097

FILED

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 88,276

BILL A. CORBIN,

Respondent.

RESPONDENT'S REPLY BRIEF

John A. Weiss
WEISS & ETKIN
Attorney Number 0185229
2937 Kerry Forest Parkway
Suite B-2
Tallahassee, FL 32308
(904) 893-5854
COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

The Florida Bar repeatedly argues that Mr. Corbin made intentional misrepresentations to the judicial system. For example, on page 24 of its answer brief the Bar says Mr. Corbin made "an intentional misrepresentation...." to "the trial judge...." As to the trial judge, the Bar's allegations is directly and conclusively rebutted by that judge's own testimony. Judge Woodrow Hatcher, the presiding jurist in the case forming the basis for these grievance proceedings testified at final hearing that he did not consider Mr. Corbin's conduct in the case before him to be dishonest, fraudulent, deceitful or misrepresentatian. TR 182. As to Mr. Corbin's failure to specifically alert the Court to the existence of the alleged rent payment checks, Judge Hatcher testified as follows:

> I see no obligation for you [Mr. Corbinl to bring that forward. That would be the other side's responsibility at the time [of the hearing on the motion for summary judgment] to correct the affidavit as to whether or not they were forged or not. TR 182.

This Court should give great weight, if not deference, to the trial judge's opinion of Mr. Corbin's conduct in this matter. Inherent within a judge's right to preside over his own court is the right to determine when he or she should be offended by the conduct of a lawyer appearing before the Court. In the case at Bar, there was no such offense.

POINT I

THE FLORIDA BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT INTENTIONALLY MISREPRESENTED ANY FACTS OR THE LAW DURING HIS REPRESENTATION OF MS. REED.

At the outset, Respondent would point out that The Florida Bar confuses the distinction between the Referee's findings of facts and the conclusions she draws from those findings. A referee's decision as to whether the Bar has proven misconduct by clear and convincing evidence is a conclusion; it is not a finding of fact. In the case at Bar, Mr. Corbin argues that the Referee improperly concluded that the Bar proved intentional misrepresentation by clear and convincing evidence.

The Bar's entire theory of its case rests upon the assertion that Mr. Corbin should have disbelieved his client and her mother when they told him that they had not received the five checks submitted into evidence by their rent-dodging former tenants (who never claimed *to* have paid all of the rent claimed by Mr. Corbin's client). Mr. Corbin closely questioned his client and her mother, Ann Crum, and then required the latter to submit her position under oath. She willingly did so. She then ratified her position at final hearing in the instant case. TR 135.

In essence, the Bar argues to this Court that Mr. Corbin should have rejected the assertions of his client and her other and believed their adversaries instead. Whatever happened to the concept of loyalty to one's client?

Pages eight through eleven of the Bar's brief presents extensive argument to this Court that would have been properly presented at the trial of the rent foreclosure action. Perhaps, Mr. Williams could have convinced the trier of fact that Ms. Crum was not telling the truth. That is not **the** issue before the Court today, nor was it the issue before Judge Hatcher on December 20, 1994. The issue is whether Mr. Corbin had good reason to believe his client and her mother. Absent proof to the contrary, he had the right to give them the benefit of doubt.

The Bar's presentation at the final hearing in this cause of the testimony of two bank employees begs the issue. First, and foremost, neither of those employees could testify with certainty that Ms. Crum endorsed the checks at issue. Secondly, Mr. Corbin was not required by any Bar rules to seek conclusive evidence to disprove his client's case.

The Referee's mistaken conclusion as to Respondent's culpability is, perhaps, based upon her clearly erroneous belief that Mr. Corbin "solely took his client's word for it,...." GH 7. It appears, based on that quote, that the Referee overlooked the fact that Mr. Corbin based his belief that the checks were forgeries not only upon "his client's word for it,...." but on the adamant assertions of his client's mother, Ann Crum. Ms. Crum was willing to present her position under oath. Mr. Corbin based his position on the testimony of two unwavering witnesses, not one.

As stated in Mr. Corbin's initial brief, the Bar must prove intentional misrepresentation by clear and convincing evidence. **The Florida Bar v Cramer,** 643 So.2d 1069 (Fla. 1994). In the case at Bar, there is no showing that Mr. Corbin **knew**

that Ms. Crum's sworn testimony was false. He had the right to give his client and her mother the benefit of doubt in his representation of her. As an advocate, it was his duty to argue his client's position, not to undercut it. Other than a rent-dodger's unsworn recitation, Mr. Corbin had no **knowledge** that Ms. Crum's assertion that the checks bore her forged endorsement was untrue.

As argued in Point I of Respondent's Initial Brief, Mr. Corbin's submission to the Court of his motion for summary judgment containing boilerplate language was not a misrepresentation to that Court. Judge Hatcher did not think so, TR 182. Under the Bar's reasoning, every time a lawyer unsuccessfully submits a motion for summary judgment, he or she is guilty of making a misrepresentation to the Court.

POINT II

THE REFEREE ERRED IN HER CONCLUSION THAT THE MISTAKE THAT RESPONDENT MADE IN HIS SEPTEMBER 14, 1995 LETTER TO THE FLORIDA BAR CONSTITUTED A VIOLATION OF RULE 4-8.1(a) (A LAWYER IN CONNECTION WITH A DISCIPLINARY MATTER SHALL NOT KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT).

The Florida Bar correctly points out that in Mr. Corbin's initial response to the Bar's inquiry, he attached a copy of Ms. Reed's motion for summary judgment, Ms. Crum's affidavit and its attached schedule of payments. Mr. Corbin then stated, as quoted by the Bar, the "3 pages of attachments...." "clearly shows...." credit for the five disputed payments by Mr. Williams. Obviously, Mr. Corbin was in error; the attachments show no such credits.

Rather that ascribing to the adage that "to err is human", The Florida Bar

contends that Mr. Corbin was trying to defraud The Florida Bar by stating that Mr. Williams was given credit for his five checks. If Mr. Corbin was trying to defraud The Florida Bar, however, he would not have attached the motion for summary judgment, Ms. Crum's affidavit and the schedule of payments to his answer. He attached them in good faith. No individual engaging in fraud would have done so.

Rather than accusing Mr. Corbin of fraud, The Florida Bar should have accepted his explanation that he made a pure and simple mistake. Yes, Mr. Corbin should have been more diligent in preparing his answer. Yes, he should have remembered that Ms. Crum's schedule of payments did not give Mr. Williams credit for the five checks that Mr. Williams **alleges** were paid to his landlord. But, such a simple mistake is not an attempt at fraud or misrepresentation.

The Bar and the Referee both made much of Mr. Corbin's failure to raise the issue of forgery in his initial response to the Bar. But, if Mr. Corbin was under the misimpression that Mr. Williams had been given credit for all checks delivered to his landlord, why would he raise the forgery issue at that time? He was under the good faith mistaken impression, at the time that he filled out his answer to the Bar, that Mr. Williams had been given credit for all checks paid.

In summation, Mr. Corbin submits that the Bar did not prove by clear and convincing evidence his intent to deceive the Bar because he attached to his response the documentation that belied his statement. Rather than proving fraud, it showed a good-faith mistake.

POINT III

THE APPROPRIATE DISCIPLINE FOR THE MISCONDUCT AT BAR IS, AT MOST, A PUBLIC REPRIMAND.

The Referee's recommendation that Mr. Corbin be suspended from the practice of law for six months, and thereafter until he proves rehabilitation, is simply too harsh for the circumstances at Bar. If this Court finds that misconduct occurred, the appropriate discipline is a public reprimand or, at most, a ten to thirty day suspension. The cases cited by The Florida Bar in support of the Referee's Draconian recommendation all involve lying or stealing for personal gain. There is no personal gain at issue in this case whatsoever. The Referee had to stretch to find a dishonest motive, i.e., an improper desire to further the interests of his client.

Respondent submits that the Referee's unduly harsh recommendation as to discipline was based on her erroneous disregard of substantial mitigation and on her improper determination of aggravation. Specifically, the Referee discounted Mr. Corbin's excellent standing in the community because his 32 affidavits, 26 of whom are from non-lawyers, were offset by affidavits by three lawyers from two firms in another county. The Referee improperly considered as an aggravating factor Mr. Corbin's defense of the allegations against him. The combination of not affording Mr. Corbin mitigation for his excellent reputation in the community and considering his defense of the charges against him as aggravation resulted in a discipline inconsistent with sanctions handed down by this Court for similar conduct.

The Bar argues that Mr. Corbin tried to take advantage of the defendants by filing a motion for summary judgment. If Mr. Corbin had set the hearing down in 20

days, the minimum period allowed for summary judgment hearings, instead of waiting a full six months to set the matter down for hearing, its argument might have some validity. The fact that Mr. Corbin waited one half year to set the matter down for hearing, however, completely undermines the Bar's argument that he was trying to take advantage of unrepresented parties. Mr. Williams and his co-defendant had plenty of time to seek counsel. They were fully notified of the hearing when it was finally set down and there was no attempt to ex parte the judge or secure some sort of ruling surreptitiously. Everything was handled in the sunshine.

The Bar argued on page sixteen *of* its brief that Mr. Corbin "could have just as easily...." set the matter down for trial. That is simply an incorrect statement. A trial is a far more complex, expensive, and time-consuming matter than a summary judgment. At the time that Mr. Corbin filed his motion for summary judgment, and at the hearing on the motion six months later, Mr. Williams had never stated under oath that the five checks that he sent to Mr. Corbin by facsimile were, in fact, paid to Mr. Corbin's client or her mother. If Mr. Williams was unwilling to attest to the validity of his position, Mr. Corbin's statement to Judge Hatcher that there were no issues of law or fact to be decided would have been true. Even if the five checks were accepted as valid, it is possible that Mr. Corbin could have received summary judgment on themonths for which there was no payment. Perhaps, facing partial summary judgment, Mr. Williams might have negotiated a settlement. In short, there were numerous reasons for Mr. Corbin's filing his motion for summary judgment.

While the Referee discounted Mr. Williams's legal acumen, including his 25 years in law enforcement, his participation in "a few" divorces" and his ability to file documents with the clerk of court in proper person, TR 35, those factors indicate that he is not intimidated by the legal system.

The Bar's entire charge regarding lying to the Court is predicated upon paragraph four of the motion for summary judgment in which Mr. Corbin used the following standard language for motions for summary judgment:

> There *is* no issue *of* material fact in this cause, and Plaintiff is entitled as a matter of law to a judgment against Defendants.

The Bar argues that such language was a fraud on Judge Hatcher and it disregards Judge Hatcher's opinion that it was not. No sanctions were imposed by the Court. In arguing a fraud, the Bar completely ignores the fact that Judge Hatcher had before him the answer Mr. Williams had filed disputing the initial allegations. Therefore, the Court was on notice that there may be a dispute.

Starting with page eighteen of its brief, The Florida Bar cites numerous cases as support for the Referee's recommended discipline. All of the lawyers disciplined in those cases lied or engaged in misconduct for personal, and in most cases, financial, gain.

In **The Florida Bar v Scott,** 566 So.2d 765 (Fla. 1990), the accused lawyer was suspended for 91 days, three months less than that recommended at Bar, for attempting to convert as his own property belonging to the heirs of an acquaintance. Mr. Scott received but a 91 day suspension notwithstanding the fact that the referee

found that he "was not being entirely truthful in his testimony...." to the referee.

The Florida Bar cites the one year suspension handed down in **The Florida Bar v Niles,** 644 So.2d 504 (Fla. 1994) as precedent for the discipline to be imposed in this case. Mr. Niles lied to prison officials and to **his own *client*** about an interview in prison with his client. He not only lied about the purpose of the interview, but he lied about the fact that he was paid $5,000.00 for that interview. Once again, the misconduct *in* this case was for the lawyer's personal gain.

Of all the cases cited by the Bar, the only that comes close to the instant case is **The Florida Bar v Oxner,** 431 So.2d 983 (Fla. 1983). There a lawyer received a 60 day suspension for "making bold faced lies...." to a trial judge in an attempt to improperly gain a continuance of trial.

The accused lawyer in **The Florida Bar v Schramrn,** 668 So.2d 585 (Fla. 1996) received but a 91 day suspension as a discipline in three consolidated disciplinary cases. Two cases involved separate instances of lying; in other words, a course of conduct. The first lie involved an attempt to recuse a judge by making allegations that were untrue and then representing falsely that he had attempted to verify them. The second case involved lies on two separate occasions to the court in an attempt to get a continuance. The third case involved neglect of a legal matter.

Mr. Schramm on three separate occasions deliberately lied to two different judges. The two lies in the second case were for his personal gain, i.e., the continuance of a matter.

The Bar reliance on **The Florida Bar v Colclough,** 561 So.2d 1147 (Fla. 1990) is entirely misplaced. Mr. Colclough, who received a six month suspension, the same recommended in the case at Bar, engaged in a series of material misrepresentations and fraud in an attempt to secure a costs judgment of $4,666.50 (which, presumably, was for Mr. Colclough's benefit).

Mr. Colclough lied to adverse counsel and to the court, to their faces and during a hearing, in an attempt to improperly secure an additional $4,666.50. No such motive is present in the instant case.

Diane Segal was suspended for three years by this Court for, in essence, lying to the probate court in an attempt to defraud a co-personal representative and his lawyers out of approximately $245,000.00 in fees, costs and expenses. As a beneficiary of the estate, Ms. Segal stood to materially gain from the fraud. **The Florida Bar v Segal,** 663 So.2d 618 (Fla. 1985).

The Court ordered disbarment, quite properly so in **The Florida Bar v Merwin,** 636 So.2d 717 (Fla. 1994). Mr. Merwin was guilty of a whole litany of misconduct, including failure to attend a pre trial conference and a trial, failing to return telephone calls from the presiding judge and from opposing counsel and then lying to the judge by stating that his failures to appear were due to the client's moving and lack of interest. Mr. Merwin then lied to his client and falsely stated that the presiding judge had sentenced Mr. Merwin to jail. The referee in the disciplinary case found no mitigation and Mr. Merwin did not brief the court on the sufficiency of the discipline.

The Bar cites **The Florida Bar v Jones,** 457 So.2d 1384 (Fla. 1984) as support for its argument that Mr. Corbin be suspended for six months. Unfortunately , the facts in Jones are a mere summary of the misconduct involved. In essence, Mr. Jones lied to a hospital attorney and stated that Mr. Jones's client had only received $10,000.00 for his injuries when, in fact, he had received $25,000.00. It is unclear whether Mr. Jones was to receive any personal financial benefit for his misrepresentation or not. What is clear, however, is that the referee's unappealed recommendation of a six month suspension was consecutive to a prior suspension. Aggravation was that the misconduct was cumulative to prior misconduct.

The respondent in **The Florida Bar v Palmer,** 504 So.2d 752 (Fla. 1987) was suspended for eight months for repeatedly lying to his client about the status of her case. Those lies included stating that the case had been delayed because of a change in oppasing counsel and that he had filed suit when, in fact, it was not filed. He subsequently lied to his client about scheduling court dates (when no action was pending), about the case being settled, and about the settlement check being in the mail. In fact, Mr. Palmer missed the statute of limitations and ultimately paid $10,000.00 to his client.

Mr. Palmer engaged in a long-term pattern of repeatedly lying to his client about the status of her case. His motive was, presumably, at first, saving face and, later, hiding blatant malpractice.

On page 20 of its brief, the Bar, incredibly, states that the case "most factually similar...." to the instant case is **The Florida Bar v Salnik,** 591 So.2d 101 (Fla. 1992).

The facts of the Salnik case are not at all similar to the case at Bar. Mr. Salnik was disbarred for using a "judge's rubber stamp...." to forge a final judgment after the trial judge had refused to sign that judgment. He then sent one of the forged judgments to the tenant that Mr. Salnik's client was trying to evict. When the judge was contacted by the tenant, she called up Mr. Salnik in an "attempt to clear up the issue". Mr. Salnik then lied to the judge by stating that "he had received the final judgment in the mail...." and that he had sent a copy of it to the tenant.

Mr. Salnik's gross misconduct was far, far more serious than that at Bar.

Respondent submits that the cases cited on pages 26 through 28 of his initial brief set forth the proper parameters of discipline in conduct such as that at Bar. Those cases show that the appropriate sanction, even allowing for Mr. Corbin's three prior private reprimands (all of which involved misconduct separate from that at Bar and which show no course of conduct) is a public reprimand or, at most, a ten to thirty day suspension.

Pages 23 and 24 of Respondent's initial brief rebuts the Bar's arguments on pages 21 and 22 of its answer brief regarding the Standards for Imposing Lawyer Sanctions. Respondent would emphasize that those standards requiring suspension do not set forth the length of the suspension.

The Bar defends the Referee's decision that Mr. Corbin's 32 affidavits were offset by the Bar's three affidavits by making an incredibly elitist argument. In essence, the Bar argues on page 22 of its brief that because 26 of Respondent's affidavits were from non-lawyers, and "only" three were from his fellow lawyers, that

they are completely neutralized by the Bar's three (the Bar does not use the modifier "only" when referring to its three lawyer affidavits) affidavits from lawyers in two firms in an altogether different county from that in which Mr. Corbin practices.

Mr. Corbin submits to this Court that affidavits from 26 community members, the population that he serves, is a very significant factor for this Court to consider in mitigation. Mr. Corbin is well-respected in his community. On one day's notice he received attestations as to good character from the Chief and Chief Deputy of Police, a clerk of court, a physician and a clergyman among others. He had former clients attest to his good character. He also had three lawyers, in a county with very few practitioners, submit affidavits in his behalf,

The community that Mr. Corbin serves backs him wholeheartedly. They think highly of him. This is precisely this Court had in mind when it adopted Standard 9.32(g).

For the Referee to completely disregard as mitigation Mr. Corbin's good standing in his community, because lawyers in two firms in another county dislike him, shows a callous disregard of the opinion of the public that we serve.

The Florida Bar tried, but could not, justify the referee's penalizing Mr. Corbin for defending himself. Although this Court specifically stated in **The Florida Bar v Lipman**, 397 So.2d 1165, 1168 (Fla. 1986) that a referee could not consider in aggravation a lawyer's defense of the charges against him, the instant referee did so. It was improper for the Referee to consider as aggravation the fact that Mr. Corbin defended the charges against him.

Finally, the Referee's opinion that Mr. Corbin had a "dishonest motive to advance the cause of his clients" is simply wrong. Mr. Corbin had nothing to gain in the suit against Mr. and Mrs. Williams. He had no pecuniary interest in it. He had no reason to engage in deceptive conduct to further this matter.

CONCLUSION

Mr. Corbin quite properly relied on the assertions of his client and her mother, Ann Crum, in filing his motion for summary judgment. He then waited six months to set the matter down for hearing, more than sufficient time for Mr. Williams to submit counter-affidavits or secure the services of counsel to defend him.

Mr. Corbin had the right to bring his client's case to issue before Judge Hatcher by forcing Mr. Williams to submit under oath the validity of his assertions that the five rent checks were delivered to Ms. Crum. He should not be disciplined for that conduct.

If any jurist was to be offended by Mr. Corbin's conduct, it was the presiding judge before whom he was practicing. That judge testified to the Referee that Mr. Corbin did nothing wrong. Respondent did not deceive Judge Hatcher by filing the motion for summary judgment.

In Mr. Corbin's response to The Florida Bar, he mistakenly stated in a letter that Mr. Williams had been given credit for the five checks at issue. Mr. Corbin attached to that letter the motion for summary judgment, the affidavit and the schedule of payments that had been filed with the Court. Those documents clearly indicated that Mr. Corbin's statement was in error. If Mr. Corbin was trying to deceive the Bar, he

never would have sent those documents to the Bar.

Finally, if this Court finds that the Bar has proven by clear and convincing evidence that Mr. Corbin knowingly and deliberately attempted to deceive either Judge Hatcher or the Bar, the appropriate discipline for his conduct is a public reprimand or, at most, a suspension for ten to thirty days. The Referee erroneously based her recommendation on numerous factors, including: (1) her considering as an aggravating factor Mr. Corbin's defense of the charges against him; (2) her rejection as mitigation affidavits submitted by 26 community members and three lawyers showing good character; and (3) because she found that Mr. Corbin had an improper motive in that he was trying to improperly further his client's case.

Respectfully submitted,

John A. Weiss
Attorney Number 0185229
2937 Kerry Forest Parkway
Tallahassee, Florida 32308
(904)893-5854
COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that copies of the foregoing Reply Brief were mailed to Luain T. Hensel, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 8th day of July, 1997.

JOHN A. WEISS