IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID SAMUEL NICNICK,

Respondent.
_____/

Supreme Court Case No. SC06-290

The Florida Bar File No. 2004-50,937(17J)

THE FLORIDA BAR'S ANSWER BRIEF

JUAN CARLOS ARIAS
Attorney No. 0076414
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 900
Fort Lauderdale, Florida 33309
(954) 772-2245

KENNETH LAWRENCE MARVIN
Attorney No. 200999
Staff Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

JOHN F. HARKNESS, JR.
Attorney No. 123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules Regulating

Standards

PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the final hearing held on July 20, 2006, will be designated as TT ____ (indicating the referenced page number). The Florida Bar will be referred to as "the bar." David Samuel Nicnick will be referred to as "respondent." Exhibits introduced by The Florida Bar at the final hearing will be designated as TFB Ex.____.

STATEMENT OF THE CASE AND OF THE FACTS

In the interest of accuracy, and to ensure the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

This Bar Grievance action arises from a civil suit for fraudulent transfer of stocks initiated by a mother seeking child support for her children's father and grandmother. The respondent represented the mother and plaintiff in the action, Susan Cerny.

The core facts of this case are not in dispute and can be found in the parties' Joint Pretrial Stipulation. The referee, in his report at pages 2 through 4, adopted the following facts found in that stipulation:

1. The Respondent, David S. Nicnick, represented Susan Cerny in the case styled Susan Carney v. Heinrich F. Buettner and Luise Buettner, designated as Case Number 99-08110 (08) (hereinafter referred to as "the litigation").

2. Prior to the aforementioned lawsuit, the Respondent had represented Cerny for several years concerning Heinrich Beuttner's failure to pay child support. In the Susan Cerny v. Heinrich F. Buettner and Luise Buettner litigation, it was alleged that Heinrich Buettner had fraudulently transferred stock to his mother to avoid a child support obligation.

3. Respondent, David S. Nicnick, was the attorney of record for Cerny in the above referenced litigation from the filing of the lawsuit on May 11, 1999 through January 27, 2003, when he was replaced by another lawyer.

4. Luise Buettner retained the services of E.E. Jordan, Esquire, to defend her in the above referenced litigation and he represented Luise Buettner in the litigation from June 1, 1999, through until May 2, 2001, when his Motion to Withdraw was granted by the trial judge.

5. Respondent knew that attorney Jordan was representing Luise Buettner during the dates described in paragraph 4, above.

6. Prior to Mr. Jordan's withdrawal from the litigation, the Respondent prepared two documents concerning a potential settlement of the litigation. These documents were drafted at different times. The Respondent gave both of these documents to his client, Cerny, shortly after he had drafted same.

7. On or about February 17, 2001, or shortly thereafter, one of these documents, styled Compromise and Settlement Agreement, was returned to the Respondent with a signature attached thereto purporting to be Luise Buettner's signature.

8. The Respondent did not inform Jordan that he had prepared either of the aforementioned documents or that it appeared that Luise Buettner had executed the document styled Compromise and Settlement Agreement. The parties agreed that if called to testify, Jordan would have stated that, prior to his withdrawal from the litigation he had no knowledge of either of the aforementioned documents or that his client had allegedly executed the document styled Compromise and Settlement Agreement.

9. Luise Buettner is deceased and was unavailable to testify in this case.

10. E. Howard Seidin, a Criminalist employed by the Broward County Sheriff's Office, if called to testify would have stated that he analyzed the signature on the document styled Compromise and Settlement Agreement and that, in his expert opinion, Luise Buettner did not sign the document and that he had no expert opinions as to who affixed Ms. Buettner's signature to this document.

The final hearing focused on respondent's drafting and use of a document entitled Compromise and Settlement Agreement. [TFB Ex. 1.] The referee found the respondent guilty of certain rule violations relative to the respondent's participation in the negotiation of a settlement agreement with the opposing party and his intention not to notify the opposing party's counsel of the negotiations and

the execution of the final settlement agreement. In particular, the referee found the respondent violated R. Regulating Fla. Bar 4-3.3(a) and R. Regulating Fla. Bar 4-8.4(c) when he "prepared a settlement agreement he knew or should have known would be delivered to Luise Buettner for her consideration without sharing it with Mr. Jordan." [RR 12.] Furthermore, the referee concluded that once the Respondent "gave the agreement to his client with the understanding that it would be delivered to Luise Buettner for her consideration, he had an obligation to share it with opposing counsel." [RR 14.]

The bar requested a 1 year suspension but the referee recommended that the respondent receive a 91 day suspension from the practice of law, that he complete a minimum of 10 hours in Ethics Continuing Legal Education (CLE) courses within six 6 months of the date of Florida Supreme Court's approval of the findings and recommendations, and that he pay all costs in the matter. Respondent challenges this sanction as being too severe, yet there is ample support in the record of the proceedings to uphold this recommendation.

SUMMARY OF THE ARGUMENT

At the final hearing, the bar provided testimony from a detective who investigated criminal wrongdoing relating to this case. The referee also heard the testimony of the respondent and concluded that respondent's conduct violated the Rules of Professional Conduct. Respondent now argues that he did not intentionally engage in any dishonest or deceitful conduct and that the referee's recommended discipline is excessive.

This Court has held a bar disciplinary action must serve 3 purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to the purpose of lawyer discipline because it is fair to society, it is fair to respondent, and it would deter other attorneys from engaging in similar conduct. Given this respondent's intentional misconduct, the aggravating factors found by the referee, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee's recommendation is appropriate.

ARGUMENT

A LAWYER VIOLATES THE RULES REGULATING THE FLORIDA BAR BY KNOWINGLY OBTAINING A SETTLEMENT AGREEMENT FROM AN OPPOSING PARTY REPRESENTED BY COUNSEL AND BY CONCEALING THE PURPORTED SETTLEMENT AGREEMENT FROM THE OPPOSING PARTY'S COUNSEL

Respondent argues that he did not intentionally engage in any dishonest or deceitful conduct and that he did not actively conceal the existence of the proposed settlement agreement, therefore, the discipline recommended by the referee is excessive. The party contesting the referee's findings of fact and conclusions as to guilt, however, must demonstrate either a lack of record evidence to support such findings and conclusions, or that the evidence in the record clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), quoting The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998). A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Canto, 668 So. 2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So. 2d 810 (Fla. 1996); The Florida Bar v. Forrester, 656 So. 2d 1273 (Fla. 1995), quoting The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994). The referee is in the better position to evaluate the demeanor and credibility of the witnesses. See Sweeney, 730 So. 2d at 1271 (Fla. 1998).

Respondent contends that the referee's findings were clearly erroneous and lacking evidentiary support. In support, respondent argues in his Initial Brief that

his testimony at the final hearing was "misunderstood" by the referee. The referee, however, made the following specific findings in his Report of Referee:

> It is undisputed that the Respondent knew that Luise Buettner was represented by E.E. Jordan, Esquire. It is also undisputed that the Respondent prepared a settlement agreement he knew or should have known would be delivered to Luise Buettner for her consideration without sharing it with Mr. Jordan. The Respondent provided the following testimony during the final hearing:

Mr. Arias: You drafted that document; you wrote in those paragraphs; am I correct?

Respondent: Upon my client's instructions.

Mr. Arias: You wrote them?

Respondent: I put the words on the paper, yes.

Mr. Arias: So that's your document; you prepared the document; am I right?

Respondent: I prepared it under my client's instruction.

Mr. Arias: So you prepared the document? And again, no flag came up that that was going to be shown to the defendant in a civil action, in your mind, as you just testified?

Mr. Tynan: Objection. Was that a question, Your Honor, or a statement?

The Court: I think it was a question.

Respondent: I didn't hear it in a question. I thought it was a statement too. Can you repeat the question?

Mr. Arias: And again, no red flag came up at that point that you should have contacted Mr. Jordan?

Respondent: No.

Mr. Arias: Would it be fair to say that you obviously did not want Mr. Jordan to be involved in this settlement?

Respondent: Not at that time. I didn't think that was the time to bring it up.

Mr. Arias: Well, you actually never brought it up to Mr. Jordan; am I right?

Respondent: Not before he withdrew. He withdrew a couple of months later. [RR 11.]

The referee also made the following specific findings in his Report of Referee:

> While the respondent did not have an obligation to reveal to opposing counsel that he had drafted an agreement, once he gave the agreement to his client with the understanding that it would be delivered to Luise Buettner for her consideration, he had an obligation to share it with opposing counsel. His failure to do so, given the aforesaid testimony that he did not want opposing counsel involved at the time, was a violation of Rule 4-3(a) [sic] and Rule 4-8(c). [RR 13.]

Furthermore, while respondent testified that he thought he was "somewhat" shielded from any ethical issue by allowing his client to execute the settlement agreement with the help of the opposing party's caretaker, Mr. Edwards, the following final hearing testimony from the respondent crystallizes the nature of his intentional conduct:

Mr. Arias: Did you think that by using a third party, you relinquish all responsibility for having contacts with a person that is represented by counsel?

Respondent: No. I didn't use a third party. I only dealt with my client.

Mr. Arias: Well, you knew that she was using Edwards?

Respondent: She was.

Mr. Arias: So that shields you from having any ethical issue in your mind?

Respondent: Somewhat.

Mr. Arias: What do you mean by somehow, somewhat?

Respondent: Somewhat. Well, it shields my somewhat. I'm only dealing with my client. I'm talking to my client. My client says, well, we're going to settle this thing; can you draft some kind of settlement agreement for me, because I don't have a computer? Okay. So I did. [TT 103.]

Respondent's testimony at the final hearing supports the referee's findings that respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation and that he concealed a document that he knew was relevant to a pending or a reasonably foreseeable proceeding. Considering that the referee refers to the respondent's own testimony at the final hearing to support his specific findings, the respondent's contentions that the referee's findings are clearly erroneous and lacking in evidentiary support are without merit.

THE REFEREE PROPERLY RECOMMENDED A NINETY-ONE DAY SUSPENSION FOR RESPONDENT'S ETHICAL MISCONDUCT AND THE REFEREE'S RECOMMENDATION IS SUPPORTED BY THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS AND EXISTING CASE LAW.

In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), this Court held that 3 purposes must be held in mind when deciding the appropriate sanction for an

attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter other attorneys from similar conduct. This Court has further stated that a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). The Court will not second–guess a referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." The Florida Bar v. Laing, 695 So. 2d 299, 304 (Fla. 1997).

In addition, The Florida Standards for Imposing Lawyer Sanctions provide a reasonable basis for the referee's recommendation of a ninety-one day suspension for the respondent. First, Florida Standards for Imposing Sanctions 6.0 deals with the proper sanction for an attorney's violations involving duties owed to the legal system. Florida Standards for Imposing Sanctions 6.11(b) provides that disbarment is appropriate when a lawyer improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. The respondent's intentional conduct of drafting settlement documents to be presented to the opposing party and his decision not to inform the opposing party's attorney of the negotiations or the final settlement agreement, is prejudicial to the administration of justice and involves dishonesty, fraud, and deceit for which respondent could

have been disbarred. The bar requested a 1 year suspension in this case.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. It is also well settled that this "Court considers the respondent's previous history and increases the discipline where appropriate." Florida Bar v. Morrinson, 669 So. 2d 1040, 1042 (Fla. 1996). The referee, after a final hearing in the instant case, found in aggravation, pursuant to Florida Standards for Imposing Lawyer Sanctions 9.22(a) and (b), a prior disciplinary offense and substantial experience in the practice of law. In mitigation, the referee found, pursuant to Florida Standards for Imposing Lawyer Sanctions 9.32(b), (e), (g), (l), and (m), absence of a dishonest or selfish motive, full cooperation with the bar, otherwise good character and reputation, remorse, and remoteness of prior offense (2001).

There is authority to support the referee's recommendation that respondent be suspended for the violation of R. Regulating Fla. Bar 4-3.4(a) and 4-8.4(c). This Court held in The Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997), that an attorney who failed to disclose a material fact to a tribunal, unlawfully obstructed another party's access to evidence, and who engaged in conduct involving dishonesty, fraud, and deceit, warranted the imposition of a 3 year suspension. Although Hmielewski presents facts substantially more egregious than the case before us, at the core it deals with conduct by an attorney who undermines justice

by gaining the upper hand in litigation at all cost. As in Hmielewski, the present case is about an attorney making a mockery of the justice system when he deliberately participates in obtaining a settlement agreement from an opposing party without the knowledge of the opposing party's attorney and then intentionally concealing the executed settlement agreement from the opposing attorney. Further, in The Florida Bar v. Myers, 581 So. 2d 128 (Fla. 1991), this Court held that an attorney who failed to inform the tribunal of all material facts known, unlawfully obstructed another party's access to evidence, and who engaged in conduct involving dishonesty, fraud and deceit, warranted a 90-day suspension and a 2 year probation period.

In this case, the referee's recommendation for a 91 day suspension is clearly not excessive considering the respondent's prior discipline and this Court's precedent. Therefore, the Court should rely on the referee's recommendation for discipline and adopt his recommendation for a 91 day rehabilitative suspension. The referee properly weighed the testimony and evidence presented at the final hearing and had a reasonable basis in existing case law and The Florida Standards Imposing Lawyer Sanctions.

CONCLUSION

This Court should approve all the findings of fact and conclusions of guilt within the referee's report and adopt the referee's recommendation of discipline. Respondent has failed to meet his burden of proof or to provide any specific relevant evidence within the final hearing transcripts or any other evidence introduced at the referee level that calls into question the referee's findings and recommended discipline in this case.

The recommendation of a 91 day suspension, completion of a minimum of 10 hours in ethics Continuing Legal Education (CLE) courses within six 6 months of the date of Florida Supreme Court's approval of the findings and recommendations, and payment of all costs in the matter, is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions.

Respectfully submitted,

JUAN CARLOS ARIAS #0076414
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 North Andrews Avenue, Suite 900
Fort Lauderdale, Florida 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and 7 copies of The Florida Bar's Answer Brief has been furnished via regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and has been electronically filed; true and correct copies have been furnished by regular U.S. mail to Kevin P. Tynan, counsel for respondent, 8142 North University Drive, Tamarac, Florida, 33321 and to Kenneth Marvin, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this _____ day of _____, 2007.

_____

JUAN CARLOS ARIAS

CERTIFICATE OF TYPE, SIZE STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

_____

JUAN CARLOS ARIAS