Schiller was improper. However, the testimony by Mrs. Schiller was that during her meeting with Respondent, she was advised that her suit had been dismissed for want of prosecution, that she had the right to sue Respondent, that she had the right to seek independent counsel before reaching any settlement with him, and, most importantly, that he was at fault. TR 18, 27, 28, 79 and 84.

In its statement of facts, the Bar glosses over Mrs. Schiller's testimony to the effect that she told a male investigator for the Bar that she did not wish to disclose the terms of her settlement with Mr. Glick. TR 23. It was that refusal by Mrs. Schiller to discuss her settlement with the Bar's investigator that formed the basis for Respondent's statement in his November 6, 1995 letter to the Bar that Mrs. Schiller requested that the terms of her settlement agreement remain confidential.

2. As to the Bar's Sub-paragraph A. (allesed lie).

There is no testimony in the record that from the date that Mrs. Schiller's case was dismissed for want of prosecution in February 1993 until August 1995 that she periodically called to ascertain the status of her case as argued by the Bar on page 7 of its Brief. The cited testimony by the Bar only refers to calling and writing letters for five years. That time span went all the way back to 1990 (the grievance was filed in August 1995) many years before the case was dismissed. Clearly, Mrs. Schiller was frustrated by her attempts during the summer of 1995 to set up an appointment with Respondent. An appointment to meet with her was set down and canceled and then, Respondent left for vacation. TR 78. Mrs. Schiller then filed her grievance.

Clear and convincing evidence, while not as stringent a burden as that required in criminal cases, is more than a preponderance of evidence. The Florida Bar v Rayman, 238 So.2d 594 (Fla. 1970). The complete lack of specificity of the dates and nature of the communications by Mrs. Schiller prior to August 1995, defeats the

presumption raised by the Bar that Respondent was refusing to communicate with Mrs. Schiller.

The Bar's argument about Respondent's "refusal" to communicate with her is really a smoke screen; the Bar readily concedes on page 5 of its Brief that it is the "alleged lie" in Respondent's November 1995 letter that "drives this case into the suspension category". There was no such lie. There certainly was no attempt to deceive the Bar because, at the time Respondent was replying to the Bar's grievance (and at the time he made the alleged misrepresentation to the Bar), he was only replying to allegations of neglect and failure to communicate. In other words, even if his statement was not correct, it had no bearing on his response to the allegations against him and therefore there was no attempt to deceive. See The Florida Bar v Bariton, 583 So.2d 334 (Fla. 1991).

The Bar unjustly speculates on page 9 of its Brief that Respondent "hoped" that if the settlement with Mrs. Schiller remained confidential, that the Bar would not discover the "irreparable damage" caused to her. (The Bar immediately thereafter concedes that there was no quid pro quo between the settlement and Mrs. Schiller's withdrawal of her grievance.) The Bar's argument is, simply put, wrong. In that same letter Respondent admitted his misconduct and the effects on Mrs. Schiller's case.

When Respondent wrote his November 6, 1995 letter to the Bar he completely revealed the ramifications of his conduct. He specifically stated that:

> On February 25, 1993, the court dismissed Mr. and Mrs. Schiller's claim for lack of prosecution....
>
> Since the dismissal occurred after the four year Statute of Limitations had expired, Mr. and Mrs. Schiller were precluded from bringing suit again. BEX 1.

The November 6, 1995 letter, rather than being an example of obfuscation, is clearly a candid acknowledgement to The Florida Bar that Mrs. Schiller's case had been dismissed for want of prosecution and that the statute of limitations had expired. Respondent was not trying to cover up his misconduct. He readily admitted to the Bar and to Mrs. Schiller that he had made a grievous error. His statements regarding the confidentiality of the terms of the settlement had no bearing on the alleged misconduct.

The Bar readily acknowledges that it must prove intent by clear and convincing evidence in misrepresentation cases. The Florida Bar v Cramer, 643 So.2d 1069 (Fla. 1994) and The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992). The Bar has not proven intent by clear and convincing evidence in the case at Bar. First, since Respondent was admitting misconduct, there was no attempt to cover up anything in his November 6, 1995 letter. Second, as discussed in Point I of Respondent's initial brief, his statement regarding Mrs. Schiller asking that her settlement terms be made confidential was predicated upon conversations with his lawyer to

the effect that prior to November 6, 1995 Mrs. Schiller had told a Bar investigator exactly that. Mrs. Schiller herself testified about that conversation before the referee. TR 23. She could not, however, pin a date on it. Up until a week before final hearing, the Bar was willing to stipulate that the investigator had, in fact, spoken to Mrs. Schiller prior to that November 6, 1995 date. Respondent is not trying to make confusion where none exists; clearly the Bar itself was confused as to when its investigator spoke to Mrs. Schiller. Respondent avers that the conversation took place prior to November 6, 1995. The Bar, at final hearing for the first time, was convinced the conversation took place afterwards.

Too much is made of the "misrepresentation" regarding the confidentiality of the terms of the agreement. The Bar acknowledges that this "lie" is the driving force for a suspension. In fact, the misrepresentation had nothing to do with the grievance; it merely pertained to the terms of the settlement. Not the underlying misconduct. The misrepresentation, if such it was, was immaterial and unintentional. It does not warrant a sanction at all, let alone a suspension. See, Bariton, supra. This Court should find that Count V of the Bar's complaint was not proven by clear and convincing evidence.

3. In reply to the Bar's argument B. (the allesed settlement offer.

Respondent refers to the arguments made on pages 17 through 20 of his initial brief regarding this topic. In essence, the only evidence the Bar set forth regarding any offers from the defendants

was Respondent's November 6, 1995 letter. In that letter, Respondent used the poor choice of the word "offered" in discussing his conversations with defense counsel. He clarified those statements in his testimony to the referee. TR 76, 77, 87, 89, 90 and in his February 12, 1996 letter to the Bar. BEX 2. The conversation was not an offer, but a range of value for the case. A discussion regarding the range of the value of the case is not an offer. If defense counsel had said to Respondent cases like this settle for somewhere between $1.00 and $10,000,000.00, would Respondent be disciplined for failing to convey that range to his client? Of course not. Disciplinary rules are rules of reason, not merely vehicles for imposing discipline at the slightest whim.

In the case at Bar, there was no offer conveyed to Respondent and, therefore, there was nothing that he was required to convey to Mr. and Mrs. Schiller. The Bar can cite no cases to support its position in this matter.

4. In reply to the Bar's arguments regarding sanction.

Respondent appreciates the Bar acknowledging that cases such as this, without the misrepresentation and the failure to communicate the offer allegations, would warrant at most a public reprimand. See pages 17 and 18 of the Bar's Brief. The Bar then argues that it is the "lie" to the Bar that raises this case to the suspension level. It cites The Florida Bar v Lund, 410 So.2d 922 (Fla. 1982) as support for the statement. As pointed out at page 15 of Respondent's initial brief, Lund is inapplicable. Mr. Lund received a 10 day suspension for lying, under oath, to a grievance

committee regarding the allegations against him. In the case at Bar, there is no testimony under oath, the alleged false statement had no applicability to the allegations against Respondent (he was not being charged with incorporating a confidentiality clause into his settlement agreement) and, as stated before, Respondent was under the good faith impression that Mrs. **Schiller** had already told the Bar's investigator that she did not want the terms of confidentiality revealed.

Respondent repeats the argument made on page 21 of his Brief that, even should this Court find him guilty of Counts III and V, the mitigation in this matter makes a public reprimand the harshest sanction that should be imposed. Lund got ten days for deliberately lying to a grievance committee about the matters at issue. He was sworn at the time of his testimony and, therefore, under a heightened duty to be precise in his language and his answers. This is particularly when he knew that the questions being asked pertained to the conduct under investigation. Mr. **Glick,** on the other hand, acknowledged completely his misconduct. He was not, however, being as precise and careful with his language when he was discussing the fact that the terms of the settlement agreement were confidential. There was no deception regarding the conduct at issue. (Similarly, Respondent was not replying to any allegation that he had failed to convey an offer of settlement to his client when he wrote the November 6, 1995 letter and, therefore, was not being as precise in his language at that time).

With the exception of Respondent's substantial experience in the practice of law (which is a minimally aggravating factor) Respondent submits the Bar's other aggravating factors should be completely disregarded. Respondent had no dishonest or selfish motive as to the allegations covered by Counts I and II. Even if he is guilty of Count III, he had no dishonest or selfish motive in his failure to convey the settlement range to his clients. As to Count V, Respondent's statement that Mrs. **Schiller** asked him not to discuss the terms of their confidential statement was not made with a dishonest of selfish motive; he had already admitted the dismissal of her case for want of prosecution and the fact that the statute of limitations had expired. There were not multiple offenses in the case at Bar. Finally, Respondent made no intentionally false statements to the Bar in these proceedings.

The mitigating factors discussed on pages 21 through 25 of Respondent's initial brief far outweigh the aggravating factors submitted by the Bar. In light of the fact that the closest case the Bar can cite in arguing discipline is the Lund case, which resulted in a ten day suspension and which involved conduct far worse than that at Bar, its arguments for a ten day suspension should be rejected.

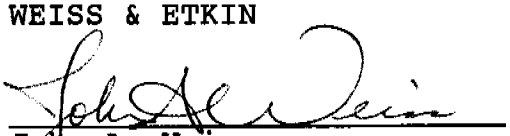
The cases cited by Respondent on pages 26 through 29 of his initial brief dictate that the appropriate discipline for the case at Bar should be an admonishment or, at worse, a public reprimand.

CONCLUSION

This Court should reverse the referee's guilty finding on Counts III and V. It should substitute as discipline for the referee's recommended ten day suspension an admonishment for minor misconduct, or, at worse, a public reprimand.

Respectfully submitted,

WEISS & ETKIN



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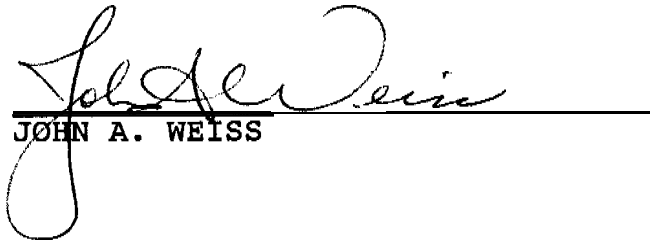
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Reply Brief was mailed by overnight mail to Kevin P. Tynan, Esquire, Bar Counsel, The Florida Bar, Cypress Financial Center, Suite 835, 5900 N. Andrews Avenue, Ft. Lauderdale, FL 33309 and by regular mail to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 3rd day of January, 1997.



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