IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DANIEL PETER FEINBERG,

Respondent.
_____/

Case No. 93,165
TFB No. 97-11,980(20D)

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Daniel Peter Feinberg, will be referred to as "Respondent".

"TT" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 93,165 held on May 10, 1999 and May 27, 1999.

The Report of Referee dated June 21, 1999 will be referred to as "ROR".

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. 93,165.

"AB" will refer to Respondent's Answer Brief (styled "Reply Brief of Respondent") filed in this matter.

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

"Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE
Supreme Court Case No. 93,165

The Bar's Initial Brief in this matter was filed on September 22, 1999. The Respondent's Answer Brief was filed on October 11, 1999.

Respondent's Answer Brief (styled "Reply Brief of Respondent") quotes Respondent's own testimony at trial concerning whether or not he knew Alto Blanding, Jr., was represented by counsel when he met with Mr. Blanding outside the presence of counsel. Respondent extracted the following quote from his trial testimony: "...I recall him saying he is not my attorney. I'm not 100% sure of what he said regarding he is fired or he's gonna fire. I know my mind set going out of the meeting is that Sullivan is not going to represent Blanding anymore, he is not representing Blanding in that meeting. That I know is my mind set." (TT P47 L18-24; AB P3-4).

However, in Respondent's prior report to The Bar regarding his meetings with Mr. Blanding, Respondent indicated he knew Mr. Blanding was represented by Mr. Sullivan. This report states the following:

> The defendant was asked if he wanted his Attorney, Sullivan present. He did not.
>
> The Defendant advised that he was **going to** 'get rid of Sullivan.' The undersigned advised the Defendant that the state did not, could not and would not recommend that the defendant fire his attorney[sic]. And further

> advised that the defendant should be represented by an attorney. ...The Defendant was asked whether or not he would like a **different** attorney to be present during any discussions which would follow.

(TFB Exh. 1, p. 4) (emphasis added). This statement is dated June 25, 1997, approximately one month following the events described when these events were fresh in his mind. The statement indicates that Respondent knew Sullivan still represented Blanding at the time of the May 5th meeting. In contrast, Respondent's trial testimony was given approximately two years after the described events occurred. Respondent was certainly on notice that Sullivan still represented Blanding after Sullivan's appearance at the May 6, 1997 hearing. Despite this notice, Respondent met with Blanding again on May 20, 1997.

On page 5-6 of his Answer Brief, Respondent stated that "on May 6th, in court, Sullivan did not advise Respondent he was aware of the May 5th meeting between Respondent and his client." (AB p.6). However, Mr. Sullivan was under no duty to advise Mr. Feinberg of his conversations with his client. Similarly, on page 8 of his brief Respondent states that "Sullivan never disclosed to Judge Casanueva or Respondent that he knew everything from May 5th forward because Blanding had told him so." (AB p. 8). Again, Mr. Sullivan was under no duty to advise Respondent of his conversations with his client. The contention that Sullivan knew "everything" from May 5th forward is

absurd. Respondent has admitted that he met with Mr. Blanding a second time without informing Mr. Sullivan. At this second meeting, Respondent and Mr. Blanding executed a stipulation. Mr. Sullivan was not provided a copy of this stipulation. In fact, Respondent states in this same brief that "[b]etween May 5 and May 20, 1997, Respondent made no effort to advise Sullivan of any contact or substantial assistance agreement with Blanding."(AB p. 7). Mr. Sullivan did not know "everything" from May 5th forward. If Mr. Sullivan had known "everything" as Respondent claims, he would have attended the May 20th meeting.

Respondent states that "[p]art of his rationale for not informing Sullivan of the meetings with Blanding was that Sullivan was involved in illegal narcotics activity...." (AB p.7). Respondent persists in presenting this rationale despite the fact that there is no support for the contention that Sullivan was involved in illegal narcotics activities.

SUMMARY OF ARGUMENT

The Referee's finding that Respondent is not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) is clearly contradicted by the record evidence and the Referee's own findings of fact. The Referee's recommendation of a public reprimand is inappropriate. A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's conduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions

ARGUMENT

ISSUE I: The Referee's finding that Respondent is not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) is clearly contradicted by the record evidence and the Referee's own findings of fact.

In attorney disciplinary proceedings "[a] referees findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support of the record.... The party contending that the referee's findings of fact and conclusions of guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions." The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998). In the instant case, the Referee's conclusions of guilt as to Rules 4-8.4(a), 4-8.4(c), and 4-8.4(d), are clearly contradicted by the record evidence and the Referee's own findings.

Respondent states that he accepts the Report of Referee and recommendations therein in its totality. (AB p. 12). Respondent's total acceptance of the Report must therefore include the following findings of the Referee as to 4-4.1(a):

> [t]he Respondent has admitted to **lying** to Attorney Sullivan at least on one occasion, and the record is clear, at best the Respondent **deceived** Attorney Sullivan in reference to contact with his client on several other occasions. The **deception** either direct or indirect is evidenced by the fact that on May 6, 1997, after it was clear that Blanding had not dismissed Sullivan, and a

> day after Respondent made contact with Blanding, Respondent, upon seeing Sullivan in Court with Blanding, and conversing with Sullivan regarding Blanding, did not advise Sullivan of the May 5, 1997, contact, and later **denied** any improper contact with Blanding. **The record supports the Referee's contention that the Respondent did indeed lie to Attorney Sullivan, and perpetuated that lie by continued denials and continued contact with Sullivan without revelation of Respondent's contact with Blanding**.

(ROR p. 6.) (emphasis added).

By accepting the Referee's report in its totality, Respondent also accepts the Referee's finding that "clearly the May 20th, 1997 meeting was a **blatant disregard of Rule 4-4.2** since Respondent was on actual notice that Sullivan was evidently still representing Blanding." (ROR p. 6) (emphasis added). The Referee further states that his findings made as to Rules 4-4.1(a) and 4-4.2 apply to Rules 4-8.4(a), 4-8.4(c), and 4-8.4(d). (ROR p. 7).

Despite his findings that Respondent lied to and intentionally deceived Sullivan regarding his contacts with Blanding and that Respondent blatantly disregarded Rule 4-4.2, the Referee incongruously concluded that Respondent was not guilty of violating Rules 4-8.4(a) (violate or attempt to violate the Rules), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). This conclusion is clearly erroneous and is contradicted by the record and the Referee's own findings.

A referee's legal conclusions are subject to broader review by this Court than are findings of fact. The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996). Upon review, this Court will find that the Referee's conclusions of guilt as to Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) are clearly erroneous and contradicted by the record and the Referee's own findings of fact.

ISSUE II: A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's misconduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions.

The Respondent correctly states that The Florida Bar cited Suarez v. State, 481 So.2d 1201 (Fla. 1985), for the fact that this Court found it to be a violation of the former Disciplinary Rule prohibiting communication on the subject of representation with a represented party for a prosecuting attorney to interview a defendant represented by counsel without notice to defense counsel even if defendant requests or acquiesces to the interview. The Bar did not cite this case due to close factual similarities between the cases. However, Respondent's proceeds to distinguish the case on the facts and unsurprisingly finds that they are "extraordinarily different." (AB p. 14).

The Respondent then attempts to distinguish The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997), from his own case. (AB p. 15). Hmielewski received a three (3) year suspension for making deliberate misrepresentations regarding the location of medical records in a medical malpractice action. Respondent tries to distinguish his case from Hmielewski by emphasizing out that Hmielewski acted without supervision while Respondent was supervised every step of the way. (AB p. 15). However, Respondent, who was an experienced supervising attorney himself, has presented no testimony or

evidence that his supervisor instructed him to lie to Mr. Sullivan.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), Broida received a one-year suspension after continuously misrepresenting facts to the court, failing to properly notify the opposing party of hearings and filing frivolous pleadings in order to delay proceedings. Id. at 86. Respondent claims that, unlike Broida, his conduct was singular and isolated. (AB p. 15). This is not the case. Respondent made a series of misrepresentations to opposing counsel. Respondent then attempted to conceal his meetings with Blanding. When Sullivan repeatedly inquired if Respondent had met with his client, Respondent repeatedly denied having such meetings. Respondent's misconduct was not singular and isolated.

In The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), Shapiro received a 91 day suspension for communicating an offer of settlement directly to an adverse party, engaging in trust account violations, engaging in a law practice under a trade name, paying a contingent salary to an employee of his corporation, electing a nonlawyer as secretary of his corporation, and being too mentally unstable to practice law. In considering discipline, the court considered Shapiro's psychiatric, personal, and emotional problems as mitigating factors. Id. at 1186. The court also noted that these conditions had improved by the time of the hearing. Id.

Respondent's brief lists some of the facts in Shapiro in an apparent attempt to

factually distinguish Respondent's case. However, Respondent fails to recite the fact that unlike Shapiro, Respondent directly lied to opposing counsel. Furthermore, the strong mitigating factors present in Shapiro are absent in the instant case.

In The Florida Bar v. Nunes, 661 So.2d 1202 (Fla. 1995), Nunes received a ten-day suspension and eighteen (18) months of supervised probation for knowingly communicating with a represented person without the consent of opposing counsel. Nunes accomplished his improper communication by copying a letter he wrote to opposing counsel to the opposing counsel's clients. Unlike Respondent, Nunes did not lie to opposing counsel about the communication. In fact, the case arose because he copied the critical letter to the clients. In this letter, Nunes criticized opposing counsel's handling of a foreclosure matter and stated that he believed that opposing counsel had breached the ethical standards of The Florida Bar. Id. at 1203.

Respondent attempts to distinguish his case from Nunes based on the presence of aggravating factors in Nunes and the lack of aggravating factors and presence of mitigating factors in his own case. (AB p. 20). Respondent maintains that the fact that he was supervised and was following the advice of a superior should be considered in mitigation. However, Respondent is an experienced attorney and prosecutor in his own right and has produced no evidence that anyone coerced him into engaging in prohibited communications with Blanding, misleading the court, or lying to Sullivan.

CONCLUSION

In conclusion, Respondent, an Assistant State Attorney, knowingly violated Rules 4-4.1(a), 4-4.2, 4-8.4(a), 4-8.4(c), and Rule 4-8.4(d) of The Rules Regulating The Florida Bar. Respondent met and communicated with a defendant known to be represented by counsel concerning the subject of that representation. These clandestine meetings were accomplished outside the presence of and without notice to defendant's counsel. Respondent then lied to defendant's counsel on more than one occasion, denying that the meetings had occurred. It is the Bar's position that Respondent's misconduct warrants no less than a three (3) year suspension from the practice of law and an assessment of the Bar's costs in these proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief has been furnished by Airborne Express to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Arthur I. Jacobs, Esq., Counsel for Respondent, at Post Office Box 1110, Fernandina Beach, Florida 32035-1110; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 22nd day of October, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt.

_____

Stephen Christopher Whalen
Assistant or Branch Staff Counsel