IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY A. POE,

Respondent.

CASE NO.: SC 94,768

TFB FILE NO.: 98-31,914(05A)

RESPONDENT'S REPLY BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

R. = Transcript Page of Final Hearing before Referee on October 27, 1999.

ARGUMENT

In its Answer Brief, The Florida Bar appears to misconstrue the record testimony in order to support its arguments. For example, in order to apparently suggest some deficiency in competency that was not included in the Referee's findings, The Florida Bar asserts that "Respondent knew that the will was not adequate to meet Mr. Sewall's desire that his children be provided for." (Answer Brief, p. 8 (citing R. 129-130)). However, this cannot be inferred from the transcript pages cited to by Complainant in support of that assertion. During that portion of the record, Respondent was explaining the rationale behind Mr. Sewall's desire to name Respondent as a beneficiary. Respondent testified that Mr. Sewall wanted to leave Respondent money to take care of any special needs that his children incurred.

In addition, Complainant suggests that Respondent admitted not only to committing a Rule 4-1.8(c) violation but also to intentionally committing this violation after being investigated for similar

misconduct. (Answer Brief, p. 8 (citing R. 136-137)). Again, after review of the record to which The Florida Bar cites, it is clear that Respondent was describing his reaction to discovering the final executed will. Respondent testified that when he reviewed the will, he immediately recognized the devise to him was a clear ethical violation. (R. 136). Moreover, he explained that he immediately recognized the ethical implication because a few years earlier, The Florida Bar had investigated him when a former client, unbeknownst to him, had left him her estate in a will drafted by another attorney. (R. 137). Certainly, the testimony in the record does not support the Complainant's insinuation that Respondent was knowingly and repeatedly committing the same ethical violations.

The Florida Bar characterizes Respondent's testimony in this manner to further its contention that the Florida Standards for Imposing Lawyer Sanctions supports the disbarment recommendation. Standard 8.1(b) is the only standard relied upon by Complainant to justify its request for disbarment. Standard 8.1(b)

states, in pertinent part, "disbarment is appropriate when a lawyer has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct." Fla. Stds. Imposing Law. Sancs. 8.1(b). The Florida Bar asserts that Respondent's suspension imposed in Florida Bar v. Poe, 717 So. 2d 540 (1998) should be applied to Standard 8.1(b) to elevate Respondent's sanction to disbarment.

The Florida Bar's reasoning is deficient and potentially misleading. In order for Standard 8.1(b) to be relevant, the responding attorney must have been suspended during or before the misconduct that is currently being considered. In this case, Respondent had not been suspended prior to or at the time of the execution of Mr. Sewall's will (October 21, 1996) or on the date the renunciation was signed (November 4, 1996). Respondent was suspended from the practice of law in April 1998.

The Florida Bar contends that a prior suspension is not necessary because the hearing in Florida Bar v.

Poe, 717 So. 2d 540 (1998) was "held in November, 1996, and continued through 1997" and that "this time period was the same period during which the present misconduct occurred." (Answer Brief, P. 15). However, the Referee Report on which Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998) is based, indicates that the hearings in this matter were held on November 8, 1996 and April 17, 1997. Clearly, Respondent's conduct in the present case occurred prior to both of these hearings.

Second, although Respondent's disciplinary history includes prior conflict of interest violations, the prior conflicts were not similar to the present Rule 4-1.8(c) violation. In Florida Bar v. Poe, TFB Case No. 1990-30,829(05A), Respondent was privately reprimanded for violating Rules 4-1.6(a) and 4-8.4(b). The admonishment of minor misconduct indicates that Respondent had represented a husband and wife in a civil matter. Respondent was disciplined for reporting his clients' previous threats of burning down their home to arson investigators after his clients' home had caught on fire. Thus, in contrast to the implications

of a Rule 4-1.8(c) violation, the rule violations in TFB Case No. 1990-30,829(05A) do not involve a conflict between Respondent's interest and the interest of his clients.

Similarly, the suspension cases involving conflict of interest violations did not suggest a conflict of interest between Respondent and his clients. Respondent received two six month concurrent suspensions in Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998) and Florida Bar v. Poe, Case No. 94,967 (Fla. March 18, 1999). In both cases, the conflict of interest concerned Respondent's representation of one spouse in a dissolution action after having previously represented the other spouse. Therefore, Respondent's prior concurrent suspension sanctions did not concern similar misconduct.

The Florida Bar also attempts to distinguish the case law that specifically involves a Rule 4-1.8(c) violation. In particular, The Florida Bar asserts that Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994)(Rule 4-1.8(c) violation in which ninety day suspension was

imposed) and Florida Bar v. Miller, 555 So. 2d 854 (Fla. 1990)(public reprimand imposed for attorney naming himself as a beneficiary in a testamentary instrument) are not compelling because Miller and Anderson had no disciplinary history. However, as discussed more thoroughly in Respondent's Initial Brief, the factual circumstances of Anderson and Miller were more egregious since the responding attorneys actually received pecuniary gain from the bequests. Accordingly,
Respondent's disciplinary history in this case does not elevate the sanction from a non-rehabilitative suspension to disbarment.

The Florida Bar relies upon Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991) to argue that Respondent's disciplinary history aggravates the present case to the imposition of disbarment. However, Neely is distinguishable from the present case based upon a comparison of the disciplinary records and on the severity of the rule violations. Neely's disciplinary history included four separate suspensions and a public

reprimand for serious and repeated rule violations. In Florida Bar v. Neely, 372 So. 2d 89, 91-92 (Fla. 1979), Neely was suspended for ninety days when he was found to have "take[n] advantage of a situation involving his clients' real estate to their detriment and his personal gain" and thereafter lying under oath during a disciplinary hearing. In Florida Bar v. Neely, 417 So. 2d 957 (Fla. 1982), this Court imposed a public reprimand and one year of probation due to Neely's failure to diligently prosecute a criminal appeal. In 1986, Neely was suspended for sixty days and received a two year term of probation for his gross negligence in managing his trust account. Florida Bar v. Neely, 488 So. 2d 535 (Fla. 1986). In 1987, Neely was again suspended for three months, followed by a two year term of probation for several rule violations including conduct adversely reflecting upon fitness to practice law, conduct contrary to honesty, justice, or good morals and for several violations pertaining to his trust accounting practice. Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987). Some of the

underlying conduct for the rule violations involved Neely's failure to deliver his client's funds held in trust to the client's creditors as instructed and then subsequently demanding his client's signature on an exculpatory letter requesting withdrawal of the client's Bar complaint as a condition of delivering those funds. Id.

In 1989, Neely was again suspended for ninety-one days for repeating the same rule violations for which he had previously been suspended. Florida Bar v. Neely, 540 So. 2d 109 (Fla. 1989). This suspension was imposed due to Neely's failure to safe keep property entrusted to him by a client, for misrepresenting to his client that she had won a case when in fact the case had been dismissed for lack of prosecution and for overdrawing his trust account. Id.

Disbarment was ultimately ordered in 1991 after Neely was again found to have committed several serious acts of misconduct, which, without any aggravation, may have justified disbarment. Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991). This misconduct included Neely

“falsely and fraudulently” inducing his client’s mother “to convey her homestead . . . to a corporation owned by [Neely]. Id. at 466. Further, [Neely] did falsely and fraudulently cause a mortgage to be placed against the . . . property . . . without her knowledge or consent.” Id. Moreover, Neely then used the fraudulent deed to induce another party to loan his corporation money. Id. Besides this fraudulent, deceitful and dishonest conduct, Neely also failed to preserve funds held in trust, misrepresented fictitious costs and travel expenses in his settlement statement given to his client and violated other trust accounting rules. Id. at 467.

Respondent’s disciplinary history is not comparable to Neely’s pattern of repeatedly committing the same serious ethical breaches. Whereas, Neely’s misconduct consistently involved dishonesty, overreaching with or deception of clients, trust account violations or lying under oath, Respondent’s conduct has generally touched on conflict, neglect or diligence issues. Given the obvious disparity between the misconduct of Neely and

the violations by Respondent, Neely has no precedential value to the consideration of sanctions in this case.

CONCLUSION

The Referee’s recommendation of disbarment is not supported by the Referee’s factual findings, the case law, the Florida Standards for Imposing Lawyer Sanctions or Respondent’s disciplinary history. This Court should reject the Referee’s recommendation and impose a one or two year concurrent suspension from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Reply Brief have been furnished by UPS overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies have been furnished by regular U. S. Mail to: Jan K. Wichrowski, Esquire, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314 and Bill Hendrix, Esquire, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; all on this 14th day of September, 2000.

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 12 point not proportionally spaced Courier font.

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SCOTT K. TOZIAN, ESQUIRE