IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DANIEL EVERETT ABRAMS,

Respondent.
_____/

SUPREME COURT CASE
NO. SC04-1433

THE FLORIDA BAR
FILE NO. 2002-51,779(15E)

REPLY BRIEF OF RESPONDENT, DANIEL EVERETT ABRAMS

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ARGUMENT

I DID THE REFEREE ERR IN FINDING RESPONDENT GUILTY OF VIOLATING R. REGULATING FLA. BAR 4-8.4(c) AND R. REGULATING FLA. BAR 4-1.1.

Abrams does not, as argued by The Florida Bar, " merely point to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings." Abrams' position is that The Florida Bar failed to prove its allegations that he violated Rules 4-8.4 (c) and 4-1.1, R. Regulating Fla. Bar.

RULE 4-8.4(c), R. REGULATING FLA. BAR:

Rule 4-8.4(c), R. Regulating Fla. Bar states "A lawyer shall not... engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Ms. Ulershperger, was quite clear that she and her husband were well aware that Ms. Akbas was not an attorney and testified,

> Oh, well, the friend of ours, when he saw her card, he told us that she not lawyer. But since she agreed to help us, we didn't have any suspects - - just we trusted her, that she's -- we hoped that she's gonna help us." (T. 66).

Question: How did that make you feel when you found out that there was an attorney who was working with her?

> Well, really we didn't know anything about that. I mean, since she was taking care of our case, of our papers, she was meeting with us, we just - - we just didn't know that supposed to be some attorney was gonna' take care of us. (T. 72).

How was Abrams dishonest to Mr. Ziya and Ms. Ulershperger when they were aware was Ms. Akbas was not an attorney, did not care that she was not an attorney, and did not care if an attorney was involved in their case or not? How did Abrams commit fraud upon Mr. Ziya and Ms. Ulershperger when they were aware was Ms. Akbas was not an attorney, did not care that she was not an attorney, and did not care if an attorney was involved in their case or not? How did Abrams deceive Mr. Ziya and Ms. Ulershperger when they were aware was Ms. Akbas was not an attorney, did not care that she was not an attorney, and did not care if an attorney was involved in their case or not? How did Abrams misrepresent to Mr. Ziya and Ms. Ulershperger when they were aware was Ms. Akbas was not an attorney, did not care that she was not an attorney, and did not care if an attorney was involved in their case or not?

The conclusion of the Referee that Abrams engaged in conduct involving dishonesty, fraud, deceit or misrepresentation might be supported if there was record evidence that Mr. Ziya and Ms. Ulershperger believed they Abrams was retained as an attorney to assist them and that he was supposed to be involved in their case, however, there is no such record evidence. The record reflects everything to the contrary.

The record supports, and Abrams does not dispute it, that he associated with U.S. Entry, Inc. (T. 87-88; 130-132), that his name appeared as Managing Attorney on the letterhead of U.S. Entry, Inc. (T. 155-156), that he shared fees with US Entry, Inc. of no more than $5,000.00 or $6,000.00 (T. 107; 136-137) over an approximate two and one half year period of time (T. 87; 155), and that his New York law license was on the wall at the office of U.S. Entry, Inc. (T. 91). Each finding separately or together, however, fail to support that Abrams has engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. Even with Abrams' name appearing as managing attorney on US Entry, Inc. letterhead and with his New York law license on the wall, same were never relied upon, let alone considered, by Mr. Ziya and Ms. Ulershperger in retaining US Entry, Inc. to assist them.

Mr. Ziya and Ms. Ulershperger knew Ms. Akbas was not an attorney and did not care and, in fact, had prior knowledge of it (T. 44 - 45; 66; 72). According to Mr. Ziya's testimony, prior to retaining US Entry, Inc. to assist him and his wife, his wife, Ms. Ulershperger, had once previously met Ms. Akbas when she went to translate for a friend (T. 44). And not only does the testimony of Ms. Ulershperger, as set forth above and in Abrams' initial brief, support that Mr. Ziya and Ms. Ulershperger did not care that Ms.

Akbas was not an attorney, Mr. Ziya himself testified he did not care (T. 44 - 45):

Question: Did - - Didn't matter to you whether she was a lawyer or not?

Answer: No.

The argument presented by The Florida Bar, appearing on pages 20 and 21 of its answer brief, asserts "the clients in this case believed that they hired an attorney who could help them with their immigration needs. They did not know, and Ms. Akbas never informed them, that she was providing legal services and advice, which only an attorney is supposed to provide." This argument presented by The Florida Bar, as set forth above and in Respondent's initial brief, and as clearly reflected in the record, is just not correct.

Abrams was not hidden from Mr. Ziya and Ms. Ulershperger as his named appeared as managing attorney on US Entry, Inc. letterhead and his New York law license hung on its wall. Given these facts, there can be no fraud, deceit, dishonesty, or misrepresentation. Again, Mr. Ziya and Ms. Ulershperger were both well aware that Ms. Akbas was not an attorney and did not even care whether an attorney was involved in their case or not (T. 44 - 45; 66; 72). Given the testimony of Mr. Ziya and Ms. Ulershperger, there was no dishonesty, fraud, deception, or misrepresentation herein.

It is easy to conceptualize terminology such dishonesty, fraud, deceit, and misrepresentation. It is, however, another thing to prove it. The only complainants herein are Mr. Ziya and Ms. Ulershperger, no others, and it would be improper to consider "potential" others outside of the record and to do so would violate Abrams' right to due process of law, and the testimony of both Mr. Ziya and Ms. Ulershperger came up short in proving that Abrams engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

As set forth in The Florida Bar v. Cueto, 834 So.2d 152 (Fla. 2002), this Court stated:

> Rule 4-8.4(c) states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." Although the rules do not define these four words, *Black's Law Dictionary* notes that "misrepresentation" includes "[c]oncealment or even non-disclosure." *Black's Law Dictionary* 1016 (7th ed.1999) (quoting Restatement (Second) of Contracts section 159 cmt. a (1981)). For the term "dishonest act," *Black's* refers to "fraudulent act," which is defined as "[c]onduct involving ... dishonesty, a lack of integrity, or moral turpitude." *Id*. at 672. Further, "moral turpitude" is defined as "[c]onduct that is contrary to justice, honesty, or morality," and "[i]n the area of legal ethics, offenses involving moral turpitude ... traditionally make a person unfit to practice law." *Id*. at 1026.

Using this Court's concept of "dishonesty, fraud, deceit, or misrepresentation" as defined by this Court in Cueto, supra, all four words revolve around fraud and misrepresentation, and the elements of fraud and misrepresentation, as defined by this Court in Lance v. Wade, 457 So.2d 108

(Fla. 1984), are as follows: 1) a false statement concerning a material fact; 2) knowledge by the person making the statement that the representation is false; 3) the intent by the person making the statement that the representation will induce another to act on it; and 4) reliance on the representation to the injury of the other party. Based upon the principles of law set forth in forth in Lance v. Wade, supra, and The Florida Bar v. Cueto, supra, The Florida Bar, as evidenced by the testimony of Mr. Ziya and Ms. Ulershperger, failed to prove that Abrams engaged in dishonesty, fraud, deceit, or misrepresentation.

There is no issue of non-disclosure, concealment, misrepresentation, dishonesty, deceit or fraud as Abrams appeared on US Entry, Inc. letterhead as managing attorney and had his New York law license hang on the wall of the office. Abrams did not hide or conceal anything. Notwithstanding his name appearing on US Entry, Inc. letterhead and his New York law license hanging on the wall, Mr. Ziya and Ms. Ulershperger never inquired about Abrams nor even considered him involved in their matter. And in the end, being fully aware that Ms. Akbas was not an attorney, Mr. Ziya and Ms. Ulershperger elected to deal directly with her.

The manner in which the Referee concluded that Abrams' conduct was tantamount to dishonesty and misrepresentation, to wit:

> Allowing Miss - - Ms. Akbas to appear to - - to represent or to be a - - to have the benefit of Mr. Abrams as a managing lawyer is - -is, uh, conduct involving dishonesty and misrepresentation (T. 212)

reflects a disconnect between the facts and the legal conclusion. Abrams acknowledges that the findings of fact made by the Referee support his conclusions that he violated Rules 4-5.3(a), (b), and (c); 4-5.4(a) and (d); and 4-5.5(b), R. Regulating Fla. Bar, however, not Rule 4-8.4(c), R. Regulating Fla. Bar.

RULE 4-1.1, R. REGULATING FLA. BAR:

The Referee focused solely upon the asylum claim that was not pursued by (T. 214-216), however, completely failed to consider the pursuit of employment based visas and the failure of Mr. Ziya and Ms. Ulershperger to respond to further inquiry (T. 105). The case sub judice is not a situation where there was a failure to act or a want to act, but whether the specific action taken reflected incompetence as defined by Rule 4-1.1, R. Regulating Fla. Bar, to wit: Whether Abrams failed to provide "the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

The Florida Bar presents no legal precedent on the issue of competence to further define Rule 4-1.1, R. Regulating Fla. Bar. The legal precedent set forth by Abrams in his initial brief addresses the argument

raised by The Florida Bar regarding an attorney's failure to adequately prepare; failure to properly interrogate a client or make an independent investigation (a/k/a intake and "legal conclusion, which required a detailed analysis by (Abrams) Respondent"; and overlooking or otherwise misconstruing law. Based upon The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980) and The Florida Bar v. Penn, 351 So.2d 979 (Fla. 1977), the Referee's findings herein fail to support a conclusion that Abrams violated Rule 4-1.1, R. Regulating Fla. Bar.

The record supports that Abrams violated Rules 4-5.3(a), (b), and (c); 4-5.4(a) and (d); and 4-5.5(b), R. Regulating Fla. Bar, and Abram concedes these violations. The record evidence, however, does not support that Abrams violated Rule 4-8.4(c) and 4-1.1, R. Regulating Fla. Bar.

II DID THE REFEREE ERR IN IMPOSTING A 1-YEAR SUSPENSION FOR RESPONDENT'S MISCONDUCT AND IS THE SANCTION SUPPORTED BY EXISTING CASE LAW AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

Abrams does not assert that a suspension is not appropriate. A one (1) year rehabilitative suspension, however, is beyond the scope of the facts of this case and any legal precedent. It is the position of Abrams that a suspension ranging between ten (10) days to ninety (90) days, however, not exceeding same, is appropriate.

How many violations were committed or not in any given legal authority is based upon those claims actually prosecuted and proven by The Florida Bar, not necessarily the amount that "could have" been prosecuted and "could have" been proven. In The Florida Bar v. Nunes, 679 So.2d 744 (Fla. 1996), Nunes was found to have violated Rule 4-1.5(a), R. Regulating Fla. Bar (entering into an agreement providing for, charging, or collecting an illegal, prohibited, or clearly excessive fee), however, given the nature of the conduct, Nunes could have easily also have been charged and found guilty of violating Rules 3-4.3 and 4-8.4(c), R. Regulating Fla. Bar. Is not charging an illegal or prohibited fee conduct contrary to honesty, as well as fraudulent, deceitful, and/or misrepresentation? Is it the conduct of an attorney that is in issue or the amount of charges actually alleged and proven? Hypothetically, should an attorney who is only charged with violating 4-8.4 (c), R. Regulating Fla. Bar, as a result of absconding with millions of dollars of client funds, subject to a lesser sanction because he is only charged with one rule violation when considerably more violations could have been charged (i.e 3-4.3; 3-4.4; 4-1.2(a); 4-1.7; 4-1.8; 4-1.15)?

How many more rule violations could have been included in the Nunes prosecution? How many more violations above the five (5) prosecuted and proven could have been included in The Florida Bar v.

Roberts, 689 So.2d 1049 (Fla. 1997)? How many more violations could have been included in The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996)?

On the other hand, the egregiousness of conduct is relevant, however, The Florida Bar fails to reconcile its arguments with the likes of The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) where seven (7) violations of misconduct were found to have been committed, including a violation of Rules 3-4.3 (conduct contrary to honesty) and 4-8.4(c), R. Regulating Fla. Bar, yet the attorney only received a ten (10) day suspension. And in Nunes, supra, with four violations, which could easily have included charges of dishonesty, fraud, deceit, and misrepresentation, the attorney only received a ninety (90) day suspension notwithstanding two prior disciplinary sanctions imposed against him.

The Florida Bar, in attempting to distinguish this matter from Beach, supra, again directing this Court to pages 20 and 21 of its answer brief, asserts "the clients in this case believed that they hired an attorney who could help them with their immigration needs. They did not know, and Ms. Akbas never informed them, that she was providing legal services and advice, which only an attorney is supposed to provide." As reflected in Abrams' initial brief, and as discussed above, the record contradicts The Florida Bar's position and is clear that Mr. Ziya and Ms. Ulershperger were

both well aware that Ms. Akbas was not an attorney; did not even know an attorney was even involved in their matter; and did not care whether an attorney was involved in their case or not (T. 44 - 45; 66; 72).

Again, Abrams does not suggest a suspension is not warranted. Abrams merely asserts that a one (1) year rehabilitative suspension is beyond the scope of the facts of this case and any legal precedent. And certainly, as argued in his initial brief, the Referee, in imposing his sanction, in part, improperly relied upon matters outside of the record (T. 218) that can only be seen as speculation and conjecture, regardless if even subsequently proven true, thereby violating those principles set forth in The Florida Bar v. Fredericks, 731 So.2d 1249 (Fla. 1999) and The Florida Bar v. Vernell, 721 So.2d 705 (1988). Additionally, the Referee incorrectly determined Abrams conduct to be a pattern of misconduct, as opposed to one act as defined in The Florida Bar v.McLawhorn, 535 So.2d 602 (Fla. 1988); a pattern of misconduct being defined in The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994) and The Florida Bar v. Inglis, 660 So.2d 697 (Fla. 1995).

There is no bright-line rule set forth in any legal precedent issued by this Honorable Court for imposing sanctions against an attorney. The ultimate sanction to be imposed upon Abrams rests with this Honorable Court, however, given the facts and circumstances of the case sub judice,

compared to other legal precedent, the sanction of a suspension imposed against Abrams should range between ten (10) days and ninety (90) days, however, not exceeding ninety (90) days.

III DID THE REFEREE ERR IN THE COSTS HE ASSESSED AGAINST RESPONDENT OR IN ORDERING RESTITUTION

The argument presented by Abrams is one of due process of law. Due process of law trumps discretion. See, The Florida Bar v. Fredericks, supra, and The Florida Bar v. Vernell, supra.

There is no argument against the right of The Florida Bar to seek additional costs, however, before an additional amount was entered Abrams was entitled to notice and an opportunity to be heard. At the trial the Referee understood Abrams' right to due process of law and stated to his then counsel, in connection with the sum of $1,663.70, "And of course, if Mr. Tynan has any real objection to this, I'll certainly reconsider it." (T. 220). Would not the same principle apply to any subsequent request for costs by The Florida Bar? Any additional effort by The Florida Bar to tax costs, post trial, would have required an evidentiary hearing, with proper notice, so as not to violate Abrams' right to due process of law.

The same due process principle applies to the restitution that Abrams was ordered to pay. There is no question that The Florida Bar had a right to

seek restitution and, if properly requested and warranted, have it imposed as a sanction, however, the relief was not specifically requested by The Florida Bar in the complaint filed against Abrams (A. 2). In accordance with the principle of due process of law, the restitution Abrams has been ordered to pay must be reversed. It is error to award relief outside of the pleadings and a prayer for general relief is not sufficient to provide specific relief not requested nor pled. See, Precision Tune Auto Care v. Radcliffe, 804 So.2d 1287, 1292 (Fla. 4th DCA 2002); Hooters of America, Inc. v. Carolina Wings, Inc., 655 So.2d 1231, 1233 (Fla. 1st DCA 1995); Jahnke v. Jahnke, 804 So.2d 513, 515 (Fla. 3d DCA 2001); McDonald v. McDonald, 732 So.2d 505, 506 (Fla. 4th DCA 1999); Rhodes v. Wall, 514 So.2d 437, 438 (Fla. 4th DCA 1987); Freeman v. Freeman, 447 So.2d 963, 964 (Fla. 1st DCA 1984); Cooper v. Cooper, 406 So.2d 1223, 1224 (Fla. 4th DCA 1981); Hernandez v. Hernandez, 444 So.2d 35, 36 (Fla. 3d DCA 1983).

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's Reply Brief, pursuant to Rule 9.210(a)(2), Fla. R. App. P., complies with the font requirement of said rule and is submitted in Times New Roman 14-point font.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Reply Brief of Respondent was overnighted, by U.S. Express Overnight Mail, to THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was forwarded, by U.S. Mail, to LILLIAN ARCHBOLD, ESQUIRE, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, Florida 33309, as well as to JOHN A. BOGGS, ESQUIRE, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this ___ day of May, 2005.

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