IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC05-1225

v. TFB File No. 2002-00195(2A)

JOHN JOSEPH KORESKO, V,

Respondent.
_____/

THE FLORIDA BAR'S REPLY BRIEF

AND ANSWER BRIEF ON CROSS APPEAL

Donald M. Spangler, Bar Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5845
Florida Bar No. 184457

Kenneth Lawrence Marvin, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending that Respondent be found not guilty of any misconduct and that neither party should recover its costs.

Complainant will be referred to as The Florida Bar, or as The Bar. John Joseph Koresko, V, Respondent, will be referred to as Respondent, or as Mr. Koresko throughout this brief.

References to the Report of Referee shall be by the symbol "RR" followed by the appropriate page number. (e.g., RR, 12).

References to specific pleadings will be made by title. References to the transcript of the final hearing are by symbol "TR", followed by the volume, followed by the appropriate page number. (e.g., TR III, 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 AND THE FACTS

Complainant, The Florida Bar, relies upon the Statement of Case and Statement of Facts set forth in its Initial Brief.

SUMMARY OF ARGUMENT

REPLY BRIEF

As to Issue I, The Florida Bar introduced evidence at trial pertaining to Respondent's conflict of interests in the Pennsylvania foreclosure action consisting of all pleadings filed in that action as well as the examination of the Respondent. The evidence, though succinct, is clear and convincing.

As to Issue II, the evidence clearly demonstrates that Respondent's pervasive role in the Pennsylvania foreclosure action violated Rules 4-1.7 and 4-1.9, Rules Regulating The Florida Bar.

As to Issue III, should the Court agree that The Florida Bar has proven violations of those rules, the Bar should be entitled to recover its costs.

ANSWER BRIEF ON CROSS APPEAL

As to Issue I on cross appeal, the referee relied on a developed body of case law regarding prosecutorial delay and, where the delay was comparatively slight and there was no prejudice to Respondent caused by the delay, properly denied Respondent's motion to dismiss on that basis.

As to Issue II, the denial of Respondent's costs by the referee properly fell within his discretion and there was no abuse of discretion shown.

ARGUMENT

REPLY BRIEF ISSUE I

THE EVIDENCE OF RESPONDENT'S CONFLICT OF INTEREST IN THE PENNSYLVANIA FORECLOSURE ACTION, THOUGH SUCCINCT, IS SUFFICIENT AND IS CLEAR AND CONVINCING.

Respondent argues that The Florida Bar "devoted very little focus or time" during trial of this case to the issue of Respondent's role in the Pennsylvania foreclosure litigation. An examination of the record, however, discloses that the Bar's trial exhibit 35 consisted of all of the pleadings that had been filed in that action (TFB Ex. 35), and that Bar counsel cross-examined Respondent as regards his role in that action (TR IV 441-442). The record further establishes that the plaintiff in that action, FBCCII, was a creature of Respondent's creation, wholly under Respondent's dominion and control (TR II 165-167), that he employed outside counsel in the form of a colleague for the purpose of bringing the foreclosure action because he recognized the conflict of interest (TR IV 441-442), that he caused FBCCII to sue himself in his representative capacities as Trustee of Magee Corporation Retirement Plan and Trust and as Executor of the Estate of Marilyn Magee (TFB Ex. 35), that he appeared as counsel for the estate and the trust (TFB Ex. 35) and that he raised no affirmative defenses but rather admitted each and every allegation contained in the foreclosure complaint, including the reasonableness of a plea for a $40,000 attorneys fee award (TFB Ex. 35). Those pleadings speak for

themselves in a clear and convincing manner. The fact that the evidence of Respondent's conflicts was succinct does not dilute its effect. No amount of belaboring of the point or repetitive questioning of the witness would have educed any additional information. The simple fact remains that Respondent found himself on both sides of the Pennsylvania foreclosure action as both plaintiff, in the guise of the partnership he created, and as defendant in his fiduciary roles as executor and trustee. Respondent's counsel had the opportunity to attempt to rebut the Bar's evidence in re-direct examination but did not do so (TR IV 446-447). When the perpetrator is found standing over the bleeding body of his victim, holding a smoking gun, and admits that he pulled the trigger, no amount of legal verbosity will add to the enlightenment of the trier of fact.

REPLY BRIEF ISSUE II

RESPONDENT'S VIOLATION OF RULES 4-1.7 AND 4-1.9 WARRANT A SUSPENSION OF 91 DAYS OR MORE. THE COURT SHOULD REMAND THIS MATTER FOR CONSIDERATION OF MITIGATING AND AGGRAVATING FACTORS.

The Florida Bar's Initial Brief presents precedent supporting a suspension of 91 days or more for violation of R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests) and R. Regulating Fla. Bar 4-1.9 (Conflict of Interest, Former Client). If the Court agrees, it can order the case remanded to the referee to conduct a hearing to consider aggravating and mitigating factors and make a recommendation as to the sanction to be imposed upon Respondent.

REPLY BRIEF ISSUE III

IF DISCIPLINE IS TO BE IMPOSED UPON RESPONDENT THE CASE SHOULD BE REMANDED TO CONSIDER TAXATION OF COSTS IN FAVOR OF THE BAR.

Should the Court agree that discipline should be imposed for violation of R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests) and R. Regulating Fla. Bar 4-1.9 (Conflict of Interest, Former Client), the Court should remand the matter to the referee for a hearing to consider taxable costs.

ANSWER BRIEF ISSUE I

THE REFEREE CORRECTLY DENIED RESPONDENT'S MOTION TO DISMISS FOR PROSECUTORIAL DELAY BASED UPON THIS COURT'S BODY OF PRECEDENTIAL CASE LAW

In denying the Respondent's pre-trial motion to dismiss the referee properly relied upon a body of case law that has developed addressing this issue. Respondent urged the referee to determine that Bar counsel's delay of two years in the filing of the formal litigation in this matter should work to Respondent's benefit to the extent that he should escape responsibility for his alleged misconduct. There is no question that the two year delay resulted from dilatory handling by Bar counsel (which was candidly acknowledged before the referee), but rather than prejudicing Respondent, the delay benefited him. No witnesses died or become inaccessible to Respondent during this two year hiatus. There is no showing that his reputation has been tarnished. No public records requests were made concerning his complaint/disciplinary record with The Florida Bar. In fact, he had submitted and had published articles in The Florida Bar Journal during this period.

In his initial brief on cross appeal, the Respondent advances fifteen cases in support of his argument that this case should have been dismissed by the referee for prosecutorial delay. Of those fifteen cases, only three, which are discussed herein, resulted in dismissal. They are Murrell v. The Florida Bar, 122 So. 2d 169 (Fla. 1960), The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978) and The Florida Bar v. Walter, 784

So. 2d 1085 (Fla. 2001). The remaining twelve cases, also discussed herein, are relied upon by Respondent as a result of dicta contained in those opinions, but do not have precedential value.

Murrell involved a complaint of misconduct which occurred in 1951 but was not filed until 1954 or 1955, which was tried before a grievance committee in February 1955 and found to be lacking in merit. The complaint was re-asserted by the complainants more than a year after the grievance committee hearing, in January 1956. A new grievance committee heard the evidence in the case, beginning in September 1957 and continuing on various dates through March, 1958, at which time a finding of probable cause was reached. The formal complaint was filed with this Court in August, 1959. In the interim the complainants had filed (in 1958) and tried a civil action for damages against the respondent, in which the trial court made a finding for the respondent and observed that the complainants' testimony was unworthy of belief and utterly absurd. This Court granted the respondent's motion to cease and desist in 1960, based apparently upon the lack of merit of the complaint as well as the delay in prosecuting the matter for nine years after the alleged misconduct had occurred.

Although The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978) was also dismissed, the circumstances which led to the dismissal are distinguishable from those in the case at bar. Rubin was decided based upon the no longer extant Code of Professional

Responsibility and the Integration Rule of The Florida Bar. In Rubin the Bar was found, *inter alia*, to have violated Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(b) which required that a report of referee recommending a private reprimand (no longer a recognized form of discipline) was not to be filed in the Supreme Court unless review of the referee's recommendation was sought. By having done so, the Court found the Bar to have acted improperly by prematurely breaching the confidentiality which otherwise surrounded a private reprimand. Further, the Bar was found to have violated Fla. Bar Integr. Rule, art XI, Rule 11.09(3)(a), which provided that proceedings to commence a review of the report of referee were to be initiated by the filing of a petition for review within thirty days after serving a copy of the referee report on the respondent, a process no longer applicable under the pertinent Rules Regulating The Florida Bar which apply to the case at Bar. It therefore appears that, while the dicta found in Rubin may still be appropriate, Rubin no longer serves a *stare decisis* role since the adoption of the current Rules Regulating The Florida Bar.

In Walter, though dismissing the complaint, this Court found that even as many as seven years delay was a "close call" and that the Court needs to look at the "unique circumstances" (Id at p. 1087) of each case to determine whether dismissal is warranted. The complaint in Walter was filed in 1999, based on misconduct that was alleged to have occurred in 1992, seven years earlier. In the case at bar, the Pennsylvania foreclosure

action was filed on March 23, 2003 and this formal complaint was filed on July 18, 2005, two years later.

Thus it appears that the three cases relied upon by Respondent in which dismissal was appropriate are all distinguishable here, either on the basis of the length of prosecutorial delay involved or on the fact that the procedural violations that required dismissal are no longer applicable. The remaining twelve cases relied upon by Respondent are also factually distinguishable, as discussed below.

In the case of The Florida Bar v. Wagner, 197 So. 2d 823 (1967) the Court's disposition of the respondent's motion to dismiss was reserved to allow the Bar to file its complaint within fifteen days and proceed to judgment within ninety days, whereupon "…[T]his Court will consider the merits of the cause and determine whether, by reason of the delay, ***the rights of the respondent have been prejudiced***." Id at p. 823) (Emphasis added).

The opinion in The Florida Bar v. Fussell, 474 So. 2d 210 (Fla. 1985) offers little insight regarding the length of prosecutorial delay involved, other than an inference based upon the fact that the discussion of Count I of the Bar's complaint refers to a complaint having been filed in June 1979 and a grievance committee hearing on January 15, 1980, and the discussion of Count III of the Bar's complaint refers to a complaint having been filed on June 26, 1979, whereas the opinion is dated July 3, 1985, six years after the

referenced complaints were filed. The Court departed from the referee's recommended two year suspension in part because of the delay, but in part because of the mitigation offered by respondent. It is apparent, however, that the Court did not deem dismissal to be required despite an apparent delay of up to six years from the filing of the complaints to a final disposition.

In The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978), despite what appears to have been a delay of four or five years from the time of the grievance committee proceedings (1973 and early 1974 (Id at p. 6)) until disposition of the case by this Court (March 2, 1978) the case was not dismissed as Respondent urges in the case at bar, but Mr. Papy was suspended for a period of one year.

In The Florida Bar v. Randolph, 238 So. 2d 635 (Fla. 1970), despite the delay of seven years from inception to conclusion of the disciplinary process, the Randolph case was not dismissed, and Mr. Randoph was suspended for ninety days, as recommended by the referee, who had rejected the Bar's offer to stipulate to a public reprimand.

In The Florida Bar v. Davis, 419 So.2d 325 at 327 (Fla. 1982), the court found that though "the delay in reaching a final resolution is regrettable, ***it was not prejudicial*** ..." (Emphasis added). The opinion is silent regarding the facts of any prosecutorial delay, other than a reference to the "protracted duration of the case" (Id at p. 327). Rather than dismissing the case for prosecutorial delay, as Respondent urges here, the Court accepted

the referee's recommendation of a 90 day suspension and public reprimand, without reduction despite any delay.

In The Florida Bar v. Kaufman, 347 So. 2d 430 at 432 (Fla. 1977), the Court placed respondent on two years probation rather than suspend him for two years as recommended by the referee. The Court apparently considered the fact that "the charges were filed more than three years before the matter was argued in this Court," then went on to state "During that time respondent has had time to evaluate his conduct and has experienced personal and professional detriment," but the opinion is silent as regards whether that consideration and inferred prejudice resulted in a reduction of the sanction or whether the respondent's inferred rehabilitation was the precipitating factor in the departure from the referee's recommendation, or resulted from some combination of both. Regardless, the case was not dismissed, as Respondent here urges, despite any inference of prosecutorial delay.

In State of Florida ex rel. The Florida Bar v. Oxford, 127 So. 2d 107 (Fla. 1961), the Court observed as an afterthought that the proceeding had begun more than four years previously, but nonetheless ordered a public reprimand. It is apparent from the comments of the Court throughout the opinion that the imposition of a relatively lenient sanction was due to the merits of the case and not prosecutorial delay.

Respondent cites The Florida Bar v. Barrett, 897 So. 2d 1269 (Fla. 2005), a case

in which a pre-trial motion to dismiss for prosecutorial delay was denied and upheld by this Court, which entered an order disbarring Barrett, and affirming the referee's denial of the pre-trial motion to dismiss.

The respondent in The Florida Bar v. Lipman, 497 So 2d 1165 (Fla. 1986) was disbarred in spite of his argument that the case should have been dismissed due to the Bar's delay in prosecuting him. Where Lipman had been suspended upon a felony conviction in October, 1981, the suspension was then terminated in December 1984 upon the reversal of the felony conviction (due to prosecutorial misconduct), and the Bar filed it's disciplinary complaint in June, 1985, the Court disregarded his argument for dismissal of the case and found that the Bar had acted within a reasonable time after the December 1984 termination order.

John L. James was suspended for a period of four months in The Florida Bar v. James, 478 So. 2d 27 (Fla. 1985), upon the recommendation of the referee, where there had been a delay of four years from the respondent's misconduct until the referee filed his report. The opinion is silent as regards when, during that four year period, the Bar was placed on notice of the misconduct, but even assuming the Bar had the advantage of notice for the full four year period, the case was not dismissed for prosecutorial delay as the Respondent here would have the Court order.

The case of The Florida Bar v. Arnold, 767 So. 2d 438 (Fla. 2000) is another case

where the referee found there to have been a measure of prosecutorial delay which was factored into the discipline as a mitigator, but which nonetheless did not result in dismissal, but rather in a 60 day suspension.

Respondent cites the case of The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978) as additional authority for the concept of prosecutorial delay, but a reading of McCain discloses that the Court found that the Bar had acted "promptly" (Id at p. 705) following McCain's resignation from the Court and "has been diligent in its efforts" (Id at p. 706).

The referee below properly applied this body of case law to the facts of the case at bar and denied Respondent's motion to dismiss, recognizing that this Court has not dismissed a lawyer discipline case for prosecutorial delay of less than seven years, has declined to dismiss cases involving delays of three, four, five and six years, and has inferred a requirement that the respondent had been prejudiced by the delay (see Wagner, Davis and Kaufman, supra). Here the delay amounted to two years and there was no prejudice to the Respondent.

ANSWER BRIEF ISSUE II

THE REFEREE PROPERLY EXERCISED HIS DISCRETION IN DENYING RESPONDENT'S COSTS.

Respondent argues in support of his quest for an award of costs that the Bar's case was frivolous, and should not have been prosecuted. He points to the fact that the Bar has sought review of only the issue involving the Pennsylvania foreclosure action as indicative of that assertion. The record, however, establishes that the Bar's case turned on two critical disputed issues of fact, and that had the evidence met the clear and convincing standard on either or both, the referee would have made recommendations of guilt.

The first of those issues was whether or not Mr. and Mrs. Magee's wills had been properly executed and notarized. Mr. Magee's testimony, if un-refuted, clearly established that Respondent had given the wills to him to take home to his wife, where she signed her will and he later returned it to Respondent, un-witnessed and un-notarized (TR I 34-37). Respondent's testimony was diametrically opposed to Mr. Magee's (TR IV 372-373), and more importantly, the testimony of a very persuasive and disinterested witness (Curran) buttressed Respondent's testimony and refuted Mr. Magee's (TR II 143-145). Hence Bar counsel acknowledged in The Florida Bar's written closing argument that the Bar's evidence had failed to meet the required standard of proof on that issue (The Florida Bar's Closing Argument, p. 1).

The second disputed issue was whether or not the Magee Corporation was a sham, created solely for the purpose of assisting the Magees in a tax evasion scheme, or was intended to meet a legitimate business need and purpose. The Bar's expert testified that, in her opinion, the corporation did not meet that test and therefore the scheme orchestrated by Respondent was created solely to evade the imposition of personal income tax upon Mrs. Magee's retirement funds (TR II 186-188). Admittedly, the Bar's expert acknowledged in response to a series of hypothetical questions by the referee, that had the Magee Corporation served any legitimate business purpose, the scheme would have met IRS tests (TR III 243-249). Thus the testimony of Mr. Magee that neither he nor his wife had been counseled by Respondent to engage in some form of business activity, coupled with the fact that, in reality, it never did so (TR I 75), supported the Bar's contention and that of its expert, that the scheme devised by Respondent was not a legitimate tax avoidance plan, but in truth and in fact was a tax evasion plan. Respondent, of course, testified that he did in fact counsel Mrs. Magee (whose testimony was unavailable due to her death in 1999) to engage in some business activity in order to legitimize the corporation (TR IV 434-436), thereby disputing Mr. Magee's testimony to the contrary. The trier of fact either chose to believe Respondent on this lynchpin point, or determined that the Bar's disputed evidence to the contrary was not clear and convincing.

Respondent would have the Court determine that based on the failure of the Bar's evidence on these two disputed factual issues, the Bar's case was frivolous, should never have been prosecuted and therefore he is entitled to recover costs. Were the Court to so decide, it would be tantamount to a declaration that if you try a disputed case and lose, your case must, as a matter of law, have been frivolous.

Respondent has appropriately cited The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982) as holding that the referee should take a discretionary approach to the awarding of costs. Respondent advanced the same argument for an award of costs in his Final Argument and Post Hearing Memorandum (pp 25-31) that is advanced in Respondent's brief, and the referee, exercising his discretion, explicitly denied those costs (RR 12). Respondent has demonstrated no argument or supporting facts that would lead to the conclusion that the referee abused his discretion in doing so.

CONCLUSION

The Court should make a determination based upon the clear and convincing evidence in the record that Respondent's conduct as reflected by the Pennsylvania foreclosure action was in violation of R. Regulating Fla. Bar 4-1.7 (Representing Adverse Interests) and R. Regulating Fla. Bar 4-1.9 (Conflict of Interest, Former Client) and should remand this matter to the referee to conduct a dispositional hearing to consider the Florida Standards for Imposing Lawyer Sanctions, including evidence of aggravation and mitigation, and make a recommendation as to the appropriate sanction to be imposed upon Respondent. The referee should also be directed to make recommendations of the appropriate taxation of costs in favor of The Florida Bar and against Respondent.

Respectfully submitted

_____

Donald M. Spangler, Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief and Answer Brief on Cross Appeal regarding Supreme Court Case No. SC05-1225, TFB File No. 2002-00195(2A) has been mailed by certified mail #7004 1160 0004 673 8055, return receipt requested, to John A. Weiss, Counsel for Respondent at 2937 Kerry Forest Parkway, Suite B2, Tallahassee, Florida 32309-6825 on this _____ day of July, 2006.

_____

Donald M. Spangler
Bar Counsel, The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850)561-5845
Florida Bar No. 184457

Copy provided to:
Kenneth L. Marvin, Staff Counsel

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

Undersigned counsel does hereby certify that the Reply Brief and Answer Brief on Cross Appeal 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.

_____

Donald M. Spangler, Bar Counsel