IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JONATHAN ISAAC ROTSTEIN,

Respondent.
_____/

Case No. SC01-114
[TFB Case Nos. 2000-30,672(07C);
2000-32,134(07C);
2000-32,142(07C)]

THE FLORIDA BAR'S AMENDED REPLY BRIEF AND ANSWER BRIEF ON CROSS APPEAL

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SYMBOLS AND REFERENCES

The complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar" in this brief.

The transcript of the final hearing held on June 26 and June 27, 2001 shall be referred to as "T" followed by the cited page number and line number.

The Report of Referee dated August 3, 2001 will be referred to as "ROR" followed by the referenced page number(s) of the attached Appendix. (ROR-A____).

SUMMARY OF THE ARGUMENT

Respondent failed to point to any record evidence contradicting the referee's conclusions and failed to demonstrate that the record does not support the findings. The record reflects competent, substantial, clear and convincing evidence of a Rule 4-1.7 violation. The evidence demonstrates that respondent filed motions to enforce mediation settlement against two clients without first discussing this action and obtaining client consent, without being discharged by his clients, or without first withdrawing from his representation of those clients. The referee noted that by doing so, respondent took a position adverse to his clients where he could no longer effectively represent their interests, violating Rule 4-1.7.

In addition, the record clearly supports the referee's findings that respondent made a false statement of material fact or law to a tribunal in violation of Rule 4-3.3 by creating and back-dating a client letter, then representing it as timely notice of a statute of limitations to the grievance committee. Intentionally deceptive conduct occurring during Bar disciplinary proceedings should properly be given the same weight as intentional deception upon a court or tribunal pursuant to Rule 4-3.3.

Contrary to respondent's assertions, the referee did not err in considering and finding respondent's failure to comply with The Bar's instanter subpoena

duces tecum an aggravating factor. Florida Standards for Imposing Lawyer Sanctions provides that referees may consider, among other factors, the existence of aggravating and mitigating circumstances before recommending or imposing the appropriate level of sanctions in an individual case. Upon service of the subpoena, respondent objected to the production of the requested electronic data and did not comply with The Bar's request. The referee properly considered and found respondent's failure to comply with The Bar's subpoena duces tecum an aggravating factor.

At the discipline phase, The Bar's presentation of relevant rebuttal evidence of misconduct neither violated respondent's due process rights nor constituted fundamental error. Judge Richard Orfinger testified that he imposed sanctions on respondent for engaging in fraud upon his court, and the referee properly considered Judge Orfinger's testimony as rebuttal evidence during the disciplinary phase of the bifurcated proceedings.

Finally, The Bar maintains that a one year suspension is insufficient considering the serious nature of respondent's conduct. The referee found that respondent intentionally deceived The Bar on four separate occasions. Respondent's repeated pattern of deception reflects adversely both on his fitness as a lawyer and on the reputation and dignity of the profession. No less than a three

year term of suspension would be appropriate to impress upon respondent the seriousness of his misconduct and fulfill the goals of discipline.

ARGUMENT

POINT I

RESPONDENT FAILED TO DEMONSTRATE AN ABSENCE OF RECORD EVIDENCE TO SUPPORT A RULE 4-1.7 VIOLATION OR FAILED TO DEMONSTRATE THAT THE RECORD EVIDENCE CLEARLY CONTRADICTS THE CONCLUSIONS.

A. The record reflects competent, substantial, clear and convincing evidence of a Rule 4-1.7 violation.

A referee's findings of fact regarding guilt are presumed correct and should be upheld unless clearly erroneous or without support in the record. Florida Bar v. Vernell, 721 So.2d 705, 708 (Fla. 1998), citing Florida Bar v. Rue, 643 So.2d 1080, 1082 (Fla. 1994). The party contesting the referee's findings of fact and conclusions of guilt must demonstrate that there is no evidence in the record to support the findings or that the record evidence clearly contradicts the conclusions. Vernell, 721 So.2d at 708, citing Florida Bar v. Benchimol, 681 So.2d 663, 665 (Fla. 1996), and Rue, 643 So.2d at 1082.

Respondent failed to point to any record evidence contradicting the referee's conclusions and failed to demonstrate that the record does not support the findings. As long as the referee's findings are supported by competent substantial record evidence, this Court has held that it will not reweigh the evidence and substitute its judgment for that of the referee. Vernell, 721 So.2d at 708, citing Florida Bar v. Lecznar, 690 So.2d 1284, 1287 (Fla. 1997).

The evidence demonstrates that respondent filed motions to enforce mediation settlement against two clients without first discussing this action and obtaining client consent, without being discharged by his clients, or without first withdrawing from his representation of those clients (T. 69, L.11-23; T. 84, L. 1-18). The referee noted that by doing so, respondent took a position adverse to his clients where he could no longer effectively represent their interests, violating Rule 4-1.7.

Additionally, the referee noted that the three judges whose depositions were presented in this matter all ultimately agreed that respondent had a conflict of interest with Ms. Margaret Beaver and Ms. Olga Petrucha (T. 342). Having personally heard and observed the witnesses first-hand, the referee is in a unique position to assess their credibility. Vernell, 721 So.2d at 708, citing Lecznar, 690 So.2d at 1287, and Florida Bar v. Thomas, 582 So.2d 1177, 1178 (Fla. 1991).

The referee noted that respondent's actions caused potential injury to each client (T. 479-480), defined by The Standards for Imposing Lawyer Sanctions as harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

It is elemental to the precepts of ethics that one does not file motions against one's own clients absent their knowing consent. Respondent admitted that he did not discuss the conflict with his clients or otherwise protect their interests from the conflicts (T. 69, 84). The record reflects that neither client willingly accepted the settlement terms respondent subsequently attempted to enforce with his motions (T. 67-68, 82).

Respondent argues that by filing these motions, he effectively took a preemptive strike to protect his clients from incurring sanctions in the event that opposing counsel took action to enforce settlement (T. 70). In fact, Ms. Petrucha's case had already concluded upon her execution of the release documents and therefore no risk of sanction exposure existed when respondent filed the motion to enforce settlement. Respondent filed the motion merely to force Ms. Petrucha to sign the settlement check that would net her $12.15 in suit proceeds (T. 82). The record evidence negates respondent's reasoning for a preemptive, protective strike.

As the comment section of Rule 4-1.7 notes, loyalty is an essential element in the lawyer's relationship to a client. Loyalty to a client is impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. Respondent did not withdraw his representation prior to proceeding against his

clients, nor was he discharged by either client. Respondent's actions in filing the motions to enforce settlement were in opposition to the expressed wishes of his existing clients.

Contrary to respondent's assertions, his actions in filing these motions cannot be divorced from the balance of proof supporting the various rule violations found by the referee and forming the basis of the disciplinary findings. The record reflects evidence of an attorney who takes "aggressive positions" (T. 188-189) and who has "too much on his plate" (T. 166), descriptions that support respondent's unusual acts. The long-term effect of respondent's acts upon his clients' confidences in the legal profession cannot reasonably be considered of a de minimus nature in the same manner his violation of Rule 4-1.7 cannot be considered de minimus.

It is a violation of Rule 4-1.7 for an attorney to allow his personal interests to interfere with his ability to adequately represent his client, and The Bar submits that the record reflects clear and convincing evidence of a significant Rule 4-1.7 violation, supporting the referee's findings.

B. The record reflects competent, substantial, clear and convincing evidence of a Rule 4-3.3 violation.

The record clearly supports the referee's findings that respondent violated

Rule 4-8.1 for knowingly making a false statement of material fact in connection with a disciplinary matter and that respondent made a false statement of material fact or law to a tribunal in violation of Rule 4-3.3 by creating and back-dating a client letter, then representing it as timely notice of a statute of limitations to the grievance committee.

Since the Florida Bar is an official arm of the Supreme Court of Florida as provided in Rule 3-3.1, respondent's deceptions upon the grievance committee were by definition deceptive actions upon the Supreme Court. This Court has held that disciplinary proceedings by The Bar are essentially a function of the Supreme Court, that local grievance committees are an "intermediate agency" of the Court, and that as an "arm" of the Court, the grievance committees "[deal] with a vital function of the Court and under its exclusive jurisdiction." Florida Bar v. Harper, 84 So.2d 700, 705 (Fla. 1956). Thus, intentionally deceptive conduct occurring during Bar disciplinary proceedings should properly be given the same weight as intentional deception upon a court or tribunal pursuant to Rule 4-3.3.

This position is supported by the Court's ruling in Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997), where the Court found that the respondent violated Rule 4-3.3 by making a false statement and misleading The Bar during its investigation. Similarly, in Florida Bar v. Orta, 689 So.2d 270 (Fla. 1997), the

referee found applicable sanction standard 6.11(a), deceiving a court, where the respondent made misrepresentations to The Bar. The referee's findings of a violation of Rule 4-3.3 should stand accordingly.

POINT II

THE REFEREE PROPERLY CONSIDERED AND FOUND RESPONDENT'S FAILURE TO COMPLY WITH THE BAR'S SUBPOENA DUCES TECUM AN

AGGRAVATING FACTOR.

A referee in Bar discipline proceedings is not bound by the technical rules of evidence and is "authorized to consider **any** evidence...deem[ed] relevant in resolving the factual question." (emphasis added) Florida Bar v. Fredericks, 731 So.2d 1249, 1251 (Fla. 1999), citing Florida Bar v. Rood, 620 So.2d 1252, 1255 (Fla. 1993) and Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998). More specifically, "[a] referee's findings as to the existence of a particular mitigator [or, by extension, a particular aggravator] is considered a factual determination and is 'presumed correct and will be upheld unless clearly erroneous or lacking in evidentiary support.'" Florida Bar v. Wolis, 783 So.2d 1057, 1058 (Fla. 2001), citing Florida Bar v. Tauler, 775 So.2d 944, 946 (Fla. 2000).

Florida Standards for Imposing Lawyer Sanctions provides that referees may consider, among other factors, the existence of aggravating and mitigating circumstances before recommending or imposing proposed discipline and following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules Regulating The Florida Bar. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote

consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case, consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline, and consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

The guidelines are broadly permissive, defining aggravating circumstances as any considerations or factors that may justify an increase in the degree of discipline to be imposed after misconduct has been established. The sample aggravators listed in Standard 9.22 include but are not limited to bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.

Pursuant to Rule 3-3.1, grievance committees have the jurisdiction and powers as are necessary to conduct the proper and speedy disposition of any investigation, including the power to order production of records. In the matter at hand, The Bar's instanter subpoena of August 16, 2000 was designed to gather electronic evidence stored on computer drives (T. 63, L. 22-23), namely evidence of a date when respondent created the fraudulent letter, that had the potential to be immediately destroyed if attempts were made to secure it by other means. The Bar's actions under the circumstances were as limited as reasonably possible.

Upon service of the instanter subpoena, respondent objected to the production of the requested electronic data and did not comply with The Bar's request. He was put on notice of the information sought by The Bar (T. 63-64, L. 1-7, L. 25), effectively thwarting The Bar's intent to preserve that evidence, if it existed.

The date of the fraudulent letter's creation remained at issue in the final hearing, where respondent testified that he drafted and back-dated the subject letter sometime in September 1999 (T. 47, L. 27; T. 386, L. 9).

Accordingly, the referee did not err in considering and finding respondent's failure to comply with the Bar's subpoena duces tecum an aggravating factor.

POINT III

AT THE DISCIPLINE PHASE, THE BAR'S PROPER PRESENTATION OF RELEVANT REBUTTAL EVIDENCE OF MISCONDUCT NEITHER

VIOLATED RESPONDENT'S DUE PROCESS RIGHTS NOR CONSTITUTED FUNDAMENTAL ERROR.

After findings of guilt were concluded, and after respondent testified under oath during the disciplinary phase of The Bar's bifurcated proceedings that he had never counseled clients to lie to the court nor had he been previously sanctioned by a court for counseling clients to lie (T. 401, 404), The Bar called rebuttal witness Judge Richard Orfinger, whose testimony conclusively refuted respondent's statements under oath and corroborated The Bar's position of a pattern of dishonesty (T. 424-436). Judge Orfinger testified that he imposed sanctions on respondent for engaging in fraud upon his court (T. 424-436). The referee's subsequent discipline findings were based on a "totality of circumstances", not solely on this evidence (T. 481-483).

As noted previously, a referee in Bar discipline proceedings is not bound by the technical rules of evidence and is "authorized to consider **any** evidence... deem[ed] relevant in resolving the factual question." (emphasis added) Fredericks, 731 So.2d at 1251; Rood, 620 So.2d at 1255; Vining, 707 So.2d at 673. Had respondent not falsely testified during these proceedings, The Bar would not have been compelled to call Judge Orfinger to refute respondent's testimony.

Respondent's reliance on Vernell to advance his fundamental error/due process argument is misplaced. In Vernell, the allegations of new misconduct on

which that referee based a finding of guilt uncharged by The Bar in its complaint arose during the **fact-finding** phase of the proceedings. The Court reversed the referee's finding on the basis that "attorneys must know the charges before proceedings commence" to ensure preservation of due process rights. Id. at 707.

Here, the referee did not make new or additional findings of guilt on uncharged rules. Judge Orfinger did not testify during the fact-finding phase. Instead, the referee properly considered Judge Orfinger's testimony as rebuttal evidence during the disciplinary phase of the bifurcated proceedings. The testimony was relevant, recent, and well within the scope of The Bar's complaint allegations of misrepresentation, demonstrating systematic dishonest conduct on the part of respondent. Respondent testified falsely under oath during this final disciplinary hearing.

Even if the referee had made fact and discipline findings solely on the subject testimony, this Court has held that specific findings of uncharged conduct and violations of rules not charged in the complaint are permitted where, as in this case, the conduct is either specifically referred to in the complaint or is within the scope of the specific allegations of the complaint. Fredericks, 731 So.2d at 1253, citing Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) and Florida Bar v. Nowacki, 697 So.2d 828, 832 (Fla. 1997). The Bar committed no error in

presenting this evidence, nor did the referee err in considering it.

POINT IV

CONSIDERING THE SEVERE NATURE OF RESPONDENT'S MISCONDUCT AND THE ABSENCE OF ANY SIGNIFICANT MITIGATION, A THREE YEAR TERM OF SUSPENSION WITH OTHER RECOMMENDED CONDITIONS IS WARRANTED.

Although a referee's recommendation for discipline is persuasive, it is

ultimately the task of this Court to determine the appropriate sanction. Vernell, 721 So.2d at 709, citing Florida Bar v. Beach, 699 So.2d 657, 661 (Fla. 1997) and Florida Bar v. Reed, 644 So.2d 1355, 1357 (Fla. 1994).

Respondent's prior discipline record, considered with his instant acts of cumulative misconduct, merit a three year suspension. On October 1, 1999, respondent was disciplined by the Bar with an admonishment for minor misconduct for failing to diligently act on behalf of a former client and for failing to keep that client reasonably informed about case status and respondent's contemplated withdrawal.

The record before this Court demonstrates that after being thus disciplined, respondent engaged in four separate acts of deliberate deception upon the Bar to hinder its investigation of his misconduct (T. 335, L. 24-25; T. 349, L. 23-24).

Moreover, respondent falsely testified during the final hearing regarding whether he had previously counseled clients to deceive the court and whether he was sanctioned for that conduct (T. 401, 404). Judge Richard Orfinger testified that he in fact imposed informal sanctions on respondent for engaging in what Judge Orfinger perceived as fraud upon his court (T. 424-436) .

The referee applied several aggravating factors to support his recommended suspension, namely, prior disciplinary offenses (the October 1999 admonishment),

a dishonest or selfish motive, bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency, submission of false evidence, false statements, or other deceptive practices during the disciplinary process, and substantial experience in the practice of law. See Fla. Stds. Imposing Law. Sancs. 9.22(a), 9.22(e), 9.22(f), and 9.22(i), respectively.

The respondent cites several cases which are readily distinguishable from his fact pattern. The isolated instances of fraudulent or deceptive conduct referenced in Florida Bar v. Varner, 780 So.2d 1 (Fla. 2001), Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997), Florida Bar v. Morse, 587 So.2d 1120 (Fla. 1991), Florida Bar v. Morrison, 496 So.2d 820 (Fla. 1986) and Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982) are far less egregious than respondent's systemic pattern of misrepresentations. In the instant matter, the referee determined that respondent deliberately submitted false information to the Bar on four separate occasions, and in addition, respondent falsely testified during the final hearing as to whether he had previously counseled clients to deceive the court and whether he was sanctioned for that conduct.

Respondent also cites Florida Bar v. Stockman, 370 So.2d 1146 (Fla. 1979) and Florida Bar v. Neely, 372 So.2d 89 (Fla.1979) in support of a lesser discipline. These cases are twenty-two years old and we respectfully submit that they no

longer accurately reflect this Court's lack of tolerance for fraudulent misconduct. In Stockman, the attorney agreed to a finding of probable cause, submitted to a Conditional Guilty Plea for Consent Judgment, and ultimately cooperated fully with the Bar, unlike Mr. Rotstein. Neely cites outdated rules which have since been significantly revised and are not comparable to the instant matter.

The referee's recommendation of a one year suspension is disproportionate to the level of respondent's intentional, deceptive misconduct. A three year term of suspension is more appropriate and is supported by Florida Bar v. Klausner, 721 So. 2d 720 (Fla. 1998), where an attorney engaged in fraudulent conduct similar to respondent's by forging signatures on documents submitted to the court on behalf of his client and for falsely representing himself to the court.

It should not be ignored that this Court has gone so far as to disbar attorneys for misconduct involving fraud and intentional misrepresentation upon the Bar during disciplinary proceedings. See Orta, 689 So.2d at 270, Florida Bar v. Budnitz, 690 So. 2d 1239 (Fla. 1997), Florida Bar v. Cox, 718 So. 2d 788 (Fla. 1998) and Florida Bar v. Barenz, 500 So. 2d 1344 (Fla. 1987).

A three year suspension is warranted considering the grave nature of respondent's misconduct. Respondent's conduct was deliberate and intentional. The referee found that respondent intentionally deceived the Bar on four separate

occasions (ROR-A2). In light of his recent admonishment, respondent's false testimony regarding prior sanctions during these very proceedings on charges of misrepresentation demonstrates respondent's disregard for the Rules Regulating The Florida Bar and for the disciplinary process itself. The referee's recommendation that respondent be required to retake the ethics portion of The Florida Bar exam is appropriate, due to the severity and cumulative nature of respondent's misconduct. It is similarly appropriate that the respondent's failure to comply with any of the referee's recommendations as to discipline shall be deemed cause to subject respondent to further disciplinary proceedings.

CONCLUSION

Respondent's blatant acts of dishonesty effectively erode both the judiciary's and the public's confidence in the legal profession's honesty, and "[t]here is no more serious impact upon the integrity of our judicial system." Corbin 701 So.2d at 336. A three year term of suspension would compel respondent to prove rehabilitation, would demonstrate to the public that this Court takes very seriously

multiple acts of deceit by a Florida lawyer, and would effectively deter attorneys contemplating a course of deceptive conduct in the future.

WHEREFORE The Florida Bar submits that respondent should be sanctioned to a term of suspension of no less than three years and payment of costs now totaling $8,482.15, in addition to the referee's original terms requiring respondent to prove rehabilitation prior to reinstatement by taking and passing the ethics portion of The Florida Bar examination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to Patricia S. Etkin, Counsel for Respondent, 150 South Pine Island Road, Suite 320, Plantation, Florida, 33324-2667; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this ____ day of January, 2002.

Respectfully submitted,

_____
Elizabeth Sikora Conan
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

Elizabeth Sikora Conan
Bar Counsel