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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MIGUEL FERNANDO MIRABAL,

Respondent.
_____/

Supreme Court Case
No. SC21-1469

The Florida Bar File Nos.
No. 2018-70,593(11D)

RESPONDENT/APPELLANT'S REPLY BRIEF

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PREFACE

The Florida Bar, Appellee will be referred to as "The Bar" or "The Florida Bar". Miguel Fernando Mirabal, Respondent, Appellant, will be referred to as "Respondent" or as "Mirabal".

The symbol "RR" will be used to designate the Report of Referee. The symbol "TT" and a page number will be used to designate references to the transcript of the final hearing. As the transcripts are not consecutively numbered there will also be a volume notation added to the "TT". TT1 denotes the December 1, 2022, proceedings; TT2 denotes the December 2, 2022, proceedings and TT3 denotes the December 16, 2022, proceedings.

Exhibits introduced by the parties hearing will be designated as TFB Ex. __ for the exhibits introduced by the Bar or R. Ex. __ for those introduced by the Respondent.

ARGUMENT

I. THE RESPONDENT DID NOT ENGAGE IN KNOWING AND INTENTIONAL CONDUCT TO MISLEAD THE PUBLIC OR THE JUDICIAL NOMINATING COMMISSION.

The Initial Brief set forth the Respondent's reasoned belief that the Referee erred in finding intentional misconduct and supported same with reference to trial testimony and exhibits. He stands by those arguments and will only point out a few factual and legal flaws in the Bar's Answer Brief.

A. Due process concerns.

Due process can be defined as:

> . . . notice and an "opportunity to be heard [that is] full and fair, not merely colorable or illusive. . . . Due process of law means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." *Ryan's Furniture Exchange, Inc. v. McNair*, 120 Fla. 109, 162 So. 483, 487 (1935); *see Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001) ("Procedural due process requires both fair notice and a real opportunity to be heard.") (citing *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991)). *Dept. Highway Safety & Motor Vehicles v. Griffin*, 909 So. 2d 538, 541 (Fla. 4th DCA 2005).

This Court has held that:

> . . . due process envisions a court that "hears before it condemns, proceeds upon inquiry, and renders judgment only after proper consideration of issues advanced by adversarial parties. In this respect the term 'due process' embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals." *Scull v. State*, 569 So. 2d 1251, 1252 (Fla. 1990) (citation omitted); *see* U.S Const.; Art. I, § 9, Fla. Const. Procedural due process, therefore, requires adequate notice and an **opportunity to be heard "at a meaningful time and in a meaningful manner**." *Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). *Jones v. State*, 750 So. 2d 520, 523 (Fla. 1999) (**emphasis supplied**).

R. Regulating Fla. Bar 3-7.4(h) provides in relevant part that:

> At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct that is being investigated and the rules that may have been violated. The respondent . . . shall be given an opportunity to make a written statement, sworn or unsworn, explaining, refuting, or admitting the alleged misconduct.

Throughout the course of this case The Florida Bar has not provided specific notice to the Respondent as to the precise rule violations that they believe were violated in this instance. The Bar's complaint fails to reveal which subparts of R. Regulating Fla. Bar 4-8.1 and 4-8.2 were allegedly violated and both rules have various

subparts which address different types of conduct.[1] See TFB Complaint at para. 32. R. Regulating Fla. Bar 3-7.5(h)(1)(B) requires that "(t)he complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined."

In the Respondent's Answer he included an affirmative defense as to this issue and filed a motion to dismiss or for a more definite statement. Said motion to dismiss was denied. At the time that simultaneous written closing arguments were submitted by the parties, the Bar had not yet explained which subparts in the rule were truly at issue. In fact, the Bar did not raise which subparts they were pursuing until a post-trial status conference held after the submission of written closing arguments where Respondent pointed out this flaw. The Referee, at the time of this post-trial conference (and supplemental written arguments after said hearing), allowed the Bar to provide a missing element of a potential violation of R. Regulating 4-8.2(b) by disclosing post-trial and after the close of all evidence a linchpin argument for such a violation – the need for a violation of the Code of Judicial Conduct, which point

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[1] The Bar also failed to list subparts for an alleged violation of R. Regulating Fla. Bar 4-5.3, but the Referee declined to find a violation of this rule.

had never been raised by the Bar until that time and only after submission of the Respondent's closing argument that pointed out that fatal flaw.[2]

For the factual reasons set forth in the Initial Brief and based upon a failure to give proper notice, the Respondent should be found not guilty of R. Regulating Fla. Bar 4-8.2 (a) & (b).

The Bar claims a scrivener's error as to the Referee's Report finding a violation of R. Regulating Fla. Bar 4-8.1(c), which applies to applicants seeking admission to the Bar, and not the rule violation they now seek – R. Regulating Fla. Bar 4-8.1(a), which discusses false statements during a disciplinary proceeding. The Bar failed to file any motion to clarify or correct this claimed scrivener's error until their Answer Brief. This requested relief should be denied.

II. THE APPROPRIATE SANCTION IS SUSPENSION AND NOT DISBARMENT.

This Court has consistently held that disbarment is the

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[2] It should be noted that the Respondent did not have an " . . . opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Boddie* at 378. Nor could he present testimony as to these exact rule violations as testimony had already concluded when he was finally given a list of the rule subparts.

ultimate extreme sanction that can be imposed and that therefore it should be reserved for only the most egregious cases and used only when rehabilitation is highly improbable. See for example *Fla. Bar v. Summers*, 728 So. 2d 739 (Fla. 1999); *Fla. Bar v. Kassier*, 711 So. 2d 515 (Fla. 1998); *Florida Bar v. Hirsch*, 342 So. 2d 970 (Fla. 1977). As was noted in the Initial Brief this Court has repeatedly held that should "never be decreed where any punishment less severe . . . would accomplish the end desired." *Fla. Bar v. Shoureas,* 892 So. 2d 1002, 1006 (Fla. 2004). The Referee, while recommending disbarment, specifically found a strong list of mitigating factors, inclusive of an eighteen-year legal career without any disciplinary sanction and strong character evidence presented by multiple witnesses. ROR 49.

The Bar points to Fla. Standard for Imposing Lawyer Sanctions, Standards 5.1(a) and 7.1(a) to support their sanction argument herein. Standard 5.1 (a) reads as follows:

> Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with

conduct involving dishonesty, fraud, deceit, or misrepresentation:

(a) Disbarment

- Disbarment is appropriate when a lawyer:

(1) is convicted of a felony under applicable law;

(2) engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft;

(3) engages in the sale, distribution, or importation of controlled substances;

(4) engages in the intentional killing of another;

(5) attempts, conspires, or solicits another to commit any of the offenses listed in this subdivision; or

(6) engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

There was no criminal act herein and the only argument that could be made herein relates to subsection (6) of the Standard. Respectfully, Standard 5.1(b) has greater applicability to the case at hand and it reads in relevant part that a suspension would be warranted for "other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice."

Similarly, subsection (b) of Standard 7 has more relevance herein. Subsections (a) and (b) of this Standard states that:

> Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.
>
> **(a) Disbarment**
>
> • Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> **(b) Suspension**
>
> • Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

While the Answer Brief in their sanction section discusses some general principals about lawyer misconduct, a comment or two should be made in that the cases cited are significantly worse than the matters at issue herein. *Fla. Bar v. Baker*, 810 So. 2d 876 (Fla. 2020) [Disbarred for three forgeries, having his secretary notarize same, having other employees witness the forged documents and then using them in a real estate closing.] *Fla. Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007) [Disbarred, for among other things, profiting on a secret deal with Dupont to his client's detriment]; *Fla. Bar v. Marcelus*, 249 So. 3d 538 (Fla. 2018) [18-

month suspension for misconduct in his own divorce proceeding and assisting in the forgery of a document used for a refinancing of his home.].

In a case decided after *Marcelus* and with much more serious misconduct in a divorce proceeding, *The Florida Bar v. Koepke*, 327 So. 3d 788 (Fla. 2021), this Court disbarred a lawyer for misconduct in his own divorce case that demonstrated a:

> willful lack of candor with the court and abuse of the legal process. We focus on the intentionality of his actions, his selfish motive, and the serious, adverse impact that his actions had on the parties and underlying case. *Id.* at 792.

Koepke most serious actions were lying directly to the trial court, engaging in outright fraudulent conduct in hiding reportable assets and being found in contempt. You do not have these facts herein.

The Bar also discusses *Fla. Bar v. Orta*, 689 So. 2d 270 (Fla. 1997), which was fully addressed in the Initial Brief. One clear distinction in *Orta*, which distinction is recognized by the Bar in its Brief, Orta also had prior 60-day suspension and committed misconduct while under suspension. The Respondent would rely upon his Initial Brief for further distinctions in the two cases.

A comment should also be made about this Court's treatment of judicial election matters in light of a recent approval, by this Court in August of this year, of a public reprimand for serious election law violations. *Fla. Bar v. Earley*, 2023 Fla. Lexis 1244 (Fla. 2023) [candidate personally raising donations for her campaign and campaign finance report issues]. The Initial Brief at pages 58 through 60 fully discussed other judicial campaign misconduct cases. The sternest sanction imposed was removal from the bench with the Bar securing a 90-day suspension thereafter for the now former judge.[3] See *Inquiry Concerning Santino*, 257 So. 3d 25 (Fla. 2018); *Fla. Bar v. Fragakis (f/k/a Santino)*, 2021 Fla. Lexis 1341 (Fla. 2021). A 90-day suspension of judicial obligations was also referenced. *Inquiry Concerning Shepard*, 217 So. 3d 71 (Fla. 2017). The remaining cases were all public reprimands. See for example, *Fla. Bar v. Aven*, 317 So.3d 1095 (Fla. 2021); *Fla. Bar v. Hotusing*, 121 So. 3d 1038 (Fla. 2013);

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[3] The Respondent herein voluntarily resigned from the bench, which even the Bar recognized as a significant mitigating factor in offering the initial consent judgment for a 90-day suspension that was originally presented to this Court.

Inquiry Concerning Kinsey, 842 So. 2d 77 (Fla. 2003); *Fla. Bar v. Williams-Yulee*, 138 So. 3d 379 (Fla. 2014).

The Initial Brief discussed the mitigation that is present in this case and commented upon the aggravation found by the Referee. It is respectfully submitted that there is a compelling case for mitigation, as set forth in the Initial Brief. The Referee in his Report at page 49 recognized as mitigation that (1) the Respondent has, in his 18-year career as a lawyer, has never been disciplined; (2) significant evidence of his good character was presented by six-witnesses, inclusive of detailed descriptions of his lifetime of charitable causes; and (3) that he has suffered two distinct penalties for the same misconduct in that he paid a $2,000.00 fine to the FEC and he submitted a resignation from continued service as a county court judge, which was a lifetime goal of continued service to the community. A discussion of other important mitigation is found at pages 53 through 58 of the Initial Brief. While not specifically referenced in the Report of Referee, the Bar presented no evidence to contradict evidence found in the record that supports a finding of voluntary remedial action to correct his

campaign finance reports;[4] a finding that the Respondent fully and candidly cooperated with The Florida Bar throughout these proceedings; a finding related to his health issues and the passing of his mother; a finding relative to his heartfelt remorse and the delay in the Bar's prosecution of this matter.[5]

Lastly, the Initial Brief set forth relevant precedent for this Court to consider in imposing an appropriate suspension from the practice of law, rather than disbarment. The record in this case is clear, Mr. Mirabal made mistakes for which he is extremely remorseful, but these mistakes, while negligent, were not intentional.

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[4] As noted in the Initial Brief, there was trial testimony from the Respondent and his second CPA, Janet Garcia, that discussed the timing on the campaign finance report amendments. Also see Resp. Ex. A.

[5] The Initial Brief at pages 55 through 58 explain in detail that this grievance was opened in May of 2018, the first probable cause finding in December of 2020, the lack of any record activity by the Bar from that time frame through January of 2021, when they lost jurisdiction due to the Respondent being sworn in as a jurist, and the delay between the time frame when he resigned his position on the bench and the amended probable cause finding in October of 2021 and the filing of the formal complaint in this matter in October 2021. This case was "under investigation" or outright dormant for great periods of time and the Respondent did not cause any of these delays.

CONCLUSION

This is not a disbarment case, and the Referee should be reversed as to his sanction recommendation and his finding that the Respondent engaged in intentional misrepresentations by omissions, when the record before this Court clearly documents that these omissions were negligent and unintentional. A one-year suspension is the appropriate level of sanction for this case based upon this Court's precedent discussed above, and if the Court does find some of the conduct to be intentional, then the appropriate sanction would be no more than a three-year suspension.

WHEREFORE, Respondent, MIGUEL FERNANDO MIRABAL respectfully requests this Court reverse the findings of intentional conduct and impose a rehabilitative suspension of one year and for any further relief this Court deems reasonable and just.

Respondent also respectfully requests that the Court hold oral argument now that this appeal is fully briefed.

CERTIFICATE OF TYPE, SIZE AND STYLE, WORD COUNT

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Bookman Old Style font, that it does not exceed three thousand (3,000) words and it excludes the content authorized to be excluded under the rule.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been served via the e-portal to: Jennifer R. Falcone, Esq., Bar Counsel, The Florida Bar, 444 Brickell Ave., Ste. M-100, Miami, FL 3313, (jfalcone@floridabar.org; nfronckowiak@floridabar.org), Patricia Ann Toro Savitz, Esq., Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399, (psavitz@floridabar.org); and Mark Lugo Mason, Bar Counsel, The Florida Bar, 651 East Jefferson St., Tallahassee, FL 32399-2300 (mmason@floridabar.org; mhowland @floridabar.org), on this 18th day of September, 2023.

Respectfully submitted,

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