IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
Complainant,

Case No. 90,855
TFB No. 97-11,875 (26A)

v.

HARRY JAY KLAUSNER,
Respondent.
_____/

REPLY BRIEF

OF

THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

SYMBOLS AND REFERENCES

'RR" will refer to the Report of the Referee dated January 14, 1998, in which the referee made factual findings and a recommendation as to the discipline to be imposed in Supreme Court Case No. 90,855.

'TR" will refer to the transcript of the final evidentiary hearing held on October 7, 1997 in Supreme Court Case No. 90,855.

"TFBI and Resp. Exh. #" will refer to the exhibits submitted by The Florida Bar and Respondent and admitted into evidence at the evidentiary hearing held on October 7, 1997 in Supreme Court Case No. 90,855.

"AB" will refer to Respondent's Answer Brief in Supreme Court Case No. 90,855.

"Rule or Rules" will refer to The Rules Regulating The Florida Bar".

STATEMENT OF THE CASE AND THE FACTS

Respondent in his Answer Brief points out that the Bar incorrectly cited page 33 of the transcript for the conclusion that Respondent was fully aware that he was not authorized to sign certain collection case defendants' names to the stipulations agreeing that they owed the debt and agreeing to a payment schedule. (AB, p.1). Respondent is correct that the page cited standing alone does not support the Bar's statement as a factual statement. The Bar notes that the Referee did find that Respondent had signed the debtors' names to the nine stipulations without the authorization or knowledge of the debtors and was fully aware that he was not authorized to sign their names to the documents. (RR, p.2). Respondent acknowledged forging the signatures, and did not try to suggest that he was authorized to sign the debtors' names to the stipulations. In fact, when faced with questions making it apparent that the potential forgeries were being investigated, rather than claiming he was authorized to sign the names, Respondent suggested that his father or his secretary **may** have been responsible. (TR, p.32,l.1-4;TFB Exh.5 at 37).

The Bar does not contest Respondent's argument that he became fully cooperative; this occurred after he became aware that what

the Referee called Respondent's "fraudulent scheme" (RR, p.3) could not be concealed. That cooperation did not begin immediately on November 27th when he thought maybe the authorities were on to him (TR, p.35), nor when questioned by the Judges handling the abatement actions, nor when first questioned by representatives of the State Attorneys Office. It was after he was confronted by an investigator from the State Attorney's Office with the information that the Florida Department of Law Enforcement had determined that the signatures had been forged.

ARGUMENT

Respondent argues that a Referee's findings of fact carry a presumption of correctness, and that the Court is precluded from re-weighing the evidence and substituting its judgment for that of the referee. The Bar is not challenging the referee's findings of fact, nor the finding of guilt.

The Bar did not address the multitude of cases Respondent presented to the Referee because they were in large part not similar to the case at Bar. For example, Respondent suggests that because in The Florida Bar v. McShirley, 573 So.2d 807, (Fla. 1991), McShirley was not disbarred in spite of a pattern of misappropriation, and because he showed mitigation, Respondent should not be disbarred. McShirley did not engage in a pattern of fraud on the court and commit perjury.

Respondent claims the Bar is trying to shift the burden of proof. What the Bar did was cite this Court's statements regarding fraud on the Court. As noted in the Bar's initial brief, there is "a general rule of strict discipline against attorneys who knowingly and deliberately perpetuate a fraud on the court. (The Florida Bar v. Kickliter, 559 so. 2d 1123 (Fla. 1990) . There is "no breach of professional ethics or of the law, is more harmful to the administration of justice or more hurtful to the public

appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done, it deserves the harshest penalty." (Dodd v. The Florida Bar, 118 So. 2d 17, 18 (Fla. 1960). Respondent has not cited any cases in his Answer Brief which direct themselves to this Court's application of the general rule of strict discipline against any attorney who commits a fraud on the court. He has provided no case authority from this Court finding that an attorney who engages in a pattern of fraud on the court, lying and committing perjury, should not be disbarred because he became cooperative after finding that detection was inevitable.

The Respondent argues that "the Respondent was not committing a fraud on the court, but was, albeit misguidedly and wrongfully, trying to prevent a wrongful abatement from being entered by the court." (AB, p.11). Respondent would have this Court accept a position that presenting forged documents and perjured statements to the court does not constitute fraud if an attorney believes that the court is incorrect in entering abatements and is only lying to get what he in his wisdom believes is the proper action out of the court.

Respondent seeks to distinguish Kickliter (supra) by arguing that Kickliter created a document which did not exist, while

Respondent only re-created documents to prevent a wrongful abatement. Kickliter drafted a document which his client requested, and then forged the client's signature after his client died before being able to sign that document (will). Unlike Kickliter, Respondent was not trying to ensure his client's wishes were carried out. He forged the signatures of persons against whom he had collection actions, and dated the documents to prevent abatements. He did not determine whether the individuals whose signatures he signed, and who were not his clients, would have preferred an abatement or not. The debtors did not authorize Respondent's actions, and were not aware of them.

The Bar did not 'concede that the signing of other peoples' name (sic) was not an effort to duplicate their signatures." (AB, p.12). The Bar did make the following comment: "I would stipulate that he (Respondent) was either not trying to duplicate the other person's signature or he is terrible at it," to which Respondent's counsel replied, "I'll take the first." (TR, p.32, l.13-22.). Respondent admitted to forgery. (TR,p.33,l.7-10). An examination of the signatures which were forged does demonstrate that Respondent did a very poor job of signing signatures purported to be those of the debtors.

Respondent claims that Respondent's misconduct is due to a

"naive and child-like nervousness." (TR, p. 36,l. 3-5; AB,p.12). The referee stated that Respondent's fraudulent scheme began because he did not know how to respond to a 'Notice of Abatement. Respondent's motive was to prevent having to explain a dismissal of the cases to his client and to prevent the costs associated with refiling." (RR, p.3).

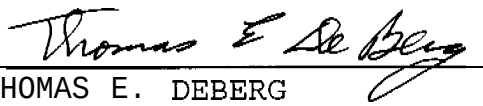
Respondent did have a lawyer friend, Thomas Smoot, testify that the misconduct was an aberration. Respondent used to meet at least once a week for lunch, with Mr. Smoot, a friend who has invested money and was a co-venturer in a closely held corporation in which Respondent is an officer and Mr. Smoot is a shareholder. (TR, p. 101, l.24-p,104, 1.10). Mr.Smoot however, did not know the details of the perjury committed before the court, nor about the lies Respondent engaged in when trying to shift the focus from himself to his father or to a secretary. (TR, p. **112**, 1. 11 p.113, 1.12). The former local bar president to whom Respondent refers in his Answer Brief, did suggest Respondent could be rehabilitated. (TR,p. 95, 1. 1-23), and should not be told he could never be an attorney. (TR, p. 125, 1. 10-20). The Bar is not seeking permanent disbarment. He also attributed Respondent's problems, at least in part, to his not having a mentor. (TR 124, 1. 10 P 127, 1. 6), but acknowledged that it was not necessary for

a mentor to tell Respondent not to lie to a judge under oath, not to lie in a sworn statement, not to lie to an investigator from the State Attorney's Office, and to not file false affidavits with the court. (TR, p.127, 1. 9 - p,128, 1.8).

CONCLUSION

The mitigation suggested by Respondent's witnesses are insufficient to justify non-application of the general principle that fraud on the Court deserves the harshest penalty, disbarment. Remorse upon learning that being detected is inevitable, and honesty, when there is no more potential benefit from deceit, should not be viewed as mitigating factors that would warrant a suspension as opposed to a disbarment.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and seven (7) copies of The Florida Bar's Answer Brief **have** been furnished by Airborne Express to **Sid J. White, Clerk,** The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL. 32399-1925; **a** true and correct copy sent by Regular U.S. Mail to **Nicholas Friedman, Counsel for Respondent,** at his record bar address of 1823 Phillip's Branch Road, Vilas, North Carolina 28692; and a copy by Regular U.S. Mail to **John Anthony Boggs, Staff Counsel,** The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 27 day of May, 1998.

Thomas DeBerg

Thomas E. DeBerg