IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MARK D. GREENSPAN

Respondent.

Supreme Court
Case No. 88,384

On Petition for Review
of
the Referee's Report
in a Disciplinary
Proceeding,

REPLY BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STANDARDS FOR IMPOSING LAWYER SANCTIONS

RULES REGULATING THE FLORIDA BAR

RULES OF PROFESSIONAL CONDUCT

RULES OF DISCIPLINE

INTRODUCTION

In this brief, MARK D. GREENSPAN is referred to as either "Respondent" or "Greenspan"; The Florida Bar will be referred to as either the "Complainant" or "the Bar"; and Counsel for The Florida Bar will be referred to as "Bar Counsel".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee.

"RR" refers to the Report of Referee dated October 9, 1996.

"ANS BRIEF" refers to the Answer Brief of The Florida Bar

ARGUMENT

I. DISMISSAL OF THIS DISCIPLINARY PROCEEDING IS WARRANTED BASED UPON THE BAR'S FAILURE TO DISCLOSE TO THE REFEREE ERROR IN THE CASE LAW CITED BY THE BAR AS WELL AS THE BAR'S FAILURE TO DISCLOSE THE EXISTENCE OF LEGAL AUTHORITY WHICH WAS CONTRARY TO THE BAR'S ARGUMENT PERTAINING TO DISCIPLINE. (Argument I of Initial Brief of Respondent).

It is significant that in its Answer Brief, the Bar does not address The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978) which Respondent has cited as legal authority in support of dismissal of this disciplinary proceeding. Instead, the Bar cites civil cases which suggest that dismissal of civil proceedings must be based upon a showing of willful disregard of a court order or bad faith. This Court in Rubin, however, did not require either a showing of willful disregard of a court order or bad faith to justify dismissal of a disciplinary proceeding. Dismissal in Rubin was based upon a finding of irresponsible prosecution.

In the case sub judice, irresponsible prosecution warranting dismissal is demonstrated by the Bar's failure to disclose to the Referee error in the case law cited by the Bar in support of its disciplinary recommendation [The Florida Bar v. Vaughn, 608 So.2d 1.8 (Fla. 1992)] as well as the failure to disclose the existence of other case law [The Florida Bar v. Grigsby, 641 so. 2d 1341 (Fla. 1994)] which supported discipline other than the recommended discipline.

It is further significant that in its Answer Brief, the Bar does not attribute its failure to advise the Referee of the Grigsby decision to "oversight". Instead, the Bar attempts to justify its failure to advise the referee of the Grigsby decision by suggesting that Grigsby was distinguishable and, therefore, did not have to be presented. The Bar is clearly wrong; the Bar was obligated to advise the referee of the Grigsby decision but could still proceed with argument as to the applicability of Grigsby to the instant case. The Bar's attempts to justify its silence with respect to Grigsby supports a conclusion that the Bar acted "knowingly" in its failure to disclose Grigsby. Thus the Bar's awareness of the Grigsby case and its decision to withhold it from the referee supports a finding that the failure to disclose was conduct which clearly violated Rule 4-3.3(a)(3), Rules Regulating The Florida Bar.

Further, in its Answer Brief the Bar does not even attempt to justify its failure to advise the Referee that its reliance upon Vaughn as support for a suspension was erroneous. Vaughn was improperly cited by the Bar in both its Memorandum of Law and proposed Reports of Referee as the sole legal authority which supported a suspension. The Bar had an affirmative duty to advise the Referee of this fundamental error, i.e. that the suspension recommended by the Bar and adopted by the Referee was based upon legal authority (Vaughn)

which supported a lesser discipline, to wit; a public reprimand.

Finally, the Bar's argument that dismissal cannot be granted because of default is without merit and is not supported by any legal argument or authority. Dismissal of this disciplinary proceeding is justified because of the Bar's failure to turn "square corners". The Florida Bar v. Rubin, 362 So.2d 12, 16 (1978). Accordingly, the fact that Respondent did not contest the charges set forth in the Bar's complaint, either by default or by plea pursuant to Rule 3-7.6, Rules Regulating The Florida Bar, has no relevance to the issue of dismissal based upon irresponsible prosecution,

II. THE REFEREE'S REPORT IS CLEARLY ERRONEOUS AND SHOULD BE REJECTED BASED UPON THE CITED CASE LAW AND FINDINGS WHICH LACK EVIDENTIARY SUPPORT (Argument II of Initial Brief of Respondent)

The factual basis for this proceeding was admitted by default and is not challenged. A default, like an unconditional guilty plea, has the effect of admitting the charges set forth in the Bar's complaint. Admission of the charges, however, does not preclude review of the disciplinary measures imposed. See Rule 3-7.6(m)(3), Rules Regulating The Florida Bar. The instant case seeks review of referee's findings and recommendations relating to discipline.

The referee's report specifically refers to consideration of "pertinent Supreme Court of Florida Disciplinary decisions"

as a factor in determining discipline (RR 8). However, the one cited case (Vaughn) supports a public reprimand instead of the recommended discipline of a twenty-day suspension. In its Answer Brief, the Bar fails to expressly acknowledge the error in the referee's report with respect to the case law cited in support of the recommended discipline (Vaughn). Instead, the Bar attempts to ignore the error and argues that a suspension is justified as enhanced discipline because of cumulative misconduct. The Bar's Answer Brief does not, however, cite any other disciplinary case upon which the referee could have relied to support a recommendation for a twenty (20) day suspension in this case. The referee's report recommending a suspension based upon case law that supports a public reprimand is clearly erroneous; the error in the referee's report cannot be cured simply by merely disregarding case law as a factor in determining discipline.

Further, with regard to Respondent's testimony concerning his mental disability, the Bar asserts that Respondent's testimony was not unrebutted. The Bar, however, fails to demonstrate evidence of rebuttal in the record, In a confusing argument, the Bar suggests that Respondent "waived" his opportunity to present his psychological condition and incapacity as an explanation for his failure to respond by not including it as an affirmative defense or by not using it as a

basis to challenge the default. ANS BRIEF at 17-18. The Bar's position is incorrect as a matter of law.

It is a well-established principle in disciplinary proceedings that a respondent's psychological condition may only be considered as a mitigating factor in determining an appropriate disciplinary sanction. Case law does **not** support the assertion of a psychological disability or emotional condition as an affirmative defense in disciplinary proceedings. See The Florida Bar v. Musleh, **453** So.2d 794 (Fla. 1984); The Florida Bar v. Grigsby, 641 So.2d 1341 (Fla. 1994). See also Standards 9.32(c) and (h), Florida Standards for Imposing Lawyer Sanctions. Moreover, because a respondent's psychological disability is not recognized as a meritorious defense to the charges set forth in the Bar's complaint, its assertion as a basis to set aside the default would not be justified in the absence of the existence of a meritorious defense.

Accordingly, Respondent's testimony as to his mental disability and incapacity was appropriate for consideration only as a mitigating factor at the hearing on sanctions. Respondent was not obligated to raise these matters in mitigation at any earlier stage in these proceedings.

Further, contrary to the Bar's position, Respondent's sworn testimony at final. hearing is **evidence** and is sufficient to establish the mitigation offered by Respondent. While

additional evidence to support mitigation, such as hospital or medical records, may also be admissible, there is no requirement that Respondent present such documentation to corroborate his testimony. In addition, the Bar was afforded an opportunity to cross-examine Respondent concerning his testimony. Morevover,the Bar did not request a continuance to pursue further discovery related to Respondent's mitigation testimony. Instead, the Bar resisted all efforts to postpone the matter, stating "Finality is required." (TR 17)

In the instant case, Respondent's testimony at final hearing concerning his psychological condition cannot be disregarded; it was unrebutted, unimpeached and must be accepted as true.

> [W]here the testimony on the pivotal issues of fact is not contradicted or impeached in any respect, and no conflicting evidence is introduced, these statements of fact can not be wholly disregarded or arbitrarily rejected. Rather , the testimony should be accepted as proof of the issue for which it is tendered, even though given by an interested party, so long as it consists of fact, as distinguished from opinion, and is not essentially illegal, inherently improbable or unreasonable, contrary to natural laws, opposed to common knowledge, or contradictory within itself.

Vietinghoff v. Miami Beach Federal Credit Union, 657 So.2d 1208, 1209 (Fla. 3d DCA 1995), citing Duncanson v. Service First, Inc., 157 So.2d 696 699 (Fla. 3d DCA 1963)(footnotes omitted) ; see also Holland v. Gross, 89 So.2d 255, 258 (Fla. 1956) ("A finding which rests on conclusions drawn from undisputed evidence, rather than on conflicts in the

testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion."); Merrill Stevens Dry Dock co. v. G & J Invs. Corp., 506 So.2d 30, 32 (Fla. 3d DCA 1987)("Uncontradicted testimony must be accepted as proof of a contested issue." [citing Howell v. Blackburn, 100 Fla. 114, 129 so. 341 (1930)]), rev. denied 515 So.2d 229 (Fla. 1987).

The Bar's position, therefore, that Respondent's testimony concerning mitigation should not be considered as unrebutted evidence because it was not presented to the Bar until the final hearing is incorrect. The testimony is unrebutted and, as such is an appropriate evidentiary basis to reject any findings of the referee which are inconsistent with this testimony.

III" A VIOLATION OF THE BAR'S ADVERTISEMENT FILING REQUIREMENT CONCERNING ONE YELLOW PAGE ADVERTISEMENT AND A FAILURE TO RESPOND TO BAR INQUIRY CONCERNING THE REQUIRED FILING DO NOT JUSTIFY A SANCTION GREATER THAN AN ADMONISHMENT WITH PROBATION (Argument III of Initial Brief of Respondent)

At the final hearing on sanctions, Bar counsel acknowledged its suspicion that a psychological condition was responsible for Respondent's lack of response. (TR 7) Based upon this suspicion, the Bar came to the final hearing with a proposed referee's report which included a request for a psycho logical evaluation. (TR 15) Notwithstanding the fact that the Bar's suspicions concerning Respondent's

psychological condition was confirmed by Respondent's testimony, the Bar in its Answer Brief persists in characterizing Respondent's actions as "willful" or the result of a "failure and refusal" (ANS BRIEF 20, 21, 23). If, however, Respondent's failure to respond was likely to have been caused by his mental disability, then the Bar's characterizations of his conduct as "willful" and "refusal" are inappropriate and should not be considered as a basis to enhance discipline.

Although the Bar maintains that "Respondent must **suffer** a **suspension** from the practice of law", [emphasis added] ANS BRIEF 22, the Bar does not answer the obvious question, "Why?" Respondent's testimony clearly reflects suffering: Respondent suffers from depression which has required hospitalization and treatment which includes medication and counseling. (TR 3,4) His condition improved to the point that approximately two-weeks prior to the final hearing he was able to interview for and obtain employment. (TR 4, 5) Under these circumstances, the Bar does not demonstrate why any suspension meets the purposes of discipline set forth in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1.970) and why a lesser sanction would not be sufficient.

The recommended discipline of a suspension is nothing more than a clearly punitive, Draconian response to a

situation which requires a sense of humanity and compassion. **It should be rejected.**

CONCLUSION

This disciplinary proceeding should be dismissed. In the event that the court does not dismiss this proceeding, Respondent would urge the court to reject the Referee's recommendation for a twenty-day suspension and, in lieu there0f, approve an admonishment and one-year probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Reply Brief of Respondent was forwarded by AirBorne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927 and that a true and correct copy was mailed to John T. Berry, Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309 this 3rd day of July, 1997.

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