IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No. 93,523

THE FLORIDA BAR,

Complainant,

v.

RAFAEL A. CENTURION,

Respondent.
_____/

_____

RESPONDENT'S AMENDED BRIEF

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Rafael A. Centurion
2515 West Flagler Street
Miami, FL 33135
Fla. Bar No. 936340

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STATEMENT CONCERNING TYPE SIZE

This amended brief uses 14 point proportionately spaced Times Roman type.

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STATEMENT OF THE CASE AND FACTS

In July, 1998, the Florida Bar filed a five count complaint against the Respondent alleging violations of the Rules Regulating The Florida Bar. The complaint concerned five separate clients of the Respondent. The Respondent filed an answer to the complaint and the parties engaged in discovery. A hearing before the appointed referee, Leon Firtel, was held on January 22, 1999. The referee filed a report of referee on February 26, 1999. Subsequently, another hearing was held before the referee in March, 1999 on the issue of discipline. The referee's recommendations as to discipline were included in the addendum to the report of referee dated March 29, 1999. The addendum also included the costs to be taxed against the Respondent.

On March 27, 1999, the Respondent served a petition for review of the first report of referee dated February 26, 1999. The Respondent subsequently served another petition for review on April 27, 1999 directed to the addendum to the referee's report. The Respondent also requested an extension of time to file a brief directed to both reports of the referee. Accordingly, this brief concerns both referee reports.

SUMMARY OF ARGUMENT

With respect to the first report of referee, the Respondent asserts the Referee erred in the following respects:

The referee's finding that the Respondent never advised the Complainant Donnarae Flamm of the possibility of filing a separate lawsuit was erroneous since the Respondent advised of this possibility in his communication with the Florida Bar of January, 1997, a copy of which was mailed to the Complainant.

The findings concerning the Complainant Leon Smith were not supported by clear and convincing evidence since Leon Smith did not appear as a witness at the hearing, nor did he submit any sworn testimony.

The findings concerning the Complainant Suhani Raval were not supported by clear and convincing evidence since the Complainant did not testify at the hearing and the Respondent had not been charged in the Bar's complaint with misconduct concerning the individuals who did testify at the hearing – Mayuri Raval and Sunali Raval.

The findings concerning the Complainant Natalie Ortiz were not supported by clear and convincing evidence since the complainant, who testified by telephone, was not properly sworn as a witness.

With respect to the second report of referee, concerning the discipline and costs to be imposed against the Respondent, the following errors are alleged:

The period of suspension, one year, was excessive based on applicable case law

and relevant mitigating factors.

The remaining recommended discipline – completion of 10 ethics credits and ethics portion of the Bar exam, a mental health evaluation by Florida Lawyer's Assistance, one year probation with LOMAS supervision – should not have been imposed since the Bar did not put the Respondent on notice that these sanctions would be sought in addition to the suspension.

Regarding the costs imposed, the "staff investigator's fee" of $1,172.94 should not have been assessed.

ARGUMENT

THE REFEREE ERRED IN MAKING SEVERAL FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT.

It is generally accepted that a referee in an attorney disciplinary proceeding must make findings of fact based upon clear and convincing evidence. The Respondent asserts the following errors by the referee in this regard.

With respect to Count I, concerning Donnarae Flamm, the referee erred in finding that the Respondent failed to advise Ms. Flamm of the possibility of

pursuing another lawsuit based on alternative theories of law. The referee characterized this purported failure of the Respondent as "outright offensive". In fact, however, the Florida Bar's file on this complaint which was submitted to the referee contains the Respondent's January, 1997 response to Ms. Flamm's complaint in which the Respondent distinctly described that Ms. Flamm could pursue the other possibilities suggested by the Respondent. A copy of this response was forwarded to Ms. Flamm at that time. Based on this, the referee should not have have found by clear and convincing evidence that the Respondent failed to advise the Respondent of these other legal possibilities. It is clear from reading the referee's report that this perception by the referee prejudiced the Respondent since the referee concluded that this purported conduct by the Respondent was "outright offensive."

With respect to Count III, concerning Leon Smith, the referee erred in making findings of fact in the absence of sworn testimony from Mr. Smith. Mr. Smith did not appear as a witness at the hearing, not did he submit any sworn depositions or interrogatories that could have served as a substitute for his live testimony. Due to Mr. Smith's absence, clear and convincing evidence was not established to support the Bar allegations. In addition, his absence precluded the Respondent from cross-examining Mr. Smith concerning his allegations in his complaint letter to the Bar.

With respect to Count IV, concerning Suhani Raval, the referee also erred in making findings of fact without the live testimony of Suhani Raval. Suhani Raval did not appear as a witness at the hearing. Her absence precluded the Respondent from cross-examining her concerning her allegations. Although family members Mayuri Raval and Sunali Raval did testify at the hearing, the Bar's complaint did not charge the Respondent with any misconduct concerning these individuals. It is a basic tenet of due process that an individual who is being charged with misconduct be notified of the exact charges against him. In this instance, the Bar's complaint only referenced misconduct with respect to Suhani Raval. Although the Bar's complaint references that Raval retained the Respondent for two "other matters", it fails to specify the nature of these other matters.

With respect to Count V, concerning Natalie Ortiz, the referee erred in making findings of fact based on her testimony since she was not properly sworn as a witness. Ms. Ortiz testified at the hearing via telephone. The Respondent did not object to this procedure but did insist that the witness be properly sworn as a witness. The administration of an oath over the telephone is a not a proper method for swearing a witness pursuant to Chapter 92, Florida Statutes. In this instance, the proper procedure would be for a notary public or other authorized official to swear in the witness in person at the location of the

witness. The Supreme Court has stated that the requirements of Florida Statute 92.50 should be complied with. Florida Bar v. Clement, 662 So. 2d, 690, 698 (Fla. 1995). Since Ms. Ortiz was not properly sworn, her testimony could not constitute clear and convincing evidence.

THE REFEREE'S DISCIPLINARY RECOMMENDATIONS WERE EXCESSIVE.

The Referee recommended that the Respondent be suspended from the practice of law for one year. The Respondent submitted the following case law to the referee to demonstrate that a one year suspension was excessive: Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986), Florida Bar v. Barcus, 697 So.2d 71, (Fla. 1997), Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997), Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987), Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997), Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997), Florida Bar v. Griggs, 522 So.2d 24 (Fla. 1988), Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987), Florida Bar v. Graves, 508 So.2d 344 (Fla. 1987), Florida Bar v. Stein, 471 So.2d 36 (Fla. 1985). These cases imposed a suspension ranging from public reprimand to a 91 day suspension. The distinction between these cases and the case law submitted by the Bar is that the Bar's case law concerned attorneys with a history of prior discipline. In the instant case, no prior disciplinary action had been imposed against the Respondent, as noted in the referee's report.

The absence of prior discipline was a mitigating factor along with the following: The Respondent had a good reputation in the legal community, as evidenced by the Respondent's submission of letters from the past two Florida Bar presidents commending the Respondent for his service to the Bar as a member, Vice Chair, and Chair as the Florida Bar's Simplified Forms

Committee. The Respondent was relatively inexperienced in the practice of law, having been admitted to the Bar in May, 1992 and the misconduct occurring in 1995 and 1996. The Respondent refunded all legal fees paid by complainants Daniel Bernard and Natalie Ortiz. No fees had been collected from the other complainants. The Respondent demonstrated "interim rehabilitation" by virtue of serving in good standing as an assistant general counsel for the Florida Department of Highway Safety and Motor Vehicles for approximately the past two years. As the Respondent stated to the referee, he acknowledged that his transition from private practice to public employment hindered his ability to complete the cases of the complainants despite his efforts to do so. Based on the foregoing, a suspension requiring proof of rehabilitation, i.e. more than 90 days, is not warranted in this case. The Respondent expressed his willingness to both the referee and Bar counsel to serve a suspension of 30 days, since the Respondent did acknowledge responsibility for his actions.

The remaining discipline imposed by the referee – completing 10 hours of ethics classes and completion of the ethics portion of the bar exam, undergoing a mental health examination, probation and supervision by LOMAS - was unwarranted since the Respondent was never put on notice by the Bar that these sanctions were being sought. Due process requires the Bar to notify the

attorney of the sanctions it is seeking in order to allow the attorney to present a defense. See Florida Bar v. Carricarte, 24 Fla. L. Weekly S171 (Fla. April 16, 1999). In the instant case, the Bar did not notify the Respondent that it was seeking to impose these sanctions. The Respondent had only been advised in a letter from the Bar that it was seeking a suspension requiring proof of rehabilitation. Particularly objectionable was the Bar's request that the Respondent undergo a mental health examination, since no basis supports this request. When questioned by the referee as to the basis for the mental health examination, Bar counsel cited an off-the-record discussion with the Respondent in which the Respondent purportedly could not offer a satisfactory explanation for the misconduct alleged by the Bar. The Respondent was also prejudiced by Bar counsel's reading of a letter submitted by attorney Stuart Grossman, Chairman of the Grievance Committee, in which Mr. Grossman compared the Respondent to someone named "Bruce Crown" without explaining who Bruce Crown is or the basis for such a comparison. This letter was never previously furnished to the Respondent, so that an appropriate rebuttal could be prepared.

Based on the foregoing, the referee's recommendations as to discipline were excessive. The Respondent submits that a suspension not requiring proof of rehabilitation is appropriate in this case.

Finally, regarding the costs to be imposed, the Respondent objects to the charge for the staff investigator's fee of $1,172.94 since the Rules only allow taxation of investigative "costs", not "fees".

CONCLUSION

The Respondent respectfully requests the Court to review the reports of the referee and impose an appropriate discipline as described in this brief.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished by mail this ____ day of June, 1999 to Cynthia Lindbloom, Esq., The Florida Bar, 444 Brickell Avenue, M-100, Miami, FL 33131.