IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

LOUIS VERNELL, JR.,

Respondent.
_____/

Supreme Court Case
No. 90,010

The Florida Bar File
No. 96-70,267(11J)

On Petition for Review

THE FLORIDA BAR'S ANSWER BRIEF

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INTRODUCTION

Hearing transcripts are designated by date and page, e.g. (T.7/16/97, p.28). Trial transcripts are designated solely by the letter T. e.g. (T.62) since the several volumes are

consecutively numbered.

STATEMENT OF THE CASE AND FACTS

The Bar rejects virtually all of the Respondent's Statement of the Case and Facts. The Respondent has constructed that portion of his brief based upon self serving appendices to which the Bar has objected by virtue of a pending motion to strike. Those items included in the appendices which are actually part of the record are not identified by the Respondent.

The Bar is submitting its Brief at this time because the Motion to Strike is pending and a requested Stay Order has not been entered to date. However, the Bar adopts by reference the contents of the Motion to Strike and Stay attached hereto as Exhibit A.

The Respondent's Introduction, and Statement of the Case and Facts lack appropriate references to the record and are replete with conclusory and argumentative statements. Therefore, the Bar will reconstruct a statement based upon the record.

Respondent seeks review of the Referee Eugene Fierro's Report dated August 26, 1997. The Referee found that Respondent was in violation of the following Rules of Professional Conduct.

a. Rule 4-1.15(a),(failure to hold client's funds in trust)

b. Rule 4-1.15(b),(failure to promptly notify the client of receipt of funds in his behalf)

c. Rule 4-1.4(a),(failing to keep the client informed about the status of matters and promptly complying with reasonable request for information)

d. Rule 4-4.2 (communication with person represented by counsel)

e. Rule 4-8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation)

The violations were based upon Respondent's representation of Complainant Howard Rosenberg in eminent domain litigation and in respect to proposed litigation with the FAA.

In regard to the eminent domain litigation and a related appeal, Complainant and his wife testified that they asked the Respondent the status of any funds available for disbursal (T.63,356). Long after the case was concluded and checks were received by the Respondent, and the appeal had concluded, Respondent told them that the appeal was still pending (T.62,440) and that Respondent would get back to them regarding any disbursed funds. Complainant was told he would have to wait until the conclusion of the appeal (T.62,354). No information or funds were received despite many inquiries between 1989 and 1995.

In relation to the appeal, the Complainant had also learned that Respondent had not filed a reply brief. However, that fact also was not revealed to Complainant by the Respondent (T.61).

Ultimately, Complainant went to the Clerk's Office at the Fourth District Court of Appeal and learned that the appeal had concluded in 1992. (T.79). Thereafter, Complainant and his wife went to the Clerk's office at the Broward County Courthouse to determine the status of funds that had been awarded (which had been affirmed on appeal). (T.79,66) They were advised that the

funds had been disbursed to the Respondent. (T.79,442) The Complainant had not been advised by Respondent that he had received the checks. (T.442)

Respondent admits that he received the checks. (T.479) He claimed that Complainant had agreed that those funds were to be used for attorney's fees and for costs which he had advanced. (T. 479).

No written fee agreement was offered into evidence. Complainant states that no written agreement existed (T.49) and that he was told by Respondent and his prior counsel that the state pays the fees in eminent domain cases. (T.40,60,364) A check was furnished to Respondent by Complainant because Respondent requested an advance to cover costs. (T.49)

In regard to the proposed FAA litigation, Complainant stated that he paid Respondent a $500 retainer. (T.74, T.453) He also stated that Respondent did not take any steps to file a suit. (T.76). There was no discussion of fees except for the $500 retainer, according to the Complainant. (T.74). Respondent filed a civil suit against Complainant for attorney's fees after the Complainant filed his complaint with the Bar. (T.87,88). That was the first time that Complainant received an alleged accounting. (T.90).

SUMMARY OF ARGUMENT

Respondent presented five arguments. The first argument alleged some defect in the oath signed by the Complainant. It falsely implies that Complainant did not sign an oath. Furthermore, it is based upon a case which has nothing to do with the facts of this case, or the Bar Rules, nor the statute passed after that case, nor the appropriate definition of "oath" contained in Florida Statute 837.011, applicable to perjury. All of the foregoing establish that the oath was valid. In addition, if any error did exist it was waived when the Complainant

testified at a grievance hearing and/or cured or rendered harmless by inquiries before the Referee.

In regard to Respondent's second argument, there is no basis in the trial record for the claim that witness Howard Rosenberg should have been precluded from testifying. No motion was made to that effect and if a motion had been submitted, it could not be sustained. The argument is predicated upon the false assertion that the existence of a Clients' Security Fund claim was established at the time of the trial. That is not established by the trial record.

Even if a claim did exist, the case cited by Respondent is not relevant to this situation. No due process problem arises by virtue of a Clients' Security Fund remedy available at the same time that a complaint is heard by a Referee. Neither the record, nor logic, nor the Rules, nor the case cited, support Respondent's position.

Respondent's third argument is incorrect as a matter of law. Governing case law authorizes the Referee to consider an offense which was not charged in the complaint, contrary to Respondent's assertion.

Respondent's fourth argument raises the question of sufficiency of the evidence. He totally fails to establish an absence of evidence as required by settled principles of law. Much of the evidence is, in fact, uncontradicted. The appropriate portions of the record follow in the argument portion

of this brief.

The burden of the Respondent to demonstrate insufficiency of the evidence is not met by one unsustainable comment by one witness. The question of credibility should be determined by the Referee as the trier of facts.

In his fifth “argument”, Respondent has alleged a number of due process violations. The arguments are non-existent. Respondent’s argument regarding the meaning of “hearing” simply admits ignorance of Rule 3-7.6(g)(9) which uses “hearing” and “trial” interchangeably. He disagrees with the denial of a continuance, a discretionary decision, but does not specify the alleged abuse of discretion. Respondent also disagrees with the Referee’s denial of a motion to recuse, but again fails to specify the alleged basis of error.

Neither appropriate references to the record, nor <u>any</u> legal authority is submitted by the Respondent in his brief in regard to this fifth argument. In essence, there is simply no evidence of denial of due process.

ARGUMENT

I

THE RESPONDENT HAS FAILED TO IDENTIFY ANY ERROR IN REGARD TO THE OATH WHICH WAS PART OF THE COMPLAINT. (Restating Respondent's Argument I).

The Respondent implies that the Complainant did not sign the complaint form. In fact, he did, as the Court pointed out at the hearing on Respondent's Motion to Dismiss:

> THE REFEREE: Let me ask you something. The jurat on The Florida Bar complaint form, which you have submitted to the Court says: "Under penalty of perjury, I declare the foregoing facts are true and correct and complete." It is signed by Howard Rosenberg. Does that, the fact that there is that jurat, in and of itself, is that sufficient?
>
> (T.7/16/97, p.28)

Respondent suggests that there is a problem with that signature (Exhibit B), by referring this Court to The Florida Bar v. Collins, 465 So.2d 1266 (Fla.2d DCA 1985). Collins, however, does not apply to this case. In Collins a police officer, in lieu of a required oath, obtained a warrant based upon a statement that he had a good faith belief that he had an obligation to tell the truth. He did not comply with any statutory requirement regarding oaths or affirmations.

In this case, the circumstances, both legal and factual, are totally different. Subsection 3-7.3(c) of the Rules Regulating The Florida Bar provides:

> (c) **Form for Complaints.** All complaints, except those initiated by The Florida Bar, shall be in writing and under oath. The complaint shall

> contain a statement providing: Under penalty of perjury, I declare the foregoing facts are true, correct, and complete.

The Bar's form tracks the foregoing statement verbatim. The Rule does not require that an official administer an oath at the time the statement is signed, nor that it be notarized. Florida Statute 837.011, a criminal perjury statute, defines an oath:

> (2) "Oath" includes affirmation or any other form of attestation required or authorized by law by which a person acknowledges that he is bound in conscience or law to testify truthfully in an official proceeding or other official matter.

There is no requirement that an oath or affirmation or attestation be administered by a public officer nor that it be notarized.

Florida Statute 92.525, which was passed one year after the Collins decision, states that when a party uses as a form of verification of documents the identical language that is contained in the Bar rule 3-7.3(c), above, and the oath signed by Howard Rosenberg, that person is subject to the laws of perjury.

Collins, therefore, should not influence this Court for a number of reasons. As the Second District stated in that case "The key to a valid oath is that perjury will lie for its falsity." (at 1268). Therefore, even if Rosenberg's statement is deemed to be something other than an oath, the effect of the statement is identical. He would still be subject to the perjury laws and, therefore, no harm is possible.

Second, Collins, erroneously relied upon Black's law

dictionary for a definition of “oath”. The proper authority would, of course, be the Florida statutes cited above, 837.011. That error was not material in the Collins case because the officer’s statement did not comport with any statutory definition pertaining to verification. However, that definition cannot be utilized in this case.

Third, Collins[1] is irrelevant because one year after the decision, Florida Statute 92.525, cited above, established that the statement on the Bar’s form would subject the maker to the laws of perjury.

Respondent has also submitted two Exhibits (A28, A29) which are obsolete materials no longer utilized by the Bar. He relies upon them, for the false assertion that the Bar requires that a complaint be notarized. Respondent provided no evidence to support his claim that the items were current. Counsel for the Bar pointed out at the hearing on Respondent’s motion that such was not the case. (T.7/16/97, p.47)

Respondent, furthermore, has not asserted that he raised the issue of the oath at the grievance committee hearing. Since witness Rosenberg testified under oath at that hearing, without objection, any problem with the signed oath would have been waived and/or cured.

In addition, during the final hearing held on August 6,

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[1] Younger v. State, 433 So.2d 466 (Fla. 4th DCA), a 1968 case, is obviously inapplicable as well.

1997, the complainant, Howard Rosenberg identified the complaint with its appendix. He further testified that his intent was to provide all of it under oath. (T.41). Lastly, the Referee clarified for opposing counsel that Complainant's testimony regarding the oath clarified any concerns that Respondent might have had as to the validity of the complaint. (T.42).

II

RESPONDENT HAS FAILED TO ESTABLISH ANY JUDICIAL ERROR IN REGARD TO UTILIZING THE TESTIMONY OF A BAR WITNESS. (Restatement of Respondent's Argument II).

Respondent argues that the testimony of witness Howard Rosenberg should have been "precluded". However, Respondent's argument is fatally deficient since it cites no act by the Referee related to this argument which constituted error. No motion of any kind was made to the Referee to the effect that the witness' testimony should not have been considered. Therefore, that argument is not properly before this Court. McGurn v.

Scott, 596 So.2d 1042 (Fla. 1992).

Even if this issue were properly before this Court, it is apparent that Respondent is incorrect both factually and as a matter of law. Respondent bases his argument, in part, upon the claim that the witness "had already filed and was pursuing a claim with The Florida bar from the Clients' Security Fund." (p.35, Respondent's brief).

There is no testimony in the record which supports the Respondent's claim. In his Statement of the Case and Facts, Respondent relies upon (A6), an item in Appendix A which he has submitted in support of his position. Item A6 is a letter which was not part of the record below and is not properly before this Court. Fla.R.App.P., Rule 9.200(a)(1); Altchiler v. State, 442 So.2d 349 (Fla. 1st DCA 1983).

Furthermore, the letter in question is merely an inquiry from the attorney for the witness regarding the Fund. Thus, the Appendix item, which is outside the record, could not have established Respondent's conclusion even if it were part of the record.[2]

Even if none of the foregoing defects in Respondent's argument existed, the ultimate contention is supported by neither

[2] Subsequent pages of Respondent's "argument" consist of vituperative attacks which also lack support in the record. It accuses the attorney for the witness of an effort to "extort" (pps. 35-36, Respondent's brief). He also accuses the same attorney, Michael Eisler, of protecting Mr. Rosenberg from Respondent, without any indication of the materiality or relevance of that claim, which contains no support in the record.

law nor logic. Respondent's position is that a complaining party cannot file a grievance complaint and utilize the Clients' Security Fund at the same time because of his financial interest in the outcome.

The case which Respondent has relied upon as alleged authority is a criminal case, State v. Glosson, 462 So.2d 1082 (Fla. 1985). In Glosson an informant was a witness at trial whose fee from the government was contingent upon their satisfaction with his testimony. This court deemed that situation to constitute a denial of due process.

The due process violation which resulted from a third party witness being potentially influenced to alter his testimony in order to receive payment would not exist herein (even assuming arguendo the existence of a Security Fund pending claim). The only motivation of the Complainant as a witness which would have been created by a pending claim would be to testify in a manner consistent with his grievance claim.

It is interesting to note that Respondent has identified no Bar rules or Bar cases which support his position. In fact, Rule 7-2.4 supports the opposite conclusion, namely that one may be required to seek relief, through both the grievance process and the Clients' Security Fund. Obviously, the two proceedings complement one another and are designed to provide comprehensive relief for rule violations.

III

THE RESPONDENT HAS FAILED TO ESTABLISH ANY ERROR IN REGARD TO CONSIDERATION OF AN UNCHARGED OFFENSE. (Restating Respondent's Argument III).

As this Court stated in The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981):

> It was proper for the referee, in making his report, to include information not charged in The Florida Bar's complaint. Evidence of unethical conduct, not squarely within the scope of the Bar's accusations, is admissible, and such unethical conduct if established by clear and convincing evidence, should be reported because it is relevant to the discipline to be imposed.

This Court reaffirmed the Stillman holding in The Florida Bar v. DeSerio, 529 So.2d 1117 (Fla. 1988). The Respondent had challenged a finding not charged in the Bar's complaint. This Court stated:

> "As for the complaint about the unmade charge Stillman permits such evidence and findings which develop during a disciplinary hearing. (at 1119-20, emphasis supplied).

DeSerio was decided several years after The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985), upon which the Respondent relies.

IV

RESPONDENT HAS NOT DEMONSTRATED THAT ANY FINDINGS OF THE REFEREE WAS CLEARLY ERRONEOUS. (Rephrasing Respondent's Argument IV).

As this Court has stated repeatedly, a Referee's findings and recommendations will be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Lipman, 495 So.2d 1165 (Fla. 1986). It is for the Referee to weigh the credibility of witnesses and any conflicts in evidence are properly resolved by the Referee sitting as the Court's finder of fact. Lipman, supra. A party seeking to prove that the Referee's findings of guilt are clearly erroneous must show that there is no evidence in the record to support those findings or that the record evidence clearly contradicts those conclusions. The Florida Bar v. Spann, 682 So.2d 1070 (Fla. 1996).

There is ample evidence of a non-contradictory character to support the Referee's conclusions. In fact there is ample uncontradicted evidence. Respondent admits that he received the checks which were disbursed to him by Court records (T.74). Complainant and his wife both testified that the Respondent had not notified him of receipt of the checks (T.80,442) in violation of Rule 4-1.15(b) of the Rules of Professional Conduct.

Furthermore, no evidence of any written fee agreement was offered, tending to confirm Complainant's testimony that no such agreement existed. (T.49)

In regard to the eminent domain appeal, Complainant and his wife, testified that they asked the Respondent the status of any funds available for disbursal (T.63,356). Complainant had been awarded $31,000.00 in a trial, above the amount of $45,000.00 which had been paid initially by the State. The appeal sought additional funds. Even after the appeal had concluded and checks were received, Respondent told them that the appeal was still pending (T.62,440) and that Respondent would get back to them regarding any disbursed funds. Complainant was told he would have to wait until the conclusion of the appeal (T.62,354). No information or funds were received.

In relation to the appeal, the Complainant ultimately learned that Respondent had not filed a reply brief. However, that fact also was not revealed to Complainant by the Respondent (T.61).

In 1995, Complainant and his wife went to the Clerk's Office at the Fourth District Court of Appeal and learned that the appeal had concluded (T.440-442). Thereafter, Complainant and his wife went to the Clerk's office at the Broward County Courthouse to determine the status of funds that had been awarded (which had been affirmed on appeal). (T.79,66) They were advised that the funds had been disbursed to the Respondent (T.79,442)

despite the fact that Complainant was unaware of any fees or costs due to the Respondent.

Complainant testified that he was told by Respondent and his prior counsel that the State pays the fees in eminent domain cases. (T.40,60,364) A check was furnished to Respondent by Complainant solely because Respondent requested an advance to cover costs. (T.49,50).

In regard to the proposed FAA litigation, Complainant stated that he paid Respondent a $500 retainer which his wife verified. (T.74, T.453) He also stated that Respondent did not take any steps to serve the suit. (T.75,76) There was no discussions of fees except for the $500 retainer. (T.74)

Respondent is obviously unable to prove that there is no evidence to support the Referee's findings. In fact, as stated above, the salient evidence was uncontradicted, namely that Respondent received the checks, did not advise his client that he received them, took the funds for his own use and benefit and provided no accounting.

Despite the voluminous record, Respondent argues that since one witness made negative comments about the credibility of Howard Rosenberg, the Referee's findings are negated. No authority is cited for that proposition and, of course, no such authority exists.

Even if there was authority to that effect, the testimony in question, of witness Raul Diaz, was given little weight by the

Referee and with good reason. Diaz had spoken to Rosenberg, at most, for ten minutes, three or four years earlier (T.398,403).

Rosenberg was the subject of an investigation being conducted by Diaz for the FAA in 1988 (T.388). Rosenberg expressed his opinion to Diaz that the FAA was incorrect and that he did not need a charter pilot license in order to enter into a lease agreement with passengers. (T.399). Rosenberg was confrontational and issued a challenge to Diaz. (T.40O)

Diaz conceded that he described Rosenberg as a "smooth liar" because Rosenberg had expressed a legal position which differed from that of the FAA (T.407), and that it was Rosenberg's opinion (T.408). Diaz accused Rosenberg to his face of operating illegally. It was not so surprising that Rosenberg asserted that he had a defense to the FAA's position. That certainly does not make of him a "smooth liar", nor does it in any case negate all of the testimony against Respondent presented at the final hearing.

V

THE REFEREE DID NOT VIOLATE THE DUE PROCESS RIGHTS OF THE RESPONDENT.

First, the Respondent asserts that he was not aware that the case was scheduled for trial. He does concede that he received a notice of hearing on "disciplinary proceedings." In addition to the fact that the meaning of the notice would appear to be evident, the use of the word "hearing" is used interchangeably

with “trial” in rule 3-7.6(g)(9) which states:

> (h) **Notice of Final Hearing.** The cause may be set down for trial by either party or the referee upon not less than 10 day’s notice. The trial shall be held as soon as possible following the expiration of 10 days from the filing of the respondent’s answer, or if no answer is filed, then from the date when such answer is due.

Attorneys are of course, charged with notice and knowledge of the Rules. Rule 3-4.1, Standards of Conduct.

It is also apparent that the Respondent can not establish in good faith that he actually was unaware that “hearing” was equivalent to “trial”. He raised the issue at a hearing on July 24, 1997, and clearly indicated that he had a strong inkling of that which loomed ahead. Note the following exchange:

> MR. VERNELL: Your Honor, if I may, in anticipation of the worst, I have spoken with and retained Mel Black.
>
> I would like to suggest to this Court that while I did receive notice indicating August 6th, the matter that was going to be considered in the notice of disciplinary proceedings, it did not say final hearing, if I recall correctly, and I want to apologize if--
>
> THE REFEREE: It’s the trial, sir, the whole enchilada. All issues will be heard on that date. That should be reflected in the order that I have requested.
>
> (T.7/24/97,p.53).

Respondent argues that some error occurred because a continuance was not granted. The granting or denial of a continuance is a matter within the discretionary power of the Referee. The Florida Bar v. Lipman, supra. Respondent has not

provided any supporting argument which would establish the existence of an abuse of discretion.

He also argues that the Referee should have disqualified himself. Respondent fails to identify any Motion to Recuse, the basis for same and the order of denial, and presents no argument specifying the alleged basis of error.

Based upon References to Appendix B (containing items not identified as part of the Record in this cause) which the Bar has moved to Strike, Respondent advances an argument based upon events in a different case. He does not provide any authority to justify consideration of that matter in this case. He provides no authority which supports his contention that the particular events pertain to this case. He incorrectly states it involves an ex parte communication, when, in fact, he received a copy of the document as indicated thereupon.

In sum, he has advance no meaningful argument or supporting authority for the claim that he was denied due process.

CONCLUSION

Based upon the foregoing, the Referee's Report should be affirmed.

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Answer Brief was mailed to **Sid J. White, Clerk,** Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to **Louis Vernell, Jr., Respondent**, at 2020 N.E. 163rd Street, Suite 300, Miami, Florida 33162, and to **John T. Berry, Staff Counsel**, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this _____ day of January, 1998.

_____

ELENA EVANS, Bar Counsel