IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC07-2398

v.

TFB File No. 2007-31,452(05B)

JOHN VERNON HEAD

Respondent.
_____/

REPLY/CROSS-ANSWER BRIEF

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SYMBOLS AND REFERENCES

References to the Report of Referee shall be by the symbol ROR followed by the appropriate page number of the Appendix to the bar's Initial Brief (e.g. ROR A1). References to documents contained in the Appendix herein shall be by the appropriate Appendix page number (e.g. A1). References to specific pleadings will be made by title. Reference to the transcript of the final hearing held on May 13, 2008, and May 14, 2008, are by symbol T, followed by the volume, followed by the appropriate page number (e.g., T II p. 2-289). References to the sanction hearing held on June 17, 2008, are by symbol T, followed by the appropriate page number (e.g. T p. 100). References to bar exhibits shall be by the symbol B-Ex. followed by the appropriate exhibit number (e.g. B-Ex. 1). References to bar exhibits that incorporate documents also contained in the bar's motions for the referee to take judicial notice shall be referred to by the appropriate composite exhibit number followed by the Tab number and the document number that was assigned by the bankruptcy court as well as being referred to by the judicial notice exhibit notebook Tab number (e. g. composite B-Ex. 1, Tab A, document 324; Tab 53 judicial notice exhibit). References to respondent's exhibits shall be by the symbol R-Ex. followed by the appropriate exhibit number (e.g., R-Ex. 1 p. 10).

ARGUMENT

ISSUE I

THE REFEREE'S RECOMMENDATION OF A 60 DAY SUSPENSION IS NOT SUPPORTED BY THE CASE LAW WHICH SUPPORTS A SUSPENSION WITH PROOF OF REHABILITATION

Respondent engaged in serious misconduct. He intentionally filed a frivolous suggestion of bankruptcy in his clients' bankruptcy case after he became aware the court was going to order him to disgorge the fees he took from his clients' loan closing (T II pp. 2-210 - 2-211).

Intent, a necessary element to prove an allegation of misrepresentation, can be proven by showing the conduct was deliberate or knowing. *The Florida Bar v. Brown*, 978 So. 2d 107, 111 (Fla. 2008). Intent, however, should not be confused with motive. *The Florida Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999). Respondent's argument that he lacked the requisite intent because he merely filed a "blank form" suggestion of bankruptcy to put the bankruptcy court on notice of his inability to disgorge the fee is disingenuous. Respondent filed the suggestion of bankruptcy knowing he had not filed a petition for bankruptcy, either for himself or for his law firm (T II pp. 2-210 - 2-211). His action was not negligent or done in "good faith." It was intentional.

Respondent intended for the bankruptcy court, the Bankruptcy Trustee, his clients and the creditors to believe he had filed for bankruptcy protection. The suggestion of bankruptcy respondent filed (composite B-Ex. 1, Tab A, document 311; Tab 47 judicial notice exhibit, Appendix page A1) stated "The undersigned hereby gives notice of the filing of bankruptcy by the Firm, John Vernon Head, P. A., under the case styled above in the United States Bankruptcy Court for the Middle District of Florida, Orlando Division, on February 20th, 2007." Respondent served this document on the court, the Bankruptcy Trustee, and the Hackneys. It was filed with the court and thus available to all creditors. Clearly, at the time respondent signed the suggestion and filed it he knew the statement contained therein was not true.

This Court defined "good faith" in *The Florida Bar v. Jackson*, 494 So. 2d 206, 209 (Fla. 1986) as being "'an honest belief . . . . Honesty of intention, and freedom from knowledge of circumstances which ought to put the holder upon inquiry . . . . [It] describe[s] that state of mind denoting honesty of purpose . . . and, generally speaking, means being faithful to one's duty or obligation.'" Quoting Black's Law Dictionary pages 623-624 (5th Ed. 1979). There is no question respondent violated his obligation as an officer of the court not to mislead a tribunal as to a material fact when he knowingly filed the suggestion of bankruptcy with the court advising it he had filed a petition for bankruptcy for his law firm when he had clearly not done so.

Not only did respondent make a material misrepresentation, he also engaged in a conflict of interest with his clients by taking his fee payment from the loan closing. Respondent's former secretary testified that she provided a substantial amount of assistance to the Hackneys in bringing their refinancing efforts to fruition, including calculating what was owed to the only major creditor to pay off his claim in full and what legal fees were due respondent for services rendered in addition to the bankruptcy case (T II pp. 2-26 – 2-35, 2-38, 2-51 – 2-53, 2-103), thus creating the conflict of interest. In aggravation, respondent has a prior disciplinary history for engaging in similar misconduct for filing a frivolous suit and is a practitioner with 35 years of experience.

"[A]s a general rule a suspension is appropriate when an attorney is found guilty of misconduct that causes injury or potential injury to the legal system or to the profession and that misconduct is similar to that for which the attorney has been disciplined in the past." *The Florida Bar v. Grigsby*, 641 So. 2d 1341, 1343 (Fla. 1994). Even without the additional acts of misconduct and the aggravating factors, respondent's intentional self-serving misrepresentation to the court and the Bankruptcy Trustee that interfered with the orderly administration of justice warrants the imposition of a suspension requiring proof of rehabilitation.

In *The Florida Bar v. Dove*, 985 So. 2d 1001 (Fla. 2008), an attorney was suspended for 3 years for knowingly making material misrepresentations to the court in a termination of parental rights and adoption matter and for willfully withholding material information from the court that caused significant adverse effects on the legal proceedings and the interested parties. Ms. Dove filed a petition for custody in an adoption case wherein she falsely stated the legal father had surrendered his parental rights by affidavit. The affidavit from the putative father that Ms. Dove filed would not legally allow the termination of his parental rights. In a notice to the court, Ms. Dove also misrepresented that she filed a petition to terminate parental rights pending adoption and that the petition had been served on the biological parents. Relying on the truthfulness of the statements Ms. Dove made in her filings, the court entered an order terminating the parental rights.

This Court has found that the typical sanction for intentionally lying to the court is disbarment because "[a]n officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process." *The Florida Bar v. St. Louis*, 967 So. 2d 108, 122-123 (Fla. 2007). In *Dove*, this Court indicated it would have disbarred Ms. Dove had it not been for the mitigation in her case, which included evidence of rehabilitation, lack of a prior disciplinary history, and substantial contributions to the legal community in the area of adoption law.

Similarly, respondent intentionally misrepresented to the bankruptcy court facts known to him regarding the filing of the suggestion of bankruptcy for his law firm with the intent of leading the court to rely on the accuracy of his statements, thus interfering with the court's ability to make informed decisions. Respondent's misconduct was not as egregious as Ms. Dove's in that the court was not misled into entering an erroneous order based on respondent's suggestion of bankruptcy. Like Ms. Dove, mitigation exists in the instant case. Respondent disgorged the fees as ordered and enjoyed a good reputation in the community (ROR pp. A16-A17). Therefore, a 3 year suspension is an appropriate sanction.

ISSUE II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE EVIDENCE AND THE REFEREE EXERCISED PROPER DISCRETION IN RULING ON MOTIONS

Respondent seeks to re-argue matters already raised in motions denied by the referee and seeks to challenge the referee's findings of fact.

Respondent's argument in his brief that the bar's Complaint was deficient is without merit. Respondent raised this issue before the referee in his Motion to Dismiss for Failure to Plead in Accordance with Rules of Civil Procedure or, in the Alternative, Motion for a More Definite Statement served on January 15, 2008. The referee denied respondent's motion on March 2, 2008. It is well settled that in bar disciplinary proceedings, the referee's discretion in ruling on motions will not be disturbed absent a clear showing the referee abused that discretion. *The Florida Bar v. Roth*, 693 So. 2d 969, 972 (Fla. 1997). Respondent has made no such showing.

Bar disciplinary proceedings are quasi-judicial administrative proceedings and the Florida Rules of Civil Procedure apply only where the Rules Regulating The Florida Bar are silent. R. Regulating Fla. Bar 3-7.6(f)(1). Rule 3-7.6(h) of the Rules Regulating The Florida Bar, which governs pleadings in bar disciplinary cases, provides that pleadings may be informal and the complaint shall set forth the particular act or acts of conduct for which the attorney is sought to be disciplined. The

bar's Complaint clearly set forth respondent's acts in sufficient detail for respondent to formulate a response and it set forth the Rules Regulating The Florida Bar respondent was alleged to have violated. Therefore, the referee did not abuse his discretion in denying respondent's motion to dismiss the Complaint.

This Court's review of a referee's findings of fact is not in the nature of a *trial de novo*. *The Florida Bar v. Niles*, 644 So. 2d 504, 506 (Fla. 1994). A referee's findings of fact are presumed to be correct and, absent a clear showing they are not supported by the record, will not be revisited by this Court because it is the referee, not this Court, who is in the best position to judge the credibility of witnesses and evidence. *The Florida Bar v. O'Connor*, 945 So. 2d 1113, 1117 (Fla. 2006). To successfully challenge a referee's factual findings, a party must show there is a lack of evidence in the record to support such findings or that the record clearly contradicts the referee's conclusions but this burden cannot be met merely by pointing to contradictory evidence when there is substantial competent evidence in the record supporting the referee's findings. *The Florida Bar v. Glueck*, 985 So. 2d 1052, 1056 (Fla. 2008).

Respondent has failed to show by clear and convincing evidence that the referee's findings of fact were not supported by the record or the testimony or that the referee abused his discretion in weighing the credibility of witnesses. Respondent

merely points to what he believes to be contradictions in the evidence. The referee cited to the evidence that supported his findings. The fact the referee chose to believe some evidence and testimony contrary to the position taken by respondent is insufficient to prove the referee abused his discretion in this matter.

Respondent's argument that he should not be responsible for the costs of the instant bar proceeding is also without merit. The referee found respondent violated the rules governing attorney conduct and awarded costs to the bar. The referee has discretion in awarding costs in bar disciplinary proceedings. *The Florida Bar v. Williams,* 734 So. 2d 417, 419 (Fla. 1999). All of the costs listed by the bar in its Affidavit of Costs are permitted under Rule 3-7.6(q) of the Rules Regulating The Florida Bar and there is no evidence in the record that the costs were excessive, unnecessary, or improperly authenticated. *The Florida Bar v. Kassier*, 730 So. 2d 1273, 1276 (Fla. 1998). Respondent has not shown that the referee abused his discretion in awarding the bar the costs as set forth in its Affidavit of Costs, therefore, the bar is entitled to its costs. *The Florida Bar v. Carson*, 737 So. 2d 1069, 1073 (Fla. 1999). "Where the choice is between imposing costs on a bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member." *Kassier* 730 So. 2d at 1276.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's recommendation of a 60 day suspension and instead impose a suspension of 3 years with payment of costs currently totaling $9,222.80.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to John Vernon Head, Respondent, at 13011 Bellerive Lane, Orlando, Florida 32828-8828, a copy was also furnished by electronic mail to John Vernon Head, respondent, at jvhead1@bellsouth.net; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of January 2009.

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

Undersigned counsel does hereby certify that the Reply/Cross-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.

_____

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Bar Counsel

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