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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ZANA HOLLEY DUPEE,

Respondent.

_____/

Supreme Court Case
No. SC13-921

The Florida Bar File
No. 2012-00,429 (8B)

REPLY BRIEF ON CROSS-APPEAL

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PRELIMINARY STATEMENT

Complainant will be referred to as The Florida Bar, or as The Bar. Zana Holley Dupee, Respondent, will be referred to as Respondent or as Ms. Dupee throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to specific pleadings will be made by title. Reference to the transcript of the final hearing are by symbol TR, followed by the appropriate page number. (e.g., TR 289).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE

We adopt the statement of case in The Florida Bar's Answer and Cross-Appeal.

STATEMENT OF THE FACTS

We adopt the facts in The Florida Bar's Answer and Cross-Initial Brief.

SUMMARY OF ARGUMENT

The referee erred in only recommending a 90-day suspension. The appropriate discipline for the misconduct set forth in the Report of Referee should be a suspension of at least one year.

ARGUMENT

THE RECOMMENDED SANCTION OF A 90-DAY SUSPENSION WAS INAPPROPRIATE.

Based upon the misconduct and rule violations set forth in the Report of Referee, the standards and case law provide that the appropriate discipline would be a rehabilitative suspension of at least one year.

ISSUE I

WHETHER A 90-DAY SUSPENSION IS APPROPRIATE IN LIGHT OF RESPONDENT'S MISCONDUCT.

The Florida Bar's cross-appeal raised only the issue of the proper sanction, based on the findings of guilt on multiple rule violations and the serious nature of the misconduct.

In The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007), the Court found that one instance of an attorneys' failure to disclose resulted in a 91-day suspension. In this case, Respondent repeatedly failed to disclose the existence of the PECT check, filed what she knew to be, at a minimum, an incomplete financial affidavit, failed to correct what she knew to be false testimony by her client and intentionally misrepresented the facts surrounding her client's assets to opposing counsel and the court over the period of approximately one year.

When confronted with the truth, Respondent made excuses, attempting to cast blame on anyone but herself. Respondent attempts to convince this Court that she somehow took remedial measures which make everything above board. Unfortunately, Respondent is mistaken.

For the most part, in Respondent's answer to the Bar's cross-appeal, Respondent does nothing more than re-argue the exact same facts that were argued

in her initial brief and fails to address the Bar's legal argument with regard to sanctions, except to say she did nothing wrong and deserves no sanction.

It has been established by clear and convincing evidence that Respondent was guilty of misconduct. As set forth in Nicnick, intent can be satisfied by merely showing that the conduct in question was deliberate or knowing. By her actions, Respondent clearly knew what she was doing and why she was doing it.

The referee weighed the credibility of the witnesses at the final hearing and found Mr. Silverman's testimony to be frank, concise and professional and, in his discretion, placed great weight in that testimony. RR 4, 18.

Respondent challenges the referee's findings, asserting that he should have believed Respondent and her witnesses instead of Mr. Silverman. As stated in The Florida Bar v. Head, 27 So. 3d 1 (Fla. 2010), "The Court has a long established standard regarding a referee's credibility findings. The Court defers to the referee's assessment and resolution of conflicting testimony because the referee is in the best position to judge the credibility of the witnesses." The Florida Bar v. Batista, 846 So. 2d 479 (Fla. 2003). Head goes on to state that: "[a] respondent cannot prevail on review, when contesting the referee's findings of fact, merely by continuing to restate his arguments. A respondent cannot prevail on review by contesting factual findings and simply pointing to contradictory evidence, when competent substantial

evidence supports the referee's findings. The Florida Bar v. Varner, 992 So. 2d 224, 228 (Fla. 2008).

As shown below, the issues raised by Respondent are the exact same issues previously raised.

Respondent claims that she first became aware that the PECT check had not been negotiated in August of 2011. Even if this argument was taken as true, why then, when Ms. Steinberg's deposition was taken one month later in September of 2011, did Respondent take no "remedial measure" to inform Mr. Silverman that the funds existed? In fact, the act that Respondent asks this Court to believe was a "remedial measure" was the filing of the corrected financial affidavit in October 2011, approximately two months after she claims she became aware the money had been re-deposited.

If Respondent's story held any truth, why did she feel it necessary to personally provide additional documents, including a copy of the PECT check, the former Campus USA statements and the Alarion bank statements, to Mr. Silverman the very afternoon after being questioned about the substantial interest income discovered by Mr. Steinberg on Ms. Steinberg's tax return?

Additionally, based on Respondent's refusal to respond to initial discovery requests, Mr. Silverman was forced to file a Motion to Compel, which was heard

and granted by Judge Monaco on December 1, 2010. After she was placed under court order to respond, no actions by Respondent regarding discovery could be remotely considered as remedial measures.

Contrary to Respondent's arguments, these actions were not "remedial" in nature, but a last minute rush to compliance taken by someone who had been caught in an attempt to deceive.

Contrary to the argument made by Respondent with regard to the "exculpatory evidence" supposedly omitted in the Report of Referee and the Bar's Brief concerning Campus USA and Respondent's response to requests to produce, the responses did not "list records" but simply mentioned the names of several banks. No account numbers or other identifying information was provided. Further, the entire request concerning "cashier's checks" was completely omitted from Respondent's responses. The scrivener's error made by Ms. Boyd does not change the factual information contained or omitted from the responses.

In addition, all responses stated that the records were "available for inspection and copying at the office of the undersigned", in violation of Fla. Family Law Rule 12.285(l), which states: "… all production required by this rule shall take place in the county where the action is pending and in the office of the attorney for the party receiving production." (emphasis added).

Next, Respondent has the audacity to claim that she took "remedial measures" during Ms. Steinberg's deposition by offering to review the documents produced "by my client" (as though she was not aware what she had given Mr. Silverman) and produce any supplemental documents that were missing. She then attempts to blame Mr. Silverman because he "did not dispute this statement" and failed to take her up on her offer. This action is nothing short of an act of deceit and misrepresentation by omission.

It is also interesting to note that, after making her "offer" to Mr. Silverman at the deposition, Respondent alludes to the possibility that her previous law firm had somehow not included all of the documents and that "this is what I was given from the file room." Again, the blame game and Respondent's refusal to take responsibility.

By her own admission, at the September deposition, Respondent knew about the PECT check being re-deposited in August, a month before, and she was also aware that there was now an account containing over $480,000. Where are the remedial measures taken by Respondent to inform Mr. Silverman of these facts?

Respondent made no effort whatsoever to inform Mr. Silverman of any of these facts. Instead, she allowed him to believe that the bank account in question simply contained the $100,000 given to Ms. Steinberg by her husband.

Respondent also attempts to mislead this Court by arguing that because Ms. Steinberg discovered an "Alarion Bank" statement in the box of documents at her deposition that somehow Mr. Silverman magically was aware of the $480,000. In fact, Ms. Steinberg was being asked to produce the Campus USA statements from her personal account. What she was able to produce was one Alarion statement, from her existing account showing a balance of approximately $16,000, and a Campus USA statement that she admitted was a retirement account. Neither the statement from the former Campus USA account which had previously contained over $480,000, nor the current statement from Alarion, showing where the approximately $480,000 was currently deposited, were present in the box of documents. Any argument that they were there is simply another misrepresentation.

Respondent now attempts to argue that she was somehow excused from correcting her client's testimony at the first part of her deposition because "any attempt to correct her would likely have been construed by Mr. Silverman as an attempt to coach the witness." Because of this, Respondent took "remedial action" by telling Mr. Silverman to "get the documents from Bogin Munns." Again, in what way is this a remedial measure? Respondent was aware that the check had been re-deposited and that it was for approximately $480,000. How is telling Mr. Silverman to "go fish" considered remedial?

The argument regarding the updated financial affidavit is yet another vain attempt by Respondent to convince this Court that she performed some sort of remedial act as soon as she became aware that Ms. Steinberg was still in possession of the PECT check. In fact, as previously stated, Respondent claims that she learned the check had not been negotiated in August, 2011. Her argument is that she "adequately remedied" the situation by filing an updated financial affidavit in October, 2011, two months later, with the pre-trial catalog. At no time before the required pre-trial catalog did Respondent make any effort whatsoever to inform Mr. Silverman of her newly acquired knowledge. In fact, it was not until confronted about the substantial interest income on Ms. Steinberg's tax return that Respondent provided the documents that had been requested approximately a year earlier.

Respondent's argument with regard to Ms. Steinberg's plans to create the charitable trust are a misstatement of the record. Ms. Steinberg testified that she wanted Respondent to do whatever research needed to be done and that she believed there were other lawyers in Respondent's firm who would "know how to do all that." Ms. Steinberg did not tell Respondent that she would create a charitable trust. TR 217.

As found by the referee, The Florida Bar has proven by clear and convincing evidence that Respondent violated numerous Rules Regulating The Florida Bar;

however, contrary to the referee's recommended sanction the Bar believes the proper sanction is a one year suspension.

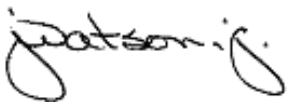
In The Florida Bar v. Draughton, 94 So. 3d 566 (Fla. 2012), the Court imposed a one year suspension for a single violation of Rule 3-4.3, commission of an act that is contrary to honesty and justice…. Here, in the Report of Referee, the referee states that "[t]he facts as set out clearly show the Respondent committed acts that were contrary to honesty and justice." RR 19.

In The Florida Bar v. Head, 27 So. 3d 1 (Fla. 2010), the Court imposed a one year suspension for failing to be forthcoming in bankruptcy court and knowingly filing a suggestion of bankruptcy even though no petition had been filed. The Court found that fundamental dishonesty is a serious flaw which cannot be tolerated, because dishonesty and a lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members.

The Florida Bar asks this Court to uphold the referee's findings and impose a one year suspension.

CONCLUSION

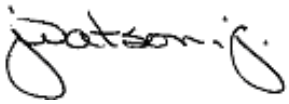
The Report of Referee's findings of guilt as to the cited rule violations were established by clear and convincing evidence. In light of the seriousness of the misconduct, a more appropriate discipline would be a one year suspension and such discipline is supported by case law.



James N. Watson, Jr., Bar Counsel

CERTIFICATE OF SERVICE

I certify that this document has been E-Filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, using the E-Filing Portal and that copies have been furnished to David Robert Ristoff, Respondent's Counsel, at drr@wrpblaw.com, and Staff Counsel of The Florida Bar at aquintel@flabar.org on this 21st day of April, 2014.



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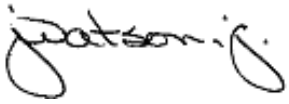
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that this 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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