SUPREME COURT OF FLORIDA

CASE NO.: SC08-1786
Lower Tribunal Case No.: 2008-10,621(20D)

THE FLORIDA BAR,

Complainant,

vs.

MICHELLE BERTHIAUME,

Respondent.
_____/

RESPONDENT, MICHELLE BERTHIAUME'S, REPLY BRIEF ON CROSS-PETITION

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, THE FLORIDA BAR, will be referred to as "The Florida Bar" or "the Bar." The Respondent, MICHELE ERIN BERTHIAUME, will be referred to as "Respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC08-1786 held on April 14, April 15, May 22 and July 9, 2009. "SH(March 19, 2010)" will refer to the transcript of the Sanctions Hearing held on March 19, 2010, and "SH(May 19, 2010)" will refer to the continued Sanctions Hearing held on May 19, 2010. "GC(April 24, 2008)" will refer to the Second Grievance Committee. "TFB Exh." will refer to exhibits presented by THE FLORIDA BAR and "R Exh." will refer to exhibits presented by Respondent at the final hearing before the Referee. The Final Report of Referee dated July 1, 2010 will be referred to as "RR."

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar,

"Standard" or :Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

ARGUMENT

I. RESPONDENT DID NOT MINIMIZE THE IMPACT OF SENDING THE OFFENDING DOCUMENT TO PELICAN BANK.

In its Cross Answer Brief, The Florida Bar mistakenly asserts that Respondent attempts to minimize of sending the offending request to Pelican Bank by pointing to the undisputed testimony from bank official, June Kossow, and her attorneys, that they immediately knew that the offending document was not a valid subpoena. (TR, p.244,ll.20-28; TR, p.292, l.22 through p.295, l.1; TR, p.144, l.15 through p.146, l.19).

Contrary to the argument of The Florida Bar, Respondent points to this undisputed testimony, not to minimize the impact of her conduct, but to demonstrate that she did not have a fraudulent or dishonest nature in sending the document to Pelican Bank. The fact that Ms. Kossow and Pelican Bank's attorney were immediately able to determine that the document was not a valid subpoena was based upon the fact that the document was written on the Respondent's law firm stationary, did not indicate that it was issued from any Court, did not contain a case number, and did not contain the names of parties. This evidence clearly establishes that Respondent made a mistake in having the offending document sent to Pelican Bank from her office. (TR, p.609, ll.8-21). Conversely, had Respondent sent a truly

fictitious subpoena that indicated that it had been issued from a Court, with a case number and parties, certainly, The Florida Bar would argue that this was evidence of Respondent's fraudulent and dishonest intent. Similarly, the absence of these factors indicates that Respondent's conduct in sending the offending document to Pelican Bank was, indeed, negligent and a mistake.

II. RESPONDENT'S POSITION AS TO HOW THE DOCUMENT WAS SENT TO PELICAN BANK IS CONSISTENT.

The Florida Bar attempts in its Cross Answer Brief to, again, create the false impression that Respondent's testimony as to how the document was sent to Pelican Bank was inconsistent. Respondent's testimony at the multiple Grievance Committee hearings and at the Final Hearing before the Referee was consistent. Respondent testified that, due to Pelican Bank's failure to return her client's worthless checks with the notation of Insufficient Funds as opposed to Return to Maker she was required to provide the State Attorney evidence that her client did not have sufficient funds in his checking accounts at the time that the checks were presented to Pelican Bank for payment. Respondent instructed her secretary to prepare a request for the documents and the secretary drafted a form subpoena. Recognizing that there was no case filed against Mr. Furlan or his company, Respondent directed her secretary to prepare the request in the form of a letter on her stationary. Respondent's secretary prepared what she thought was a request on Respondent's law firm stationary which was sent to Pelican Bank. GC(April 24, 2008) at p.16, l.17 through p. 17, l.11. Nothing in Respondent's testimony is inconsistent with how the offending document was sent to Pelican Bank. Since the commencement of this proceeding,

Respondent has admitted sending the request to Pelican Bank and accepted responsibility for it.

III. THE FLORIDA BAR'S MULTIPLE RULE VIOLATIONS REQUIRE DISMISSAL OF THE CHARGES AGAINST RESPONDENT OR, IN THE ALTERNATIVE, REINSTATEMENT OF THE FINDING OF NO PROBABLE CAUSE AGAINST HER.

The history of The Florida Bar's conduct in prosecuting Respondent leads to the unfortunate conclusion that The Florida Bar was determined to win at any cost even if it meant violating its own Rules.

It is undisputed that the original Grievance Committee, in reviewing Respondent's conduct in sending the request to Pelican Bank, determined that Respondent had not violated the Rules Regulating The Florida Bar and issued a Letter of Advice. Significantly, the Grievance Committee's initial investigation was conducted by Charles Greene who was the Clerk of the Court of the Twentieth Judicial Circuit. Mr. Greene was in a unique position to investigate Respondent's conduct and determine whether she had violated the Rules Regulating The Florida Bar or whether she had merely made a mistake in sending the request to Pelican Bank.

It is undisputed that The Florida Bar agreed to dismiss its initial Complaint against Respondent due to Respondent's assertion that the reviewing Committee member had a conflict of interest that disqualified him in reviewing Respondent's case. It is undisputed that The Florida Bar did not reinstate the finding of no probable cause recommended by the original

Grievance Committee but, instead, initiated a second investigation based upon the same facts and a claim that Respondent had communicated with a bank officer which The Florida Bar was unable to prove.

It is undisputed that The Florida Bar, in the second Grievance Committee, maintained such a degree of bias and hostility toward Respondent and her witness that Respondent sought to disqualify the Grievance Committee and a member of the Committee, Andrew Epstein. It is undisputed that after the Grievance Committee refused to disqualify itself and voted to find probable cause, Respondent learned of additional conflicts of interest held by Mr. Epstein which merited his disqualification from the Grievance Committee and the nullification of its findings. However, Respondent's Motion for Disqualification was not granted. Instead, Respondent was prohibited from engaging in legitimate discovery to permit her to demonstrate and explain the motive behind The Florida Bar's decision to continue to prosecute this matter despite an original finding of no probable cause. The Florida Bar's conduct merits either the dismissal of this action based upon its failure to follow its own rules or the reinstatement of the original no probable cause finding. While Respondent has acknowledged her conduct in sending the offending document to Pelican

Bank, it appears The Florida Bar is unable or incapable of acknowledging its own rule violations.

IV. RESPONDENT'S CONDUCT DID NOT VIOLATED RULE 4-8.4(c).

Consistent with its win at any cost philosophy, The Florida Bar now argues that it did not abandon its claim that Respondent violated Rule 4-8.4(c) despite its agreement that Respondent had not engaged in fraudulent conduct in sending the request to Pelican Bank. By agreeing that Respondent did not act fraudulently in sending the offending document to Pelican Bank, The Florida Bar affirmatively acknowledged that Respondent did not possess the requisite dishonest, deceptive or fraudulent intent to support a claim under Rule 4-8.4(c).

As set forth in Respondent's Answer Brief, this Court has long recognized the distinction between attorneys who make mistakes and those who engage in stealing, lying, cheating or other morally reprehensible conduct. Both The Florida Bar and the Referee recognized that Respondent did not act fraudulently, deceitfully, or dishonestly and this recognition should be affirmed.

V. THE IMPOSITION OF A NINETY-ONE (91) DAY REHABILITATIVE SUSPENSION IS NOT JUSTIFIED IN THIS CASE.

In its Cross Answer Brief, The Florida Bar again insists that a ninety-one (91) day rehabilitative suspension is the appropriate sanction to be imposed in this case. Not surprisingly, The Florida Bar bases this argument upon its belief that Respondent acted with fraudulent, deceptive or dishonest intent, the very conduct The Florida Bar acknowledged was not present in this case. In addition to abandoning its acknowledgment that Respondent had not acted fraudulently, deceitfully or dishonestly, The Florida Bar, in support of its claim for a ninety-one (91) rehabilitative suspension, also asks the Court to ignore its prior holdings which demonstrate that a public reprimand is the appropriate sanction in this case, absent consideration of the misconduct of The Florida Bar. A review of the cases cited by Respondent on the issue of the sanction to be imposed in this case, demonstrates that this Court has consistently held that a public reprimand is the appropriate sanction to be imposed where the attorney's conduct involves negligence or a mistake. Respondent requests that the Court not abandon its prior rulings as The Florida Bar has urged the Court to do.

CONCLUSION

The conduct complained of in this case occurred in September of 2004. Since that time, Respondent has acknowledged that she sent the offending document to Pelican Bank and accepted responsibility for her conduct. Respondent has been the subject of two (2) investigations and prosecutions for her conduct. The first investigation ended with a finding of no probable cause with a Letter of Advice. Due to misconduct on the part of The Florida Bar, this finding was not accepted and the first case filed against Respondent was dismissed. Respondent was subject to a second investigation and Complaint which, again, involved claims of bias, prejudice and conflicts of interest. During this time Respondent took objective and concrete steps to educate herself and to assure that this type of mistake would not occur in the future. Respondent had The Florida Bar's LOMAS program review her office practices twice. Respondent voluntarily completed The Florida Bar's Ethics and Professionalism Programs. In fact, the Referee found that no aggravating factors were present in this case.

As significantly, during this period of time, Respondent also continued to provide significant *pro bono* legal services to the poor through the Florida Rural Legal Services Community Corporation. Respondent's conduct in this regard affirms that her character is one of honesty and

truthfulness and that her conduct six (6) years ago was that of an inexperienced attorney who made a mistake, a mistake that has not and will not be repeated.

As a result of the foregoing, Respondent submits that an appropriate sanction for the Court to impose in this case would be to:

A. Dismiss the charges against her;

B. Reinstate the original finding of no probable cause; or

C. Order a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the original and seven (7) copies of this Reply Brief to Cross Petition have been provided by Federal Express Air Bill No. _____ to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1900; and a true and correct copy by Federal Express to Henry Lee Paul, Esquire, The Florida Bar, 5521 West Spruce Street, Suite C-49, Tampa, Florida 33607-5958; and Kenneth Lawrence Marvin, Esquire, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of December, 2010.

G. MICHAEL KEENAN, P.A.

By: _____
G. Michael Keenan

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

The undersigned counsel does hereby certify that this Cross Reply Brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer generated briefs.

G. MICHAEL KEENAN, P.A.

By: _____
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