IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC04-859

v.

TFB File No. 2004-00,743(2B)

WAYNE A. HAGENDORF,

Respondent.
_____/

ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant will be referred to as The Florida Bar, or as The Bar. Wayne A. Hagendorf, Respondent, will be referred to as Respondent, or as Mr. Hagendorf throughout this brief.

References to the Report of Referee shall be designated by the symbol RR followed by the appropriate page number (e.g., RR p. 2)

References to specific pleadings will be made by title. References to Respondent's Initial Brief shall be identified as "IB" with the appropriate page number (e.g., IB p. 5). References to Respondent's Composite Exhibit shall be designated as "RCE" with the appropriate number (e.g., RCE 10).

STATEMENT OF THE CASE AND FACTS

The Florida Bar adopts the Summary of Proceedings and Findings of Fact as presented by the Report of Referee, dated March 7, 2005, a copy of which has been previously provided to the Court. The Bar adopts the findings of the Honorable Janet Ferris in the Report of Referee.

The Florida Bar concurs with the Statement of Case and Facts as set forth in Respondent's Initial Brief and, therefore, sees no need to repeat same.

SUMMARY OF ARGUMENT

Pursuant to Rule 3-7.7(c)(5), "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." Mr. Hagendorf has not demonstrated that the referee's recommended discipline is erroneous, unlawful, or unsupported by the record.

There is no dispute as to whether Respondent committed the misconduct. Respondent entered into a negotiated plea agreement with the Nevada Bar which provided that Respondent plead guilty to violating Rules SCR 172 (candor toward the tribunal), SCR 175 (relations with opposing counsel), SCR 181 (truthfulness in statements to others), SCR 203(3) (conduct involving dishonesty, fraud, deceit or misrepresentation), and SCR 203(4), (conduct prejudicial to the administration of justice), Rules of Nevada Supreme Court. (Florida Bar Complaint pp. 3-4) Pursuant to Rule 3-4.6, Rules Regulating The Florida Bar, a final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action is considered conclusive proof of such misconduct in a disciplinary proceeding under this rule. Thus, the plea in Nevada is conclusive proof that Respondent engaged in misconduct. Further, the referee found that Respondent violated Rules 4-3.3 (Candor toward the tribunal), 4-3.4 (Fairness to opposing party and counsel), 4-4.1 (Truthfulness in statements to others), 4-8.4(c) (Conduct involving dishonesty, fraud, deceit or

misrepresentation) and 4-8.4(d) (Conduct prejudicial to the administration of justice), Rules Regulating The Florida Bar. Respondent has not disputed these findings.

Respondent argues this Court should impose discipline similar to sanctions imposed in other jurisdictions. In matters of professional discipline, this Court is not bound by the decision of a foreign jurisdiction. This Court has the ultimate responsibility to determine appropriate sanctions for professional misconduct. The nature of Respondent's misconduct, case law, and the Standards For Imposing Lawyer Discipline support the imposition of a rehabilitative suspension of at least two years.

ARGUMENT

THIS COURT SHOULD APPROVE THE RECOMMENDATION OF THE REFEREE AND SANCTION RESPONDENT BY IMPOSING A TWO-YEAR SUSPENSION FROM THE PRACTICE OF LAW.

The Florida Bar would submit that the Court should impose the recommended discipline of a two-year suspension and payment of The Florida Bar's costs. A two-year suspension would require Respondent to prove rehabilitation before Respondent is eligible to practice law in Florida. A two-year suspension is appropriate based on the nature of the misconduct, case law, and the Florida Standards for Imposing Lawyer Sanctions. The standard of review in attorney discipline cases is a well established principle, i.e., that a referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Moreover, the Court will not reweigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. See The Florida Bar v. Smith, 866 So.2d 41, 45 (Fla. 2004); The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So.2d 1284, 1287 (Fla. 1997).

Respondent's central argument is that this Court should impose the same sanction as the sister jurisdictions of which Respondent is a member. "With regards to attorney discipline, it is ultimately the Supreme Court's task to determine the appropriate

sanction..." The Florida Bar v. Centurion, 801 So.2d 858, (Fla. 2000).

If this Court is inclined to consider the discipline imposed by the other jurisdictions, it bears noting that the discipline board of Nevada reluctantly "accepted the consent judgment." The discipline board stated:

"Had this panel heard all the evidence in this matter, and based upon the information that we reviewed that has been submitted to us at this point, we probably would have recommended a harsher form of discipline relative to this matter." (RCE 2 at 88).

Furthermore, while the State Bar of California imposed a stayed suspension of five months, with an actual sixty-day suspension; Respondent was also placed on probation for one year, ordered to attend a Legal Ethics class and to pass the exam at the end of the session, and ordered to achieve a passing score on Multistate Professional Responsibility Examination (RCE 5).

The Bar maintains that the discipline imposed in the foreign jurisdictions is too lenient for many reasons. The nature of Respondent's conduct mandates a rehabilitative suspension, a suspension of ninety-one days or more. After a dispute arose between Mr. Hagendorf and his landlord, Dennis Duban, over the terms of the lease, and Respondent vacated the premises. Respondent engaged in duplicitous conduct in an attempt to gain ownership of a building owned by his landlord. A bitter legal battle ensued when Respondent asserted several claims against Mr. Duban. During the litigation, Respondent

learned that the recorded title to the office building was in the name of Duban Professional Building, a California Limited Partnership, an entity that did not actually exist. Rather, Mr. Duban had registered the name Jenni Office Plaza, d/b/a Duban Professional Building, in California, and then had failed to renew the registration. Respondent filed documents establishing a California limited partnership called Duban Professional Building, with himself as the general partner, and then filed a quiet title action in Nevada district court asserting that his newly created limited partnership owned the office building. Respondent misled the district court concerning where the defendants could be found, when he was aware that Mr. Duban was represented by counsel and knew counsel's address, he obtained an order for service by publication, and eventually, a default decree quieting title in the new limited partnership. Respondent sent letters to all the tenants of the buildings advising them to forward rental payments to Respondent. Respondent did not receive any rental payments (IB p. 3). Respondent's failure to receive payments was not due to his lack of trying. This indicates an intent to deceive not only Mr. Dubin, but the tenants of the building.

The referee indicated in the Report of Referee that Respondent tried to punish Mr. Duban, and used the legal system to exact revenge on Mr. Duban. (RR at p.6). The referee stated that Respondent "undermined the integrity of the judicial system itself." ((RR at p. 7).

This type of conduct runs contrary to the fundamental principles of lawyer ethics

and professionalism. In The Florida Bar v. Cibula, 725 So.2d 360, (Fla. 1999), the Court stated:

"Not only does the law demand truthfulness under oath, but the obligations of our profession demand it. As former Justice Ehrlich has stated, '...our profession can operate properly only if its individual members conform to the highest standard of integrity in all dealings within the legal system.' " The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla.1990) (Ehrlich, C.J., concurring in part, dissenting in part).

In Cibula, during the course of Cibula's alimony hearings, Cibula misrepresented the amount of his income during two court hearings held in connection with his alimony obligations. Cibula at 2. The judge determined that Cibula misrepresented his income in order to induce his former wife to consent to modify the alimony. Cibula at 3. The Court held that the misconduct warranted a 91-day suspension. Cibula at 5. Likewise, in The Florida Bar v. Miller, 863 So.2d 231, (Fla. 2003), the Court held that a one year suspension, rather than two year suspension or public reprimand, was appropriate for attorney's conduct in an employment discrimination case in which he deliberately concealed that he was aware of the existence of the Equal Employment Opportunity Commission's first notice of client's right to sue. Again, The Court imposed a rehabilitative suspension in The Florida Bar v. Hmielewski, 702 So.2d 218, (Fla. 1997). Hmielewski, while representing a client in a medical malpractice case, made deliberate misrepresentations during the litigation regarding the location of a patient's medical

records. The Court held that this conduct warranted a three year suspension rather than disbarment in light of mitigating factors. Hmielewski at 3.

A review of the Standards for Imposing Lawyer Discipline indicates that suspension is appropriate. The Florida Bar submits that Standard 6.12 of the Florida Standards for Imposing Lawyer Sanctions applies in this case. Standard 6.12, False Statements, Fraud, And Misrepresentation, provides:

> Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action factors in this case.

The referee found that the following mitigating factors were applicable: 1) absence of a prior disciplinary record; 2) full and free disclosure to The Florida Bar in the Florida disciplinary proceeding; and 3) imposition of other penalties and sanctions. Also, the referee considered the following aggravating factors: 1) dishonest or selfish motive; 2) bad faith obstruction of the Nevada Bar disciplinary proceeding; 3) substantial experience in the practice of law; 4) indifference to making restitution. (RR p.9)

As previously stated, Respondent bears the burden of proving that the referee's recommended discipline is unsupported by the record and is clearly erroneous. Respondent has not met the burden. The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983). Therefore, the application of the aforementioned factors, case law, and the nature of the misconduct

clearly establish that a rehabilitative suspension of two years is the appropriate sanction.

CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve the report of referee as to the findings of fact and determination of guilt and impose a two-year suspension on Respondent, and grant costs to The Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC04-859, TFB File No. 2004-00, 743(2B) has been mailed by certified mail #7004 1160 0004 5673 7621, return receipt requested, to Richard A. Greenberg, Respondent's Counsel, whose record Bar address is 325 West Park Avenue, PO Box 925, Tallahassee, Florida, 32302-0925, on this _____ day of _____, 2005.

_____

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Copy provided to:
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

Tiffany Renee Collins, Bar Counsel