IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, vs. GERALD JOHN D'AMBROSIO, Respondent. _____/	Supreme Court Case No. SC04-922 The Florida Bar File Nos. 2002-51,513(15A) 2002-51,610(15A) 2002-51,612(15A) 2003-50,817(15A)

RESPONDENT'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

Prior to the final hearing in this case, the Respondent was advised by a formal written order that there would be a bifurcated final hearing, with one hearing devoted to the merits and a second for the presentation on sanction, which would have included an opportunity to present mitigation and aggravation. Notwithstanding this order and a later affirmation of this procedure, the Referee held a status conference and announced that he was "basically" finished drafting his report without allowing for a hearing on mitigation or sanction. That same day the Referee issued his Report recommending disbarment without setting forth any justification or explanation for that decision. The Respondent has appealed several factual findings and the proposed sanction as the factual findings are clearly erroneous and not supported by the record and the proposed sanction fails to follow the precepts of lawyer sanction in that this lawyer is capable of being rehabilitated.

ARGUMENT

I. DISBARMENT IS NOT AN APPROPRIATE SANCTION FOR A LAWYER WHO ALLEGEDLY FAILS TO PROVIDE ONE CLIENT WITH COMPETENT REPRESENTATION, IS PRESENT IN COURT ON TWO OCCASSIONS POST HIS SUSPENSION FROM THE PRACTICE OF LAW (BUT DOES NOT PRACTICE LAW) AND FAILS TO SECURE TWO WRITTEN RETAINER AGREEMENTS WITH THE SAME CLIENT.

In this case The Florida Bar seeks to disbar a lawyer for matters that would otherwise result in a less stern sanction. While this is troubling enough, an Order was entered bifurcating the proceedings to include a sanction hearing at which he

could argue the appropriate nature of the sanction to be imposed, if any, and present any mitigating factors that were present, but that hearing was never held. Prior to addressing this fundamental error, it is important to note errors in the Bar's position as set forth during trial and in its Answer Brief.

1. Standard of Review.

It seems to be the Bar's position in this appeal ~~is~~ that the Respondent is only "demonstrating that the record contains other evidence" and therefore can~~–~~not prevail on appeal. (Answer Brief at 8-9.) However, the Initial Brief in this case does not merely point to other evidence in the record, i~~.~~e. It points to unrefuted and unrebutted evidence from the documents, the Respondent and the Bar's own witnesses to show that the Referee's findings are "clearly erroneous and lacking in evidentiary support". The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996).

In the case cited by the Bar to support its position, The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004), the Court makes reference to the correct standard of review, but goes further in showing that there was competent evidence in the record to support the Referee, and also opined that the Court would not second guess the Referee's evaluation of conflicting evidence. The Initial Brief in this case does not point to conflicting evidence. Rather, it points to unrefuted evidence in the record and in one instance to a stipulation entered into by the Bar,

to show that the Bar did not prove its case at trial by its standard of proof – clear and convincing evidence.

2. The Bachert complaint.

The Respondent made clear in his Initial Brief that one of the difficulties in objectively reviewing this matter is that the Referee's Report made limited findings of fact and offered unexplained findings of guilt that he did not attribute to any particular Count or conduct referenced in the Bar's complaint.

In its statement of the facts of this case the Bar refers to facts that do not resolve the issues on appeal. For example it makes reference to testimony concerning an alleged conflict of interest but there are no rule violations for same in the Report of Referee.

The real dispute revolving around the Respondent's representation of Bachert, concerns a corporate bankruptcy. The Respondent testified that the proposed filing that Bachert wished the Respondent to file included false information, such that the filing would have been a fraud on the Bankruptcy Court. It was uncontroverted testimony that the Respondent reviewed the Bachert's personal filing and determined that it included false information. It was also uncontroverted that the Respondent notified the Bachert's New York counsel of these discrepancies. In fact the Respondent's work in this regards was recognized in the corporate bankruptcy that was eventually filed in Florida~~New York~~, as well

as via an amendment to the personal filings in New York. During his testimony Bachert admits same. TT 187.[1]

The Bar carefully ignores the central issue that controlled the Respondent's actions vis-à-vis the corporate bankruptcy, which is the paramount ethical obligation- not to mislead a Court. See for example The Florida Bar v. Feige, 596 So. 2d 433 (Fla. 1992). [A lawyer "may not hide behind a client's instructions."] Hhad Bachert acquiesced to the changes requested by the Respondent in order not to file a false bankruptcy -petition, the filing would have been made. However, the Respondent was ethically bound not to file a Bankruptcy pleading which he knew to be false and misleading. The Bar, in its Answer Brief, attempts to misdirect the Court into believing that the Respondent was incorrect in his decision not to file a fraudulent petition. In fact, the Bar argues that Bachert testified as to the accuracy of the subject schedules, while ignoring the actual filings which were entered into evidence. TT 102-106.

If the Court is concerned about Bachert's trial testimony (the only witness for the Bar on this Count of the Complaint), his credibility was clearly impeached.[2]

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[1] The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

[2] For example, Bachert testified that his personal bankruptcy claimed that he owned no interest in any corporation but he had not relinquished any share to the corporation that he owned and was trying to take into a Florida Bankruptcy

Therefore, we are left with the irrefutable fact that the Respondent's representation was not incompetent, but reflected his ethical responsibility to file only truthful documents, even when his client wanted to do otherwise. Bachert was determined to file his false and misleading bankruptcy petitions and ultimately did so. The fact that the Respondent stood on his principles and ethical responsibilities should not result in a disciplinary sanction.

The last area of concern regarding the Bachert representation was the Referee's claim of "unearned fees." In the Initial Brief the Respondent explains the work that was performed for this client and the admission, by Bachert, that he had seen and executed an initial corporate petition which was drafted by the Respondent. As was explained in the Initial Brief, the record is devoid of any testimony as to the value of the service rendered by the Respondent or the reasonable hourly rate that should be used to calculate the fee that was earned. Further, there was no expert testimony offered by the Bar on either element to calculate the fee. Thus, there is nothing in the record to support the Referee's

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proceeding. TT 189. Bachert also admitted that he and his wife claimed no income from the corporation even though there was at least $71,000.00 in income. TT 186. Lastly, he admitted on cross examination that he made a "mistake" in his corporate filing when he asserted the same personal claim that his wife did regarding the corporation, in effect doubling what was owed. TT189-190. Bachert also testified that his wife was continuously in Florida through March 30, 2001, although the New York filing reflects March 23, 2001 as the signature date attested to by the Notary.

finding of an "unearned fee." On the contrary, the modiefication of the New York Petition and the filing in Florida containing the recommendation propounded by the Rrespondent demonstrates a compensable value associated with his service.

On the record presented below the Respondent should be found not guilty of a violation of R. Regulating Fla. Bar 4-1.1, 4-1.5(a) and 4-8.4(a).

3. The two appearances at the courthouse.

Both parties agree that the Respondent appeared in a courtroom on two occasions post his suspension. However, Tthe HE Bar continues to argue that the Respondent practiced law on those occasions. The Initial Brief carefully explains the facts and circumstances of each "appearance" to show that while the Respondent did appear in a court room he did not practice law at that time and those in attendance knew that fact. The only individuals testifying on these two matters were the Respondent and Phyllis Folsom, the mother of a client, who testified concerning the Dennis matter, which will be dealt with later.

There is no testimony or evidence in the record to refute the Respondent's testimony on the Friedman matter. The complaint was initiated by Joel Weissman, counsel for the wife. However, like Mmr. Dennis, Mr. Weissman did not testify, and was never subject to cross examination. The Bar, at pages 3 and 4 of its Brief, points to page 242 through 245 of the trial transcript for the proposition that the Respondent practiced law at a calendar call. However, a careful reading of these

same pages from the trial transcript reveals that the Respondent was explaining that notwithstanding that he had been replaced as counsel, his name still appeared as attorney of record, causing him to appear and make sure the new lawyer was in attendance on this important case for a former client and what transpired therein. There is no evidence in this record to refute the Respondent's testimony or to support the Bar's position that he practiced law or failed to notify his former client of his suspension. In fact Respondent notified the client and the opposing counsel of his suspension, which the Bar ignores.

On the Dennis matter there is some conflicting testimony. However, the conflict comes from the mother of the client who was not in a position to have heard all communications between the client, her son, and the Respondent. Further, she was not in a position to hear the Respondent's conversation with the Court as it was held side bar. TT240. Ms. Folsom testified that she overheard the side bar conversation whiles sitting in the gallery. This position lacks any credibility.

~~The Bar~~The Bar, at page 11 of its brief, claims that Mr. Dennis testified contrary to the Respondent's position. However, a review of the record clearly reveals that Mr. Dennis did not appear and testify.

The Bar also tries to contend that the Respondent did not advise Friedman or Dennis of his suspension because they were not listed on his Rule 3-5.1(g)

compliance affidavit. However, the Respondent testified that he personally notified both clients of his suspension. There is no testimony that Mr. Freidman denies receiving such information, but Ms. Folsom claims that her son did not know. However, ~~the~~ Randy Dennis~~son~~ clearly knew that Mr. Sayler was taking over the representation, communicated with him, offered trial tactics and listed witnesses to be called. The unrefuted testimony of the Respondent that he advised Dennis of his suspension is clear on the record. ~~because the Respondent could not continue although there is a dispute in the record as to the reasons for same.~~ Further, ~~t~~That said the Bar makes no mention of the Respondent's unrebutted testimony that Judge Oftedal and the state attorney were advised prior to the hearing ~~knew~~ R~~r~~espondent ~~he~~ was suspended because he disclosed that fact to them prior to the status conference in question. At the hearing ~~and~~ Judge Oftedal ~~just~~ reset the matter for a time when Mr. Salyer ~~counsel c~~ could appear for Mr. Dennis.

The Bar states that the affidavit was filed "~~…~~ one year after the suspension." ~~'.~~ However, the Bar admitted into evidence the Order to Show Cause filed against the Respondent alleging he did not follow the terms of the suspension. The Order to Show Ccause was dismissed as the Bar represented to the court that the Respondent had complied with the terms of the suspension. This may not be res judicata, but it does demonstrate lack of intent.

4. The Appelman complaint.

The Appelman complaint is fully discussed in the Respondent's Initial Brief and only warrants a few comments in this Reply Brief as the Bar has focused its attention to (1) the claim of a contingent fee on a foreclosure case and (2) the claim that there was no valid retaining lien regarding a personal injury case. There is no argument or trial testimony that the Respondent did not work on both matters and that he should not be paid something for the services rendered and the costs advanced.

Regarding the claim of a contingent fee on the foreclosure case the record clearly reflects that Appelman swore under oath that there was a two hundred dollar hourly rate on the foreclosure case. See Respondent's Exhibit 4. The Bar glosses over this point as it does not fit into its argument.[3] The information on Respondent's Exhibit 4 and the Respondent's trial testimony is in clear contrast to the finding that there was some form of a contingency fee on the foreclosure case.

The Bar's claim that there was no valid retaining lien is equally without merit. The Bar argues that the $10,000.00 stolen by Appelman can not be used as a basis for a retaining lien as that particular $10,000.00 was not a fee or cost related to the representation. Without conceding this point to the Bar, their argument ignores that fees were due on the foreclosure case and that these fees

[3] The Rules of Professional Conduct do not mandate a written retainer agreement on an hourly fee case.

could form the basis for a retaining lien over any of the client materials in his possession. Wintter v. Fabber, 618 So. 2d 375 (Fla. 4th DCA 1993).

It is also important to note that there can be no violation of R. Regulating Fla. Bar 4-16(d) [surrendering papers and property to client upon withdrawal] if there was no request made for same. There is stipulation in the recordThe Bar stipulated that they never spoke to Donald Dowling, identified during discovery as ~~that~~ the lawyer who assisted Appelman ~~after~~ post the Respondent ~~ceased~~ representation, and that Dowling never requested ~~the~~ any documents from the Respondent. ~~TT **NEED CITATION.**~~

While the Respondent must admit that he did not have a written retainer agreement on the personal injury case, his history with this client, and his friendship, show that he was not working for the alleged contingent fee, but was trying to assist someone who was a client, a friend, and who owed Respondent $10,000.00. The only real contingency involved in representing Mr. Appleman, was the likelihood that Mr. Appleman would not pay Rrespondent, or even the doctors who treated him. ~~he~~Respondent should be found not guilty of all other charges related to Appelman.

5. The failure to provide an opportunity to argue sanction.

The record below indicates that the final hearing was held over approximately seven hours on May 23, 2005. At the conclusion of the day the Bar

counsel reminded the Referee that he was going to "set a subsequent hearing . . . for us to comeback as to an appropriate sanctions hearing." TT327, l.8-10. After first telling the parties that he would hold the hearing on June 17, 2005, the Referee decided to set the matter for a status conference first on June 3, 2005. TT327-328. The Referee gave no indication that he had decided not to hold a sanction hearing at that time.[4]

At the Status Conference ~~on~~ held on June 3, 2005,[5] the Referee announces that he has "basically almost finalized the report already." TT 7, l. 7-8. During the status conference the Bar submitted case law to the Court on sanction and the Respondent was only able to make a few isolated remarks on guilt and innocence but did not have an opportunity to make a sanction argument or call any witnesses. The Bar, in its brief, attempts to liken this situation to The Florida Bar v. Baker, 810 So. 2d 876 (Fla. 2002). However in Baker, the lawyer was able to present an argument on the appropriate sanction and was given an opportunity to argue against the disbarment sought by the Bar prior to the Referee making any findings or rulings. In the case at hand, the Respondent was never given an opportunity to

[4] This is critical because the sanction hearing would have allowed the Respondent to present character testimony and other mitigation evidence.

[5] The transcript mistakenly identifies this hearing as being held on November 5, 2005, but the transcript is certified by the court reporter on July 13, 2005 and the Report of Referee is dated June 3, 2005, the same day as the hearing.

argue sanction and was advised that the Referee had already "basically" finished his Report without listening to any presentation from him regarding sanction.

This Court has consistently held that due process requires "a full opportunity to explain the circumstances of an alleged offense and to offer testimony in mitigation regarding any sanction." Id., at 879. The Respondent herein never had the opportunity to present mitigation and in fact was lead to believe at the conclusion of a day of trial that such a hearing would be set in the future. Thus, having the Referee announce, at a status conference, that his Report was basically done (ultimately including a finding of no mitigation), was fundamentally unfair and violates due process.[6]

6. The proposed sanction.

As was stated in the Respondent's Initial Brief disbarment is the most serious sanction that can be imposed in a Bar disciplinary action and reminded the Court that disbarment is reserved only for those cases where rehabilitation is improbable. The Florida Bar v. Davis, 379 So. 2d 942 (Fla. 1980). The Initial Brief also went into great detail on why disbarment is not warranted under the facts and circumstances of this case. Therefore this sanction argument will solely address those sanction issues raised by the Bar in its Answer Brief.

[6] Please note that the Referee in Baker found mitigating factors based upon the testimony and sanction argument that was made in that case.

The Referee in his Report makes no reference to case law or standard in reaching his conclusion that disbarment is warranted. The Bar in an attempt to support the Referee relies on some of the cases already distinguished by the Initial Brief. However, the Bar principally relies upon two cases that merit some discussion. The first case, The Florida Bar v. Rood, 678 So. 2d 1277 (Fla. 1996), the lawyer was disbarred because he "continued to meet with, represent and advise clients and disburse client funds from his bank accounts" and did so while serving a three year suspension (over two cases) from the practice of law. It appears that Roods conduct was systematic and continuous. In this case the Respondent, at worst appeared in Court two times but did not practice law on either occasion.

The second case primarily relied upon by the Bar is likewise dissimilar to this matter. In The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991), the lawyer had previously been disciplined six times[7] over and was found to have practiced law while suspended on four distinct occasions. The Court, finding that further suspension would be "fruitless" decided that disbarment was appropriate, especially when the lawyer did not defend the action. Id., at 282. Reprimanding or suspending the lawyer herein would not be "fruitless." While it is agreed that he has been sanctioned three times, including a private repreimandreprimand, public ~~repreimand~~reprimand, and the ~~only one resulted in a~~ suspension ~~and that was~~ for

[7] Inclusive of two suspensions and one contempt finding.

90 days, none of these matters are for the same type of alleged ethical violation, and reflect isolated incidences.

The Respondent in this case (if the Court upholds all of the Referee's findings) committed several minor infractions warranting, at most a public reprimand and, again depending on the Court's view of the Report, went to Court on two occasions, notifying each tribunal that he was not an attorney of record in either case, did not argue the merits of any matter or engage in the practice of law at any time. Accordingly, there has been no demonstration by the Bar that this Respondent engages in such horrendous conduct that he ought to be disbarred or that this Respondent is not capable of being rehabilitated. The mere use of phrases such as "grave and egregious" does not change the facts, that Respondents behavior did not damage anyone, nor has he ignored his obligation to respond to these claims, and learn from his actions.

CONCLUSION

The bottom line in this case is that no one suffered any damage as a result of the Respondent's actions or inactions in the matters referenced in the Report of Referee. In fact one of the client's (Friedman) never filed a complaint, Bachert committed Bankruptcy Fraud, Dennis never testified – and another (Appelman) stole $10,000.00 from the Respondent. The referee has not made proper finding of fact upon which his ruling could be upheld, nor has he allowed Respondent his

due process right to the sanction hearing which was ordered. There is no continuing pattern of behavior showing that Respondent has ignored his prior difficulties ~~, and~~ or flaunted the authority of the Bar.

Disbarment is reserved for those lawyers who demonstrate a course of conduct evidencing that they never should have been admitted to the Bar and that no lesser sanction would be appropriate as they are incapable of being rehabilitated. This Respondent has learned from these proceedings, and is capable of being rehabilitated but he was never allowed an opportunity to present mitigation to prove that point.

WHEREFORE the Respondent, Gerald John D'Ambrosio, respectfully requests that the Court find him not guilty of the Bar's complaint, and if the Court sustains some of the Referee's findings of guilt impose no more than a public reprimand or a thirty day suspension from the practice of law as a sanction therefore and grant any other relief that this Court deems reasonable and just.

~~Respectfully submitted,~~

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via U.S. mail on this 15th day of December, 2005 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

Respectfully submitted,

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