IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KEITH F. ROBERTS,

Respondent.
_____/

Case No. 94,170
TFB No. 98-10,972(13D)

THE FLORIDA BAR'S REPLY BRIEF AND ANSWER BRIEF ON RESPONDENT'S CROSS-PETITION

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TABLE OF CONTENTS PAGE

TABLE OF CITATIONS PAGE

SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as **"The Florida Bar"** or **"The Bar"**. The Respondent, Keith F. Roberts, will be referred to as **"Respondent"**.

"**TR**" will refer to the transcript of the disciplinary hearing before the Referee in Supreme Court Case No. 94,170 held on April 9, 1999.

"ROR" will refer to The Report of Referee dated April 16, 1999.

"RB" will refer to Respondent's Answer Brief and Cross-Petition in this matter.

"**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. 94,170.

"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 CASE AND OF THE FACTS

Supreme Court Case No. 94,170

In his Answer Brief, Respondent characterizes The Bar's correspondence regarding his Continuing Legal Education Requirement as confusing. Respondent states that "[a]n initial letter to Respondent accompanied an unrelated complaint correspondence to the Bar from a citizen as to which the Grievance Committee later found no probable cause." (Respondent's Answer Brief, p.1-2). Respondent refers this Court to correspondence dated January 14, 1998 and February 9, 1998. (TFB Exh. 4 and TFB Exh. 5). However, The Bar's initial correspondence with Respondent concerning his CLE delinquent status (TFB Exh. 2) was sent by Certified Mail, Return Receipt Requested on December 19, 1997, and was received on December 23, 1997 (TFB Exh. 3). The December 19, 1997 correspondence contained no mention of the unrelated complaint and was clear as to Respondent's delinquent status.

SUMMARY OF ARGUMENT

The Referee's findings of fact and guilt are proper. However, the Referee's recommended discipline of a ninety (90) day suspension and costs is insufficient based upon the facts of the case, Respondent's previous disciplinary history, the Florida Standards for Imposing Lawyer Sanctions, and relevant case law. Respondent should receive a ninety-one (91) day suspension.

ARGUMENT

I. THE REFEREE'S FINDINGS OF GUILT WERE PROPER AND A NINETY-ONE DAY (91) SUSPENSION IS THE APPROPRIATE SANCTION FOR RESPONDENT'S PRACTICE OF LAW WHILE UNDER SUSPENSION AND FOR RESPONDENT'S MISREPRESENTATION TO A GRIEVANCE COMMITTEE, BASED ON THE RECORD, RESPONDENT'S PREVIOUS DISCIPLINARY HISTORY, CASE LAW AND THE STANDARDS FOR LAWYER SANCTIONS.

A. The Referee properly found that Respondent's misrepresentation to the Grievance Committee violated Rule 4-8.4(c).

The Referee properly found Respondent guilty of violating Rules 1-3.4, 1-3.6, 4-8.4(c), and 6-10.4. The Referee specifically found that Respondent violated Rule 4-8.4(c) by misrepresenting his Florida Bar membership status in sworn testimony before the Thirteenth Judicial Circuit Grievance Committee "D" on July 14, 1998. (ROR, p.3). "A referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. If the referee's findings are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and

substituting its judgment for that of the referee." The Florida Bar v. Solomon, 711 So.2d 1141,1146 (Fla. 1998).

Respondent argues that he was not properly found guilty of misrepresentation. Respondent states that "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." (RB, p.9). Respondent admits that his statement to the Grievance Committee is "referenced" in The Bar's Complaint but that it is "[n]owhere characterized as a misrepresentation or otherwise challenged by the Complaint." (RB, p.9). Respondent further claims that his misrepresentation to the Committee should be rejected by this Court as not being properly brought before the Referee or this Court. (RB, p. 9).

Respondent's claim that the alleged misrepresentation to the Grievance Committee was not set forth in The Bar's complaint is wholly incredible. Paragraph 6 of the Bar's Complaint alleges the following: "Respondent testified on July 14, 1998 in front of the Thirteenth Judicial Circuit Grievance Committee "D" that he was an active member of the Florida Bar in good standing, and he was presently practicing law, despite the fact that he had not been reinstated." This paragraph (especially when read in the context of the entire Complaint) put Respondent on notice that the Bar was alleging that his Grievance Committee testimony could not

be truthful. Furthermore, paragraph 12 of The Bar's complaint specifically charges Respondent with violating Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation).

Even if this Court were to conclude that The Bar's Complaint does not specifically charge Respondent with making a misrepresentation to the Grievance Committee involving his membership status, the Referee's finding of guilt should stand. In The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992), this Court held that an attorney could be found guilty of a rule not specifically charged in the complaint, when conduct alleged in the complaint put the attorney on notice of an alleged rule violation. (Vaughn at 20). Again, in The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999), this Court held that "specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations in the complaint." (Fredricks at 1253).

The Bar's Complaint specifically charged Respondent with violating Rule 4-8.4(c). Respondent's misrepresentation to the grievance committee was specifically referred to within The Bar's Complaint. Respondent cannot sincerely claim that he did not receive fair notice that his representation to the Grievance Committee would be alleged as a misrepresentation in violation of the Rules.

Respondent's situation is not comparable to the the facts in The Florida Bar v. Vernell, 721 So.2d 705 (Fla. 1998), in which this Court rejected the referee's recommendation that Vernell be found guilty of violating rules not within the scope of the specific allegations of the complaint. In Vernell, this Court found that "the absence of fair notice as to the reach of the procedure deprives the attorney of due process." (Vernell at 707). In Vernell, the referee had recommended finding Vernell guilty of allegations of new misconduct, which arose during the proceedings before the referee. In this case misrepresentation was specifically charged in The Bar's Complaint and the Respondent was properly and adequately notified of the nature and extent of the charges against him. Therefore, Respondent was not deprived of due process. See also The Florida Bar v. Solomon, supra.

Respondent further claims that his representation to the Grievance Committee that he was an active member in good standing of The Florida Bar was only an expression of his legal position, and that no one was misled by his misrepresentation. (RB, p. 10). This position is also untenable. Even if the committee was not misled by Respondent's obvious misrepresentation, it does not negate the fact that his statements were untrue. The Referee correctly noted that "Respondent clearly did not enjoy such status as far as the Bar was concerned. At the time, the Respondent, arguably, may not have considered himself suspended, but

his sworn answer to the Committee, especially in light of his acknowledged concern about the issue of practicing while he was suspended, was a clear misrepresentation". (ROR, p. 3).

B. A ninety-one (91) day suspension is the appropriate sanction.

Respondent argues that a ninety-one (91) day suspension is too severe. Respondent asserts that no client was harmed and the "potential harm" noted by the Referee (ROR, p. 4), could arise not from client affairs per se but only as a consequence of the lawyer-regulation system itself. (RB, p. 4-5). Respondent is attempting to negate the fact that he failed to comply with the Rules in order to correct any misapprehension The Florida Bar may have had in regard to his fulfillment of the CLER requirements. Respondent attempts to place blame on The Florida Bar for possible prejudicial results that may have been caused by his continuing to practice law while under suspension, despite his duty as a member of The Florida Bar to be familiar and comply with the Rules. Respondent's argument also fails because he deliberately chose not to file the Petition for Removal of CLER Delinquency, because it would have subjected him to an admission that he had practiced law while under suspension. (RB, p. 6, and TR, p.37).

Respondent argues that he was in compliance with the CLER requirements, because he had taken the required CLE courses. (RB, p. 6). The Rules require that

the attorney not only take the required courses, but also report compliance or non-compliance. His failure to report compliance violated the CLER requirements pursuant to Rule 6-10.5(a).

Respondent further argues that he believed 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. (RB, p. 7). The Referee correctly responded to this argument by stating that "Respondent's position in this regard is untenable, unreasonable and unsupported by a reasonable interpretation of both the express language of the applicable Rules and the facts as presented. Respondent, as an attorney, must be presumed, as a matter of fact to have not only the ability to read and understand the Rules, but the sense to promptly and responsibly make appropriate inquiry of the Bar as to any part of their meaning about which he allegedly had uncertainty. Further, as a matter of law, he is nonetheless charged, by annual written acknowledgment, with full knowledge and understanding of the Rules, and with the express promise to comply with them." (ROR, p. 2).

Respondent's argument further fails because he did not duly file the Petition for Removal. Respondent waited almost seven (7) months after being informed of the delinquency to attempt to cure the problem by filing the Petition for Removal on

July 13, 1998. (TFB Exh. 7 & 8). In the meantime, his clients were at risk of potential prejudice, due to the fact that their attorney was not authorized to practice law.

The Respondent cites a number of cases in an effort to support his position that a ninety-one (91) day suspension is too severe. The first case cited is The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997) in which Corbin received a ninety (90) day suspension. This case is readily distinguishable from Respondent's situation. In Corbin, this Court approved the referee's findings of fact but disapproved of the referee's recommended six (6) month suspension and imposed a ninety (90) day suspension for Corbin's misrepresentations to a court in a motion for summary judgment and further misrepresentations in his initial response to The Bar. (Corbin at 335). The referee considered Corbin's prior discipline of three private reprimands between 1978 and 1988 as an aggravating factor. (Corbin at 336). However, the referee considered the remoteness of the prior discipline as a mitigating factor. (Corbin at 337). The referee recommended a six (6) month suspension. This Court found six months to be too harsh and also determined that the referee had improperly considered Corbin's refusal to acknowledge the wrongful nature of his conduct as an aggravating factor. (Corbin at 337).

In the instant case, Respondent not only made an intentional

misrepresentation, but deliberately chose to practice law when he knew The Bar considered him suspended. He deliberately delayed complying with reinstatement procedures in fear of facing the implications of an admission that he continued to practice law while under suspension, and then made a misrepresentation to the grievance committee concerning his membership status. Respondent's prior discipline of a ninety (90) suspension is more severe than Corbin's private reprimands. Furthermore, Respondent's prior discipline was imposed in the recent past (1997) and is not remote. Therefore, this Court should impose a ninety-one (91) day suspension rather than the ninety (90) day suspension imposed in Corbin.

Respondent then cites The Florida Bar v. Grigsby, 641 So.2d 1341 (Fla. 1994), for the proposition that his "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." (RB, p. 12). A comparison between Grigsby and the instant case is strained at best. In Grigsby, this Court approved the referee's recommendation of a public reprimand and three years conditional probation for Grigsby's failure to respond to a demand for information from The Florida Bar. Grigsby's prior disciplinary record included an admonishment for inadequate communication and failure to respond to Bar inquiries, and a three (3) month suspension for failing to act with reasonable diligence and failure to keep the clients

reasonably informed on three separate occasions. However, Grigsby was suffering from clinical depression at the time he failed to provide The Bar with the requested information. This Court found that Grigsby's case was an exception to the general rule set forth in Standard 8.2 that "a suspension is appropriate when an attorney is found guilty of misconduct that causes injury or potential injury to the legal system or to the profession and that misconduct is similar to that for which the attorney has been disciplined in the past" and found that his failure to respond "was likely caused by [his] mental disbility." (Grigsby at 1342). This Court concluded that the recommended discipline was adequate under the circumstances.

The Bar has not claimed that Respondent's misconduct in the instant case is of a similar nature to his prior misconduct. Misconduct does not have to be of a similar nature to prior misconduct to be considered cumulative. In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982), this Court stated that:

> [i]n rendering discipline, this Court considers the respondent's previous disciplinary history and increases the discipline where appropriate. The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant even more severe discipline than might dissimilar conduct.

(Id. at 527, 528)(citations omitted).

In further argument that a ninety-one day suspension is too severe,

Respondent cites The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997), in which Kravitz received a thirty (30) day suspension for presenting false evidence and making misrepresentations to the court and opposing counsel. This Court stated "[in] deciding to impose thirty days rather than ninety-one days, we are influenced by the fact that there has been no showing of any prior disciplinary infractions by respondent and by the fact that the referee recommended probation." (Kravitz at 728). In the instant case, Respondent has a prior disciplinary record. Unlike the referee in Kravitz, the referee in the instant case recommended a ninety (90) day suspension, not probation.

Respondent also cites The Florida Bar v. Tobin, 674 So.2d 127 (Fla. 1996), in which Tobin received a forty-five (45) day suspension for failure to inform a tribunal in an ex parte proceeding of all material facts and disobeying an obligation under the rules of a tribunal. However, Tobin's prior disciplinary record of a public reprimand in 1979 and a private reprimand in 1989 was less severe than Respondent's recent ninety day suspension. (Tobin at 128).

In The Florida Bar v. Jordan, 682 So.2d 547 (Fla. 1996), also cited by Respondent, Jordan received a one month suspension for client neglect. Jordan had previously received an admonishment and a public reprimand for similar misconduct. (Jordan at 547). Respondent's prior 90 day suspension, while not for

similar misconduct, is much more severe than Jordan's prior discipline and therefore, Respondent's conduct warrants more severe discipline than that received by Jordan.

CONCLUSION

Pursuant to the foregoing and the evidence, the applicable Standards for Imposing Lawyer Sanctions, and the pertinent case law, Respondent should be suspended for ninety-one (91) days. In addition, Respondent should be assessed The Florida Bar's costs in these disciplinary 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: Keith F. Roberts, Esq., Respondent, at 1902 So. MacDill Avenue, Tampa. Florida 33629; 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 _____ day of _____, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

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

_____
Monica Ann Frost
Assistant Staff Counsel