IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR **Case No. 94,170**
TFB No. 98-10,972(13D)

Complainant,

vs.

KEITH F. ROBERTS,

Respondent.
________________________________/

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS-PETITION

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SYMBOLS AND REFERENCES

In this brief Respondent will utilize the same references identified in the Initial Brief of The Florida Bar. In addition, references to the transcript of the hearing before the Grievance Committee on July 14, 1998, which is TFB Exhibit 9, will appear as "GC" followed by page numbers.

STATEMENT OF THE FACTS

The actual documents and events recited in the Statement of Facts contained in the Initial Brief of The Florida Bar ("the Bar") are not disputed. However, Respondent does dispute the Bar's characterization of those documents and events in certain respects that are material to his position throughout these proceedings and to the Court's consideration of appropriate sanction, as follows:

Respondent failed to comply with the Bar's continuing legal education (CLE) reporting requirement. It is not disputed that he fulfilled the substantive education requirement by timely completion of the required credit hours (TFB Ex. 6, 7, 8; GC p.23).

At the time Respondent's CLE reporting affidavit was due, the Bar's records failed to reflect credit for a certain seminar attended by Respondent. (See TFB Ex. 8, GC p.26). Respondent therefore delayed mailing the affidavit, believing it necessary to first find among his own records some evidence of attendance at that seminar (See TFB Ex. 8), and that delay triggered the referenced correspondence from the Bar (TFB Ex. 2, 4).

Besides this uncertainty, the Bar correspondence on this matter was itself confusing. An initial letter to Respondent accompanied an unrelated complaint correspondence to the Bar from a citizen (GC, Ex. I) as to which the Grievance

Committee later found no probable cause (GC p.29). Subsequent correspondence to Respondent on January 14 (TFB Ex. 4) and February 9, 1998 (TFB Ex. 5) continued to reference this citizen complaint and the Bar's case number associated with that complaint. Further, the January 14, 1998 correspondence (TFB Ex. 4) incorrectly identified "failure to pay your Florida Bar dues" as an additional reason for Respondent's purported suspension. Respondent thereafter sought to and did clarify his response obligation, but the matter soon thereafter was referred to the Grievance Committee (See TFB Ex. 6; GC pp. 16 - 17, 21 - 22).

Respondent's position concerning his purported CLE delinquency was described in correspondence to the Bar (TFB Ex. 6m 8), his Petition for Removal of CLER Delinquency (TFB Ex. 7), testimony before the Grievance Committee (GC pp.15 -16, 20-21, 27-28) and before the Referee, and is discussed infra. Respondent's statement to the Grievance Committee concerning his Bar status (GC p.5) was made in that context.

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

A. On The Florida Bar's Petition for Review

Respondent does not here challenge the findings in the Report of Referee herein concerning Respondent's unauthorized practice of law stemming from his failure to observe the Bar's assignment of delinquent status. This is so despite Respondent's good-faith contention in these proceedings that, as discussed infra, he did not violate the substantive CLE credit requirement.

Respondent also does not challenge the Referee's recommended sanction of suspension, though Respondent does challenge the recommended 90 days as excessive especially to the extent it is based on the finding of misrepresentation that Respondent has challenged by his Cross-Petition for Review and that is discussed infra. Respondent maintains however, that whether or not this Court agrees that Respondent made a material misrepresentation, the Bar's quest for a 91-day suspension under the facts and circumstances presented here is harsh and excessive.

B. On Respondent's Cross-Petition for Review

Respondent earnestly contends that his statement to the Grievance Committee (GC p.5) that his Florida Bar membership at that time was "active" and "in good

standing” cannot properly be viewed as a misrepresentation because the context of his correspondences and other testimony which were before the Committee make it clear that (1) this was a statement of Respondent’s good-faith belief concerning his status based on the legal and logical position he adopted concerning his purported “delinquency” that Respondent elsewhere described, and (2) the Committee, having all the relevant surrounding facts before it (as Respondent knew) could not possibly have been misled.

ARGUMENT

A. The Facts Distinguish This From Other Unauthorized Practice Cases

Reduced to its essentials, the core charge against Respondent here is that he failed to timely file his CLE reporting affidavit. In so characterizing his offense, Respondent does not seek to trivialize this matter or his responsibility to the system of Bar discipline; indeed, Respondent specifically does not here challenge (except with respect to the misrepresentation charge, discussed in B, infra) the referee's findings or conclusions.[1] But in judging what sanction is just, it is surely crucial to consider Respondent's misdeeds in the context suggested by the particulars of this case.

In this regard Respondent would point out the following:

(1) No client was harmed (RR, p.4)

> "Bar discipline exists primarily to protect the public from misconduct that occurs in the course of an attorney's representation of a client."

The Florida Bar v. Helinger, 620 So.2d 993, 995 (Fla. 1993)

(2) Moreover, the "potential harm" noted but not specified by the referee (RR p.4), under the circumstances presented here (further discussed below),

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[1] It is perhaps impossible to argue that one's offense is of limited consequence without thereby appearing to deny or ignore one's responsibility in the matter. Respondent hopes that the Court will not perceive his pro se advocacy here as repudiation of responsibility to the system of lawyer regulation, which Respondent does in fact fully acknowledge and appreciate.

could arise not from client affairs per se but only as a consequence of the lawyer-regulation system itself.

(3) Respondent had fully and timely complied with CLE course requirements. Among other things, this fact obviates the "potential harm" [to clients and the public] that such course requirements, and lawyer discipline concerning them, are meant to ensure against.

(4) In view of the premise of correspondence from the Bar (TFB Ex. 2, 4, 5) that the recipient had not fulfilled CLE course requirements (which, as discussed above, was wrong in Respondent's case); considering the content of the form Petition for Removal of CLER Delinquency (See TFB Ex. 7) supplied by the Bar and the implications of submitting it (see discussion below of Respondent's understanding of his status); and because of the initial, collateral confusions noted in Statement of Facts, Respondent's concern and reluctance about submitting a Petition for Removal of CLER Delinquency was not unreasonable, or at least should not be viewed as egregious.

(5) Respondent, upon review of Rules 1-3.4(a) and 1-3.6, which are those cited by the Bar and the Grievance Committee throughout these proceedings, concluded in good faith that a delinquency arises, and

suspension from practice is proper, where an attorney "fails to complete [CLE] requirements" and "fails to comply with [CLE] ... course requirements," and that these provisions properly referred to an attorney's failure to fulfill the substantive CLE course and credits obligation and not merely to a failure to timely file his affidavit.

(6) Respondent's purported suspension from practice by reason of his supposed delinquency was of course administrative in nature, rather than, for example, pursuant to order of this Court. Thus, at the very least, Respondent's belief that the matter should be subject to challenge, that the Bar administration's pro forma response to the absence of a CLE reporting affidavit from Respondent should not be the final word, was not patently unreasonable. Respondent in fact believed, not unreasonably, that his purported delinquency could be cured, and his "suspension" negated, retroactively, once the fact of his compliance with substantive CLE course requirements was duly reported to the Bar.[2]

(7) In his view of these considerations it is plain that while Respondent's decision that he was entitled to continue practicing was deliberate, and

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[2] The concepts of retroactive validation and of ratification are well known to the law.

apparently wrong, that decision in no way represented a wilful ignoring or violation of the Bar or its rules.

The system of lawyer regulation is of undoubted public benefit. Nevertheless, where no really tangible harm has occurred, it is important to bear in mind that what is truly put at issue by the Bar in this sort of case is the inviolability of its administrative prerogatives. The Bar told Respondent he was suspended for CLE non-compliance and, though its premise (that Respondent had failed to complete his course requirements) was wrong, he must submit to the Bar administration's edict as the final word. Again, it is not necessary to discount the importance of lawyer regulation or of each attorney's obligation to the system established for it - and Respondent emphatically does not do so - in order to urge, as Respondent does, an appropriate perspective in the exercise by this Court of its oversight and sanction authority in Respondent's case.

B. <u>Respondent Was Not Properly found Guilty of Misrepresentation</u>

The Grievance Committee, in documents that, to Respondent's knowledge, have not been made a part of this record, at some point investigated a possible misrepresentation by Respondent contained in a correspondence from Respondent to a member of the Committee. Respondent never was notified that the Committee intended to investigate any other alleged misrepresentation and was unaware if it did

so. The Bar's Complaint herein, at Paragraph 10, alleges the referenced misrepresentation but no other. The referee found that respondent was not guilty of this alleged misrepresentation and the Bar has not challenged this finding and conclusion by the referee either in its Petition For Review or its Brief.

The referee did find Respondent guilty of misrepresenting to the Grievance Committee that his Florida Bar status at the time - June 14, 1998 - was "active" and "in good standing." As Respondent alleged in a Motion for Reconsideration of this conclusion addressed to the referee, this alleged misrepresentation is not set forth as such in the Bar's complaint and was mentioned for the first time, to Respondent's knowledge, in the Bar's oral argument to the referee. Paragraph 6 of the Bar's Complaint references the statement by Respondent to the Grievance Committee, but does so in another context, and it is nowhere characterized as a misrepresentation or otherwise challenged in the Complaint. Thus, the conclusion by the referee that this statement constituted a "misrepresentation" by Respondent should be rejected by the Court as not being part of the allegations properly brought before the referee or this Court.

Beyond this defect, the statement is not a misrepresentation at all, for two compelling reasons. First, in the context of Respondent's position that he was not truly "delinquent" because the CLE course requirements has been fulfilled - a position he has

urged at every point throughout the investigation and prosecution of this matter, including in correspondence (TFB Ex. 6, 8), in his Petition to remove delinquency (TFB Ex. 7) his Answer to the Bar's Complaint, and his testimony before the Committee - the statement can only be viewed as an expression of that (legal) position. One in Respondent's situation must not be disabled from staking a legal position, just because neither the Bar nor the Grievance Committee agrees with it.

Second, the Committee was, on July 14, 1998, possessed of all the facts and documents affecting Respondent's Florida Bar status and the Bar's position concerning that status. Moreover, Respondent knew full well that the Committee had this information. The query regarding his status thus could not have been interpreted by Respondent as a request for information, and indeed, it could not possibly have been so intended by the Committee. Rather, it can only be viewed in the way Respondent apprehended it: as an inquiry about Respondent's view of and position concerning his Bar status and the basis therefor. When posing this question, the Committee was in no posture to be misled by Respondent's answer concerning the relevant facts, and Respondent knew that. Under such circumstances there can be no misrepresentation, certainly no material misrepresentation, and even more certainly no misrepresentation of the sort that, under the principle of ejuisdem generis, belongs in the litany of misconduct described in Rule 4-8.4(g), which proscribes as well "dishonesty, fraud,

[and] deceit." Cf. The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1998); The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997); The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997); The Florida Bar v. Tobin, 674 So.2d 127 (Fla. 1996).

C. The Sanction Sought by the Bar is Unwarranted

In urging a more severe sanction even than that recommended by the referee, the Bar places great emphasis on Respondent's "misrepresentation" to the Grievance Committee concerning his Bar status. As described in B above, no misrepresentation of fact occurred, and certainly none was relied upon in any way by the Committee or anyone else. Even if a misrepresentation is found by the Court to have occurred, however, surely the circumstances of it do not justify an augmented sanction.

The other principal reason why the Bar appears to be seeking a harsher sanction here is Respondent's disciplinary history, specifically, a previously imposed 90-day suspension. Of course, "[t]he existence of a prior disciplinary record is not dispositive." The Florida Bar v. Corbin, 701 So. 2d 334, 337 n.1. Indeed, the cited footnote is a collection of cases where lesser discipline has been imposed for an attorney's false statement to a court, which ought to be seen as a more serious affront to the public and to the administration of justice than the alleged misstatement here. In Corbin the Court imposed a 90-day suspension for misrepresentation to the Bar plus the filing of a false affidavit, by an attorney with three prior disciplinary offenses.

Moreover, Respondent's prior discipline resulted from misconduct of an entirely different nature, and therefore should not be viewed as cumulative, at least not in the same way. See The Florida Bar v. Grigsby, 641 So. 2d 1341 (Fla. 1994).

In The Florida Bar v. Kravitz, 694 So.2d 725, supra, the Court imposed a 30-day suspension for misrepresentations to opposing counsel and to the court, including presentation of false evidence. The Florida Bar v. Tobin, 674 So. 2d 127, supra, involved failure to advise the court of material facts in an ex parte proceeding , failing to comply with a court order, and other misconduct connected with a court proceeding. A 45-day suspension was ordered.

In The Florida Bar v. Jordan, 682 So.2d 547 (Fla. 1996), client neglect, with a history of the same, plus failure to respond in Bar proceedings, were found to merit a 30-day suspension.

Even those cases cited by the Bar which appear most pertinent here do not support the harsh sanction it urges. The Florida Bar v. Wasserman, 654 So.2d 905 (Fla.1995) resulted in a 60-day suspension, and The Florida Bar v. Lenkoff, 511 So.2d 556 (Fla. 1987) yielded a 90-day suspension.

Consideration of the circumstances cited by Respondent and appearing in the record in light of pertinent disciplinary precedents of this Court make it clear that the Bar's requested 91-day suspension is excessive.

CONCLUSION

Respondent was not unreasonable in failing to apprehend that a pronouncement by the Bar administration concerning an attorney's status, though issued pro forma and based on an incorrect premise, is to be regarded as inviolable and not subject to retroactive correction. There plainly was here no willful disregard of Respondents's obligation. There also was no resulting harm.

The misrepresentation alleged here, moreover, could have been neither intended by Respondent nor understood by the Grievance Committee as a statement of material fact, but on the contrary could only have been taken as part and parcel of Respondent's explication of his position regarding his Bar status. The Committee, knowing the surrounding facts, would not have been misled.

Under the circumstances and applicable precedent, the Bar's quest for a 91-day suspension is unwarranted; indeed, particularly in view of the facts surrounding the misrepresentation allegation the Court should carefully consider whether the referee's recommended 90-day suspension is itself unduly harsh.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of the Respondent's Answer Brief and Initial Brief on Cross-Petition has been furnished by United Parcel Service overnight mail to Debbie Causseaux, Acting Clerk, the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy by regular U.S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee parkway, Tallahassee, FL 32399-2300 and a true and correct copy of the foregoing was hand delivered to Monica Frost, Counsel for The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, FL 33607 on this _20th__ day of August, 1999.

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CERTIFICATION OF FONT SIZE AND STYLE

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

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