IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 96,980
TFB No. 98-10,468(20A)

JAMES EDMUND BAKER,

Respondent.
_______________________________/

REPLY BRIEF OF RESPONDENT JAMES EDMUND BAKER

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "the Bar". The Respondent, James Edmund Baker, will be referred to as "Respondent". "RR" will denote the Report of Referee. "Tr" will refer to the transcript of the final hearing held on May 5, 2000.

SUMMARY OF ARGUMENT

Respondent not informed of his right to a separate hearing; therefore, he did not make a "choice," informed or otherwise.

The Bar has failed to show any injury to the ex-wife - as sale proceeds were used to pay off joint, marital debt to her benefit - the fact that the sale proceeds were deposited into a local Florida bank account is irrelevant in light of the fact that all of the monies were used to pay off numerous marital debts

The Bar inaccurately presents the sale of the Miami home repeatedly as one that occurred without Respondent's ex-wife's knowledge or consent - when the record, including the ex-wife's own testimony, expressly shows that she knew of and consented to the sale of the home and that she knew that the alternative to selling was certain foreclosure, with which she certainly did not agree. The record further shows that she had knowingly and with consent given Respondent the very documents needed to close the sale.

The Bar has failed to show a pattern of neglect or deceit on part of Respondent; rather, the incident in question was a single, isolated matter concerning the private sale of the couple's private, second home, which was a matter solely within the personal life of Respondent and his ex-wife and which sale would not have come to fruition but for the personal assistance and efforts of Respondent's father.

ARGUMENT

III. THE REFEREE'S FAILURE TO HOLD A SEPARATE HEARING TO AFFORD RESPONDENT THE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES OF THE ALLEGED OFFENSE AND TO OFFER TESTIMONY AND EVIDENCE IN MITIGATION OF ANY DISCIPLINE IMPOSED CONSTITUTES A VIOLATION OF RESPONDENT'S RIGHT TO DUE PROCESS OF LAW.

It has been held that due process rights are fundamental; they are not discretionary, and they cannot be waived by counsel. The Bar cites The Florida Bar v. Weed, 559 So.2d 1094 (Fla. 1990) in which the Referee required that the parties file a memorandum regarding aggravation or mitigation of discipline, which Weed failed to do. However, in the instant case, the Referee inquired as to whether the parties wished to prepare proposed findings of fact regarding the initial recommendation of guilt or innocence, not as to aggravation or mitigation. Unlike Weed, who was representing himself, Respondent was represented by counsel who failed to avail himself of the opportunity to present evidence of mitigation after the Referee made his finding as to Respondent's guilt or innocence. Respondent did not personally make a "choice" as the Bar portrays.

The Bar also refers to The Florida Bar v. Carricarte, 733 So.2d 975 (Fla. 1999), where the attorney had been previously advised that the Referee had found him guilty and was arguing mitigation of discipline. In the instant case, the Referee had not made any findings of guilt before issuing his report recommending disbarment;

therefore, Carricarte is distinguishable and does not support the Bar's argument.

Respondent does not contend that he has a due process right to advance notice of the specific disciplinary sanction sought by the Bar; rather, Respondent contends that there is a basic and fundamental due process right to present evidence of mitigation once the Referee has determined the issue of guilt or innocence. In this case, Respondent was not aware of the finding of guilt until the Referee's Report was made and filed.

In The Florida Bar v. Daniel, 626 So.2d178 (Fla. 1993), cited by the Bar, the attorney represented himself and walked out of the final hearing before it was concluded. This Court characterized Daniel's actions as having "voluntarily excused himself from the hearing"; however, in the instant case, Respondent did not represent himself and did not walk out in the middle of the final hearing or otherwise voluntarily excuse himself from the proceedings. Further, Respondent did not argue or imply that the Referee had "deliberately" deprived him of the opportunity to present mitigating evidence and has made no suggestions as to any such intent on the part of the Referee to deprive Respondent of his due process rights. Rather, the record clearly shows that the Referee requested the assistance of the attorneys as to proper procedure and was provided some unintentionally misleading information as to bifurcated hearings, and Respondent's former attorney exhibited inexperience and lack of

knowledge of Bar disciplinary proceedings. The Bar suggests that the record shows that Respondent and his former counsel did not intend to present mitigating evidence and that "it is not unreasonable to conclude that for strategic and tactical reasons, he chose not to offer mitigating evidence"; however, the record persuasively shows that Respondent and his former attorney had a reasonable expectation that they would be advised of the Referee's ultimate ruling as to guilt and innocence before there would be any need to present mitigating evidence and, if the Referee had recommended that Respondent be found not guilty, mitigating evidence would be unnecessary. This is confirmed by the fact that the discussions between the Referee and the attorneys regarding the preparation of memoranda specifically and solely addressed findings of fact and a recommendation as to guilt and nothing more. It is wholly unreasonable to conclude that an attorney experienced in bar disciplinary matters would knowingly and voluntarily choose not to present mitigating evidence as to the discipline to be imposed as a "trial strategy."

II. THE REFEREE'S FINDINGS OF FACT ARE ERRONEOUS, NOT SUPPORTED BY THE RECORD, AND DO NOT SUPPORT A FINDING THAT RESPONDENT VIOLATED ANY RULES REGULATING THE FLORIDA BAR

The Bar argues that Respondent essentially disagrees with the Referee's finding of fact on the basis that they are contrary to his own testimony. This is a patently erroneous assertion. Respondent's Initial Brief intentionally addressed only those

facts that were uncontroverted and only those findings of fact made by the Referee that were made without any citation to evidence, without any support in the record, or which made implications or inferences that were not in the record.

The fact that Respondent moved to Florida before April 1997 is relevant and material to show that Respondent's ex-wife knew of the impending foreclosure, in all probability knew for some time that it was approaching, and had planned on leaving the marital home and the marriage before the foreclosure occurred. These facts impact the nature and complexion of the events leading up to and surrounding the sale and the approved conduct of Respondent therein.

At the Final Hearing, Respondent's ex-wife never produced original copies of any of the real estate documents, including the original of the cover letter or any envelope which she alleged that she had received from Respondent. The Bar claims that the Referee admitted a copy of the purported July 16, 1997 letter on the basis that it went to Respondent's credibility; however, the letter was not used to impeach Respondent, but was used by the Referee to prove the truth of the matters set forth therein. This was a clearly improper introduction of hearsay by the Referee and contrary to the Rules of Evidence.

That Respondent would send his ex-wife blank documents after-the-fact to obtain her signature and to legitimize a forgery that he purportedly committed is

illogical and inconsistent with the Bar's argument that Respondent somehow master-minded a fraud upon his ex-wife. It is obvious that such conduct would be discovered as a clumsy attempt at a cover-up, creating much more serious problems for Respondent. It is more reasonable and consistent to conclude that Respondent's ex-wife fabricated the alleged "letter" to bolster her claim that Respondent engaged in a series of acts and engaged in a plan or scheme to defraud her and to punish him for asserting his rights in the dissolution matter.

The Bar argues that Marnell Keller, Respondent's secretary and the notary public, had no interest in the outcome of the dissolution action; however, she did have a clear interest in the outcome of this Bar proceeding since she had been threatened by the ex-wife's attorney with criminal prosecution for fraud and the loss of her notary license as a result of her breaches of duty as a notary and, therefore, she was highly motivated to distance herself from Respondent and the events and to place as much of the blame on him as possible:

[BY MR. WHALEN:]

Q. And what did you learn and how did you learn something was - - that there was an issue regarding the warranty deed?

A. My husband Mark Keller, he received a letter from Mrs. Baker's attorney on my behalf questioning - - I don't exactly have the letter in front of me - - but he

was questioning the hows, the whens, the wheres, the whys, and the whats of that warranty deed...

A. ...At this point - - at this point I tried to contact - - when I received the letter, I had my husband fax it to me at the office to see what exactly he was talking about. Once it was faxed to my office, I took a look at the letter, and I looked at the deed, and I thought oh, boy...Well, I was starting to panic. And I was getting very nervous that I was actually going to be in some pretty serious trouble...

(Tr. page 94, line 7 - page 95, line 8)

A. ...As soon as the letter came in and while my husband was faxing it to me, I had him contact a friend of ours who is a Florida attorney to watch out for what's going on, because I didn't know the seriousness of the nature. I knew this was not good. I wanted to have my rights or just be sure that I was protected.

(Tr. page 96, lines 12 - 17)

[BY MR. POWELL:]

Q. But weren't you told on the phone that they believed that you had taken a large sum of money to notarize those deeds and documents, and that you were sleeping with Mr. Baker?

A. Yes. I recall something along those lines.

Q. And in fact, they threatened to prosecute you for a felony?

A. Yes...

Q. Well, tell me about the phone call that made these accusation.

A. What happened was, as I had stated, my husband contacted a friend of ours who is an attorney to make the initial contact with Mrs. Baker's attorney to find out what was going on, kind of like a reverse fact finding. And that is when - - I will give you the attorney's name. Robert Cohen. Mr. Cohen had spoken to - - I believe the gentleman's name is Dennis Collins. And Dennis Collins I believe relayed back to my attorney saying I want to talk to her on the phone. I'm just going to give a time at 1:00 o'clock. If she's not there, I have paperwork ready to file of fraud charges.

Q. Criminal prosecution for fraud, correct?

A. Yes.

Q. Which frightened you quite a bit, did it not?

A. Extremely.

Q. Because you believed that you were going to be involved in a huge fraud trial over this deed?

A. I was scared. I was very scared.

Q. And isn't true, Mrs. Keller, that that fear - - that fear has motivated you to distance yourself from this transaction?

A. Yes. I would just like for this to - -

Q. Like for it to go away?

A. Yes.

(Tr. page 100, line 19 - page 101, line 17.)

III. IF THIS COURT FINDS A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR, THE RECOMMENDATION OF DISBARMENT BY THE REFEREE IS EXCESSIVELY HARSH, ERRONEOUS, AND NOT SUPPORTED BY THE RECORD, CASE LAW, AND FLORIDA'S STANDARDS FOR IMPOSING LAWYER SANCTIONS

In The Florida Bar v. Rose, 607 So.2d 394 (Fla. 1992), which was cited in Respondent's Initial Brief, the attorney was found to have signed his ex-wife's name, more than two (2) years after their divorce, to client agreement forms, stock certificates, and checks in order to obtain their children's money for his personal use and did so without her authorization as the custodian of an irrevocable trust of the stock which was created for the benefit of their children. The attorney's conduct was found to constitute misrepresentation and warranted a thirty (30)-day suspension. The facts in the Rose opinion are more egregious than the facts in the instant matter and are discussed in more detail in the Initial Brief. Even if this Court were to find that Respondent's actions constituted misconduct, Respondent in this matter did not conduct himself with any of the intent and fraudulent purposes exhibited by the attorney in Rose.

The Bar cites several cases to support its proposition that Respondent should

be disbarred: The Florida Bar v. Forbes, 596 So.2d 1051 (Fla. 1992) (attorney who had been convicted of felony of knowingly and willfully making materially false statement in documents submitted to bank so as to influence its actions in granting loan disbarred); The Florida Bar v. Salnik, 599 So.2d 101 (Fla. 1992) (attorney who used a judge's signature stamp to forge a judgment and then sent fictitious judgment to opposing party for intimidation purposes and then attempted to cover up his guilt by lying to the judge and deceiving the Bar disbarred); The Florida Bar v. Grief, 701 So.2d 555 (Fla. 1997) (conviction of federal felony charge of conspiracy to defraud the government by filing false immigration documents warranted disbarment); and, The Florida Bar v. Kicklighter, 559 S0.2d 1123 (Fla. 1990) (the attorney was representing a client and within the course of that representation the attorney forged the signature of the deceased on a will, notarized his own forgery, and then proceeded to file the will in the probate court, thus, perpetrating a fraud upon the court).

These cases are easily and clearly distinguishable from the facts in the instant case. Respondent was not representing a client; he was acting in his own personal capacity and, along with his ex-wife and father, he was handling personal family business. Respondent did not commit a fraud and certainly not a fraud upon the court.

The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997)(imposing thirty-day

suspension where attorney presented false evidence and made misrepresentations to client, opposing counsel, and court), a case previously cited in Respondent's Initial Brief, is an example of the existing case law in which more egregious behavior than that of Respondent received discipline far less severe than disbarment.

Other cases involving attorney misconduct more egregious than that for which Respondent is accused which this Court found to have warranted discipline less severe than disbarment include: The Florida Bar v. Barcus, 697 So.2d 71 (Fla. 1997)(attorney's negligence in failing to appear at scheduled deposition, in filing notice of appeal for sole purpose of delaying foreclosure without obtaining client's consent not to pursue it, and in failing to move for rehearing or to set aside or vacate foreclosure, where attorney had no prior disciplinary history, no evidence was presented that attorney purposefully neglected clients' case or tried to disadvantage them, and where Referee did not find that clients had sustained any harm, constituted "mere isolated acts" and warranted public reprimand rather than 30-day or six-month suspension); The Florida Bar v. Thomas, 698 So.2d 530 (Fla. 1997)(attorney keeping a portion of settlement payment in his client's case for his own use, even though he knew that portion belonged to his client and was in excess of contingency fee allowed by fee settlement agreement warranted a ninety (90)-day suspension); and, The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983)(attorney lying to trial judge to obtain

a continuance warranted sixty (60)-day suspension). In Barcus, this Court noted that it deals more harshly with cumulative misconduct than it does with isolated acts. In the instant case Respondent's conduct was limited to isolated acts confined within a single, isolated personal matter. Moreover, there was no evidence presented showing that Respondent's ex-wife suffered any harm. She received financial benefit from the sale of the house as opposed to its being foreclosed, received financial benefit from the reduction and cancellation of numerous significant joint, marital debts, regardless of the subsequent dissolution of their marriage, and did not have to be involved in any of the necessities and headaches of the marketing and sale of the Miami home, as her father-in-law was instrumental in effecting same.

Notwithstanding the failure of the Referee to hold a separate hearing on mitigation, Respondent would again submit that the following mitigating factors apply in this matter: absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; character or reputation; and, remorse.

As was stated in the Initial Brief, Respondent has been a practicing attorney in the State of Florida since October 18, 1990, and has no prior disciplinary record. Respondent is also admitted in the State of Connecticut (since 1989), the Federal District Court in Connecticut, the Federal District Court in Florida for the Middle

District, and the Second United States Circuit Court of Appeals in New York City and has no disciplinary record in any of these other jurisdictions. Respondent did not have a dishonest or selfish motive and used the proceeds to pay a portion of the marital debt. Additionally, the sworn testimony of Respondent's ex-wife was that she herself previously had a history and practice of using her father-in-law's credit cards and signing both his signature and her own name as a party authorized by her father-in-law on the credit card receipts.

The uncontroverted facts in the record further show that Respondent's actions did not involve a court or a client but rather, involved personal matters of his marriage and family and were related only to a pending foreclosure upon a second home in which his own parents were residing. If anything, Respondent's actions were reasonable within the context of the marriage and, but for the buyer that Respondent's father was instrumental in locating, the Dade County home would have been lost to the mortgage company. The proceeds from the sale of the Dade County home were used by Respondent to pay off marital debt for which Respondent's ex-wife received a benefit (i.e., the reduction in the total marital debt owed).

With regard to personal and emotional problems, the record is clear throughout that all of the allegations in question occurred within the context of a volatile and contentious divorce between Respondent and his ex-wife. The fact that Respondent's

ex-wife and her boyfriend had threatened Respondent, or at least his job, placed additional emotional stress upon Respondent. The Bar states that, while not specifically listing mitigating and aggravating factors, the Referee, in his findings of fact, noted that the Respondent and his ex-wife were having domestic problems and were involved in a bitter dissolution action, including a custody battle. However, the Bar's statement is misleading. The Referee actually stated in his report that "[Mr. Baker] believes [his wife] made it up to gain an advantage in the custody battle that took place in their dissolution action. Although they were involved in a bitter action, the other evidence presented in the case does not support his proposition." (RR paragraph 8). The Referee noted the domestic problems, the bitter dissolution action, and the custody battle solely to discount Respondent's testimony in determining Respondent's guilt. A complete reading of paragraph 8 of the Report does not show any such consideration by the Referee of this information as mitigating evidence.

The record also clearly shows that, throughout the proceedings, Respondent consistently made full and free disclosure to the Bar and Referee and demonstrated a cooperative attitude toward the Bar and Referee proceedings.

As this Court stated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), Respondent should be given the benefit of every doubt, particularly since he has a professional reputation and a record free from offense and to disbar Respondent would

not accomplish the objectives set forth by this Court in Pahules, as it would deprive our society of a competent and qualified attorney, would be unfair to Respondent, and would not serve to deter others from future conduct.

CONCLUSION

Respondent was deprived of his right to due process of law when the Referee failed to hold a hearing to allow Respondent to explain the facts and circumstances and provide mitigation evidence and testimony after making a finding of guilt.

The Referee's findings of fact are erroneous and unjustified and do not support a finding that Respondent violated any Rules Regulating The Florida Bar.

In the alternative, if this Court finds that Respondent violated any of the Rules Regulating The Florida Bar, Respondent should be disciplined with an admonishment for minor misconduct or a public reprimand after consideration of the true and correct facts, case law, and mitigating factors, and to serve the three purposes for attorney discipline which have been enumerated by this Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the Reply Brief of Respondent JAMES EDMUND BAKER, filed on March 7, 2001, in this matter, complies with Rule 9.210, as amended, of the Florida Rules of Appellate Practice.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and seven copies of the foregoing has been furnished by U.S. Regular Mail to: Thomas Hall, Clerk of the Supreme Court of Florida, 500 S. Duval St., Tallahassee, Florida 32399, and a copy by U.S. Regular Mail to: Stephen Whalen, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida, 33607, and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this __ day of March, 2001.

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JOSEPH A. CORSMEIER, ESQUIRE