

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 96,980

TFB No. 98-10,468(20A)

JAMES EDMUND BAKER,

Respondent.

_____ /

INITIAL BRIEF
OF
RESPONDENT, JAMES EDMUND BAKER

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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, James Edmund Baker, will be referred to as “Respondent”. “RR” will denote the Report of Referee. “Tr” will refer to the transcript of the final hearing held on May 5, 2000.

STATEMENT OF THE CASE AND THE FACTS

Statement of the Case

The Florida Bar filed its formal Complaint on November 9, 1999, and an Amended Complaint on December 16, 1999. Respondent filed an Answer to the Amended Complaint on January 3, 2000.

The Final Hearing in this matter was held on May 5, 2000. The Report of Referee was executed on May 26, 2000, and filed with this Court on June 5, 2000. The Report was considered by the Board of Governors of the Florida Bar at its meeting which ended September 15, 2000, and the Board voted not to seek review of the discipline recommended by the Referee. On or about January 2, 2001, Respondent filed a Motion to Remand to Referee for Further Evidentiary Proceedings with this Court. The Respondent's Petition for Review was timely filed with this Court also on January 2, 2001.

Statement of the Facts

The facts of this case are as follows:

At all times relevant to the events which are the subject matter of this action, Respondent was married and had been living in New York with his wife and children. (Tr. page 17, line 18-19; page 18, lines 2-5). Respondent and his wife also owned a home in Miami, Florida, which they had purchased in 1990 or 1991. (Tr. page 18,

lines 6-10; page 57, lines 3-8). Respondent's parents lived in the Miami home. (Tr. page 58, lines 17-18; page 65, lines 20-21; page 71, lines 16-18; page 57, lines 3-8).

At some time before April 1997, Respondent moved from New York to Ft. Myers, Florida, to begin new job as staff attorney for the Lee County School Board. (Tr. page 18, line 20 - page 19, line 6; page 57, lines 1-2). His wife and children remained in New York, and his wife was responsible for making the monthly mortgage payments for the Miami home. (Tr. page 20, lines 18-20).

On or about April 9, 1997, Respondent's wife abandoned the marital home in New York and took their children with her. (Tr. page 19, lines 9-13; page 56, line 23). Simultaneously, Respondent's wife obtained a temporary restraining order against Respondent. (Tr. page 19, lines 10-13; page 56, lines 9-14). Additionally, during the same month, the mortgage company caused notices of foreclosure as to the Miami property to be sent to Respondent and his wife at their New York address, as well as to their Miami address. The notice was not sent directly to Respondent in Ft. Myers, Florida. (Tr. page 20, lines 19-24). Respondent's wife personally received the written notice of foreclosure of the Miami property, because she continued to pick up the mail delivered to the former marital home in New York. (Tr. page 58, lines 4-8). Respondent's parents received the notice of foreclosure at the Miami property, and they contacted Respondent and advised him of the foreclosure notice. (Tr. page 20,

lines 19-24; page 31, lines 2-6).

Respondent and his wife had been communicating freely with each other despite the temporary restraining order then in place. (Tr. page 20, lines 13-18, 25; page 21, lines 1-2; page 58, lines 9-14; page 61, line 22-23; page 61, line 19 - page 62, line 2). Upon learning of the pending foreclosure from his parents, Respondent in turn contacted his wife by telephone to find out what was going on. (Tr. page 20, lines 18-24; page 58, lines 9-14). Respondent and his wife agreed to put the Miami property up for sale “by owner” and that Respondent’s father, who was still residing in the Miami house, would assist in its sale. (Tr. page 19, line 25 - page 20, line 6, page 20, line 25 - page 21, line 5; page 58, lines 9-18; page 66, lines 9-10; page 71, lines 16-18). Respondent’s father, not Respondent, found a buyer. (Tr. page 58, lines 17-18; page 62, line 23). Neither Respondent nor his wife met with, spoke with, or in any way negotiated with the buyer. (Tr. page 23, lines 1-3; page 74, line 25 - page 75, line 2).

On or about July 1, 1997, the buyer offered a Contract for Sale and Purchase on the Miami house. (Tr. page 24, lines 2-7). On or about July 3, 1997, Respondent signed the Contract. (Tr. page 24, lines 8-14). At about the same time, Respondent retained a real estate attorney in Miami, Larry Parks, to review and prepare documents necessary to effectuate the closing on behalf of Respondent and his wife. (Tr. page 6, lines 5-25; page 24, lines 15-22).

Mr. Parks subsequently requested from Respondent documents relative to the preparation for the sale of the Miami property. (Tr. page 25, lines 6-9). Respondent's wife had with her in New York all of the documents necessary for the sale of the Miami home. (Tr. page 25, lines 7-8; page 27, lines 6-13). Respondent flew to New York the weekend following the execution of the Contract for Sale and Purchase, discussed the pending sale with his wife, and his wife provided him with the original documents to effect the sale. (Tr. page 25, lines 6-9; page 27, line 25 - page 28, line 7). Upon his return to Florida, Respondent immediately forwarded the documents to Mr. Parks, who then prepared the closing documents and delivered the closing documents to Respondent for signature. (Tr. page 25, lines 6-9). Upon receipt of the closing documents, Respondent signed both his name and his wife's name on all closing documents. (Tr. page 26, lines 11-14; page 27, lines 14-17; page 28, lines 9-15). Respondent asked his secretary, Marlene Keller, to notarize the signatures, which she did. (Tr. page 36, lines 21-23; page 37, lines 19-21; page 91, lines 2-5). Respondent then sent copies of the closing documents to his wife (Tr. page 42, line 21; page 59, lines 15-16) and returned by overnight delivery the original closing documents to Mr. Parks (Tr. page 36, lines 11-15), who completed the closing and delivered the sale proceeds to Respondent. Upon receipt of the sale proceeds, Respondent negotiated the check and paid outstanding marital and family debts,

including the marital debt to Respondent's parents. (Tr. page 39, lines 16-20; page 50, line 4).

SUMMARY OF ARGUMENT

Respondent was not afforded a separate hearing to explain the circumstances of his alleged offense and to offer testimony and evidence in mitigation of any discipline to be imposed which constituted a violation of his right to due process of law.

The Referee's findings of fact are erroneous, not supported by the record, and do not support a finding that Respondent violated any Rules Regulating The Florida Bar.

If this Court finds that Respondent violated any Rules Regulating The Florida Bar, consideration of the true and correct facts and circumstances, mitigating factors, case law, and purposes of attorney discipline show that Respondent should receive an admonishment for minor misconduct or, at most, a public reprimand.

ARGUMENT

I. THE REFEREE’S FAILURE TO HOLD A SEPARATE HEARING TO AFFORD RESPONDENT THE OPPORTUNITY TO EXPLAIN THE CIRCUMSTANCES OF THE ALLEGED OFFENSE AND TO OFFER TESTIMONY AND EVIDENCE IN MITIGATION OF ANY DISCIPLINE IMPOSED CONSTITUTES A VIOLATION OF RESPONDENT’S RIGHT TO DUE PROCESS OF LAW.

The Final Hearing in the above-styled cause was held on May 5, 2000. In his Report of Referee dated May 26, 2000, the Referee recommended that Respondent be found guilty of violating Rules 4-8.4(a); 4-8.4(b); and, 4-8.4(c), of the Rules Regulating The Florida Bar and be disbarred from the practice of law in the State of Florida for a period of five (5) years. Prior to the Referee making his recommendation as to discipline and in advance of any such discipline being imposed against Respondent, Respondent was not provided the opportunity to provide testimony and other evidence to the Referee in mitigation in violation of his right to the due process of law as required in The Florida Bar vs. Carricarte, 733 So.2d 975 (Fla. 1999); The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997); and Sections 9.1 and 9.3, Subsection 9.32, Florida Standards for Imposing Lawyer Sanctions.

This Court has previously held that, in determining the discipline to be imposed, due process requires that the attorney be permitted to “explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed.”

The Florida Bar v. Carricarte, 733 So.2d 975 (Fla. 1999). In Carricarte, the attorney alleged that he had no notice that The Florida Bar was seeking a mental health evaluation as an element of the discipline to be imposed until after both parties had rested at the final hearing and, thus, he had not opportunity to defend against it. Accordingly, Carricarte argued that the Referee's recommendation that a mental health evaluation be required was a violation of his right to due process of law. The opinion noted that there were two separate hearings held, one as to guilt and the other as to discipline. At the end of the hearing on guilt, the Bar specifically stated the discipline that it was seeking, thereby giving Carricarte notice of the discipline that he was facing. The hearing on the recommended discipline took place almost one month later, thereby providing Carricarte with ample time for preparation of a defense and an opportunity to present any evidence he felt was appropriate. In finding that there was no due process violation, the Court relied on The Florida Bar v. Daniel, 626 So.2d 178 (Fla. 1993), which held that an attorney's voluntary choice not to take advantage of an opportunity to be heard does not violate due process.

In the instant matter and in violation of the due process requirement of bifurcated hearings as set forth above, Respondent was not provided with a separate hearing on discipline in this case and therefore, was not provided with any opportunity to prepare and present evidence of mitigation. Moreover, the due process right of

Respondent to such separate hearing was addressed at the final hearing on discipline as follows::

“MR. WHALEN (Bar Counsel): Some Referees have asked to bifurcate proceedings, have a finding of facts. Most of them don’t, but that would be within your discretion.

THE REFEREE: No. Let’s finish the case.”

(page 110/15-18, transcript of Final Hearing of May 5, 2000).

As this Court has previously held, an attorney is entitled to due process in disciplinary proceedings and this due process is not discretionary with the Referee. In The Florida Bar v. Centurion, 2000 WL 551035, 25 Fla. L. Weekly S344 (Fla. May 4, 2000), this Court recognized that, in attorney disciplinary proceedings, due process requires that the attorney be allowed to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed. In Centurion, the attorney was defending a Complaint which alleged five separate offenses involving five different clients. The referee found the attorney guilty on all five counts and recommended a one-year suspension with, *inter alia*, the following condition for reinstatement: a mental health evaluation by Florida Lawyers’ Assistance, Inc..

On review, Centurion argued that the one-year suspension followed by one year

of probation was too severe, that the referee erred in failing to consider any mitigation in recommending discipline, that he had no notice that the Bar was seeking discipline in addition to a suspension, and the imposition of such sanctions violated his due process rights. In its opinion, this Court noted that similar discipline had been upheld in cases involving the mishandling of client matters and upheld the Referee's recommendation as to discipline. With regard to mitigation, this Court reiterated that, as to the discipline imposed, due process required that the attorney be allowed to explain the circumstance of the alleged offense and to offer testimony in mitigation of any penalty to be imposed. The opinion also specifically noted that separate hearings were held as to guilt and discipline and that, after the conclusion of the initial hearing on guilt, the attorney had received correspondence from the Bar advising that the Bar would be seeking suspension with proof of rehabilitation prior to reinstatement. The Court found that the correspondence and the prior proceedings in which the attorney's ethical breaches involving client neglect were litigated were sufficient to put the attorney on notice of the discipline that was imposed with the exception of the requirement that the attorney undergo a mental health evaluation. The Bar's correspondence had made no mention of a mental health evaluation, and the facts were not such that the attorney would be aware that his mental health was in question.

The opinion acknowledged that this Court had previously upheld a

recommendation that an attorney undergo a mental health evaluation where the attorney had either not challenged that requirement or the evidence was such that the attorney would have been put on notice that a mental health evaluation was an issue and supported the recommendation of an evaluation; however, since neither of the foregoing circumstances existed, the attorney did not have sufficient notice to allow him to offer testimony in mitigation of this penalty (i.e., the mental health evaluation), and the penalty was not reasonably supported by existing case law. Therefore, the Court approved the Referee's recommended discipline but disapproved the mental health evaluation.

Respondent did not voluntarily choose to forego a separate hearing as to discipline. Rather, the failure of the Referee to hold a separate hearing as to discipline was the result of other factors beyond his personal control. There was the apparent confusion or misunderstanding of the Referee as to the due process requirement for such a hearing as set forth above. There was the Referee's reliance upon Bar counsel for direction, as evidenced by the Referee consulting the Referee Manual (pg. 106/2, transcript of Final Hearing); stating that he wants to make sure he does it correctly (pg. 106/25, transcript of Final Hearing); inquiring as to whether proposed Reports of Referee are ever done (pg. 107/10, transcript of Final Hearing); acknowledging that Bar counsel knows the rules better than he (pg. 108/6, transcript of Final Hearing); and

requesting that Bar counsel instruct the Referee as to how he is to perform his duties (pgs. 131/16 - 132/23, transcript of Final Hearing).

Additionally, Respondent's counsel at the Final Hearing claimed scheduling conflicts and time demands and refused the Referee's offer to allow each party to prepare and submit a proposed Report of Referee (pgs. 107/6 - 109/19 and pgs. 130/11, 19 - 131/17, transcript of Final Hearing). Respondent's counsel was not specifically offered an opportunity to present mitigation evidence in a separate proceeding. Respondent should not be punished or otherwise suffer because of these factors, and this Court should not allow the due process rights of Respondent to be violated due to these factors, which were beyond his personal control.

The record establishes that, in this case, the Referee did not hold a hearing on sanctions solely because of the personal preference and convenience of Respondent's previous attorney, to "save...a tremendous amount of time and trouble" (page 130, line 22-23, transcript of the Final Hearing of May 5, 2000). Respondent's previous attorney appears to have placed his own personal concerns and preferences above that of Respondent and, as a result, Respondent was deprived of his fundamental right to due process.

Respondent did not leave the final hearing or otherwise excuse himself from the proceedings. In fact, the record shows that there was no affirmative action whatsoever

on the part of Respondent that would have caused the Referee to believe that Respondent himself was making a “choice,” exercising a “waiver,” or pursuing some “strategy or tactic” in not presenting evidence in mitigation of the disbarment recommendation.

II. THE REFEREE’S FINDINGS OF FACT ARE ERRONEOUS, NOT SUPPORTED BY THE RECORD, AND DO NOT SUPPORT A FINDING THAT RESPONDENT VIOLATED ANY RULES REGULATING THE FLORIDA BAR.

There is an insufficient factual basis for the Referee’s findings of fact and conclusion that Respondent violated the Rules Regulating The Florida Bar. In paragraph 1 of the Report of Referee dated May 26, 2000, the Referee found that Respondent had relocated to Florida in April of 1997; however, the uncontroverted facts in the record show that Respondent had moved to Florida prior to April 1997 and had been residing in Florida at the time his wife moved out of their marital home and obtained a restraining order against him. (Tr. page 18, line 20 - page 19, line 6; page 57, lines 1-2.)

In paragraph 2 of the Report of Referee, the Referee found that, when their home in Dade County became subject to a foreclosure action, Respondent alone decided to sell it; however, the uncontroverted facts in the record show that Respondent and his wife discussed the foreclosure and the selling of the home and

that they were in agreement with the decision to sell. (Tr. page 19, line 25 - page 21, line 5; page 27, line 25 - page 28, line 7; page 58, lines 9-18; page 61, lines 19 - page 62, line 2; page 71, lines 16-18). The Referee found that Respondent himself had located a buyer for the home in Dade County, but the record shows that the Respondent's father, who was still living in the home, assisted in their activity to sell the home and that it was the Respondent's father, not Respondent, who located the buyer. (Tr. page 58, lines 17-18; page 62, line 23.) Additionally, the record shows that neither Respondent nor his wife had any contact with the buyer, other than through documents at issue in this action. (Tr. page 23, lines 1-3; page 74, line 25 - page 75, line 2.) The record further shows that, at all times, Respondent's wife was aware that the house was being marketed for sale "by owner" and that her father-in-law was assisting in their marketing activities. (Tr. page 58, lines 9-18; page 66, lines 9-10.) The Referee found that Respondent retained an attorney in Dade County to represent him alone when, in fact, the record shows that Mr. Parks was retained to represent both Respondent and his wife in the sale of their property as tenants by the entirety. (Tr. page 6, lines 5-25; page 24, lines 15-22.)

In paragraph 3 of the Report of Referee, the Referee found that the wife had no idea whatsoever that the Dade County home was sold; however, the uncontroverted facts in the record show that the wife had sole possession of all of the documents

relating to the Dade County home and that she had delivered to Respondent those same documents effectuate the sale. (Tr. page 25, lines 6-9; page 27, lines 8-13.) The record also shows the wife's refusal to release any original document in her possession. Beginning at page 68, line 6, of the Transcript of the Final Hearing, the record shows that she brought with her to the final hearing a stack of documents which included copies of the closing documents she purportedly received from Respondent. When asked if the original copies could be substituted for those in evidence, she refused:

THE WITNESS: No, I want the originals.

BY MR. POWELL:

Q. You want the originals?

A. Absolutely.

(Tr. page 69, lines 1-4).

Therefore, it is unreasonable and erroneous to conclude that Respondent's wife would have released any document to Respondent if she had not know the reason and if she were not in agreement, particularly if she did not want the sale to happen. The fact that she delivered the real estate documents to Respondent is clear evidence of her knowledge of, agreement with, and desire to sell the Dade County home.

In paragraph 4 of the Report of Referee, the Referee found that Respondent led

his secretary, Marlene Keller, to believe that Respondent's wife had merely forgotten to have her signature notarized. However, there is nothing in the record to support this finding. Respondent testified that he simply asked her if she would notarize their signatures. (Tr. page 36, lines 21-23; page 37, lines 19-21; page 90, line 23 - page 91, line 16.) Ms. Keller testified as follows:

[BY MR. WHALEN:]

Q. Can you explain to the Court how it came about that you notarized the document without seeing Ellen Baker sign it?

A. We were working on a pretty big case. It was one of the last days of a big trial. And on my desk was the deed. And I had gone into Mr. Baker and said that Ellen had not had this notarized. And he had asked, "Can you please do that for me."

And I proceeded to sign and notarize. And then I went back and said to Mr. Baker - - because I wasn't looking at it closely - - that it hadn't been witnessed. Mr. Baker asked if I would talk to Gladys Ortega and Becky Allison to see if they would witness her signature.

Q. Did you watch the two other employees sign that document?

A. Yes, sir.

Q. Do you know if Mr. Baker was in their presence when you brought that

document to the employees?

A. No, sir. He was in his office.

(Tr. page 90, line 23 - page 91, line 16.)

In paragraph 7 of the Report of Referee, the Referee found that a copy of an unsigned, typed letter dated July 16, 1997 (see Appendix), was from Respondent; however, the record shows that there was no evidence linking that purported writing to Respondent. Respondent did not identify the letter or in any way testify to his knowledge, authorship, or recognition of the letter or otherwise authenticate the letter.

[BY MR. WHALEN:]

Q. I want to hand you a copy of a document. Take a look at that, and let me know whether or not you recognize that.

A. I can tell you right now I don't recognize it.

Q. So that document, which I'll represent to the Court is dated July 16, 1997, addressed to a Dear Ellen with the name Jamie at the bottom is not a document that you produced or directed anyone else to produce?

A. I don't even recognize this.

Q. Did you send a letter - - if not that letter, did you send a letter on July 16th to your wife forwarding closing documents to her?

A. No. When I had the conversation with her when I obtained her

permission to sell the home, I told her I'd keep her apprised how the sale went, and I would send documents. I don't recall exactly what the totality of that document that I sent was, nor do I recall sending a letter, a cover letter of any sort to her.

Q. So you're unable to identify that document?

A. Yeah. And I just - - I would - - there is no signature on here.

(Tr. page 44, line 10 - page 45, line 5.)

Notwithstanding the fact that there is no authentication of the unsigned letter by Respondent in the record and despite the fact that the unsigned letter contained hearsay and was itself hearsay as to Respondent's wife, a copy of the unsigned letter was admitted through Respondent's wife and was then used to prove the truth of the statements it contained and the matters asserted by Complainant against Respondent.

[BY MR. WHALEN:]

Q. Was there anything accompanying those documents [the closing documents] that you received overnight?

A. Yes. There was a letter from my then husband, dated the 16th, saying that they had found a buyer for the house.

MR. POWELL: Objection, Your Honor. Hearsay. I'd like to see the letter.

MR. WHALEN: Hearsay is admissible, but - -

THE COURT: I'll overrule it on that, but certainly he can see the letter.

BY MR. WHALEN:

Q. Let me hand you a document dated July 16th, 1997, and if you'll take a look at that document and indicate whether or not you recognize it.

A. This is the copy of the original of the letter.

(Tr. page 59, line 25 - page 26, line 12).

[later in the record]

MR. WHALEN: Your Honor, at this time, I would proffer the July 16th, 1997, document into evidence, and I request that it be admitted.

THE COURT: This is the document that she says was the letter that was enclosed with the blank forms?

MR. WHALEN: Correct, Your Honor.

THE COURT: Telling her what to do with it or something? I haven't read it, but some instructions or something?

MR. WHALEN: Yes.

MR. POWELL: Your Honor, where are the blank forms?

MR. WHALEN: If you want, Your Honor - - well, I can question her a bit more on that point.

MR. POWELL: Well, I just wanted to know if - - is it my turn to cross, Your Honor? My question is - - I mean, we object to that document going in on the grounds that there is no foundation.

MR. WHALEN: She's testified, Your Honor, that she received it.

THE COURT: Now, I know he said I have never seen it, so then it's just going to be a credibility issue, I think, for the judge. So I think it goes to weight rather than admissibility. So I'll overrule your objection. That's exhibit 8; is that right?

MR. WHALEN: Yes, Your Honor.

THE COURT: And in cross, certainly you will be able to tear into her where are the blank forms, so on and so forth.

MR. POWELL: Tear into her?

THE COURT: Well, that's my word.

MR. WHALEN: I have no further questions.

THE COURT: Let the tearing begin, then.

(Tr. page 66, line 21 - page 68, line 2.)

[later in the record]

Q. Do you have a Federal Express package with you today?

A. I'm sorry. I didn't save it.

(Tr. page 74, lines 10 - 12.)

Rule 90.952, Requirement of originals, Florida Evidence Code, provides that, "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph."

Rule 90.953, Admissibility of duplicates, Florida Evidence Code, provides in pertinent part that, "A duplicate is admissible to the same extent as an original, unless...(2) A genuine question is raised about the authenticity of the original or any other document or writing. (3) It is unfair, under the circumstances, to admit the duplicate in lieu of the original."

The issues of authenticity and reliability of the original versus a duplicate of evidence arose during the sworn testimony of Respondent's wife concerning the warranty deed.

[BY MR. POWELL:]

Q. On the documents that you received, Mrs. Baker - -

MR. POWELL: I notice that there is a difference, Your Honor, on one of them, and this is the warranty deed.

Q. Have you ever seen the actual warranty deed, Mrs. Baker, that was involved in this transaction?

A. I have the original warranty deed.

Q. All right. You have this original? You have seen this before?

A. No. That is the original warranty deed.

Q. Have you ever seen this one, Mrs. Baker, Exhibit 1?

A. Only the copies of it.

Q. You have seen this before, Exhibit 1?

A. My lawyer showed me a copy of it.

Q. Mrs. Baker, do you notice any difference besides the signatures on these two documents?

A. Yes. Mine, the original, does not have anything listed at the top about any real estate attorney. Yours, which is the copy, has the real estate attorney's information on the top.

Q. Did you white out this real estate attorney?

A. On my children's lives, no, I did not.

THE COURT: You're already under oath. That's sufficient.

BY MR. POWELL: You didn't do any altering to this document?

A. I ever never altered those documents.

(Tr. page 69, line 15 - page 70, line 16)

Authenticity is a primary question of admissibility and not, as the Referee had

ruled, a secondary question of the credibility and weight of the evidence after it is admitted. The record shows that the original of the purported writing was not produced and was not accounted for. There was no predicate or foundation laid prior to its admission into evidence. There was a complete absence of any indicia of reliability elicited from any of the testimony concerning the purported writing - the purported writing did not contain any handwriting or signature that might have linked it personally to Respondent nor was the envelope in which it was purported mailed produced which might have identified Respondent as its source. Without any direct evidence relating the printed, unsigned letter to Respondent and without any indicia of reliability as to its authenticity, it is submitted that anyone could have created the writing, at any time, from any computer, while backdating it and wording it to make it appear as if it came from Respondent. Notwithstanding the foregoing, a copy of the purported writing was admitted over the objection of Respondent's attorney. While disciplinary proceedings are quasi-judicial administrative proceedings in which hearsay may be admissible, this Court has stated in The Florida Bar vs. Vannier, 498 So.2d 896 (Fla. 1986), hearsay evidence is admissible only if it is adequately authenticated and its reliability established, neither of which occurred in this matter.

With regard to the Referee's other findings concerning when Respondent's wife learned that the home had been sold, the record shows that Respondent's wife knew

all along that the Dade County home was on the market to be sold, that her father-in-law was still living there and acting as resident agent to assist in its sale; and that she had his telephone number in Miami, but did not call him in July 1997 or any time thereafter to inquire as to the sale of the Dade County home. (Tr. page 71, lines 16-24; page 73, line 16-23.)

The record shows that Respondent's wife knew of the pending foreclosure before Respondent did; yet, when she received the notice of foreclosure, she did not call Respondent, her parents-in-law who were living in the Dade County home, or the mortgage company. If she were so concerned about the Dade County home, it would be reasonable to conclude that she would have taken some action as soon as she received the notice.

Respondent's wife testified at the final hearing that, when she received the closing documents, she immediately called Respondent but then did nothing until March 1998 (8 mos. later) when she got "curious enough [about the status of the Dade County home] to start making some phone calls." (Tr. page 64, lines 21-25.) At that time, her first call was to First Nationwide Mortgage Company and learned from them that the mortgage had been satisfied in July 1997; even then, she did not inquire of Respondent concerning the Dade County home. (Tr. page 66, lines 5-14.)

In paragraph 8 of the Report of Referee, the Referee acknowledged

Respondent's claim that his wife knew all along about the sale of the house, that he had her consent to sign her name, and that she made it up to gain an advantage in the custody battle that took place in their dissolution action, but the Referee found that the "other evidence presented in the case" did not support Respondent's proposition and found Respondent's testimony not to be credible. Notwithstanding the "other evidence," which the Referee does not discuss, the record clearly sets forth the wife's not-so-veiled threats against Respondent, as well as the wife's knowledge of her boyfriend's threats against Respondent, which clearly evidences a motive and intent on the wife's part to fabricate her lack of knowledge.

[BY MR. POWELL:]

Q. Did you ever hear your boyfriend threaten Mr. Baker on a telephone call?

A. No, I didn't.

Q. Do you know anything about it?

A. Yes, I do.

Q. Do you know whether or not he threatened Mr. Baker?

A. I know about the telephone call.

...

Q. Did you ever threaten Mr. Baker?

A. No, I did not.

Q. Never called him up and told him you were going to get his job?

A. After he called my boss and commodore of the club I worked for and told him to fire both me and Livio, yes, I probably made a phone call in anger.

MR. POWELL: I object to that as nonresponsive and move to strike.

THE COURT: She added some. All right. Sustained.

BY MR. POWELL:

Q. Mrs. Baker, did you ever threaten your husband that you were going to try and get him fired?

A. No, I did not. I told him to be careful of his job.

(Tr. page 78, line 21 - page 79, line 18.)

The record also sets forth the wife's practice of using her father-in-law's credit cards, signing both her name and the name of her father-in-law on the credit card receipts.

Q. Isn't it true, Mrs. Baker, that there were times when you would even buy things on a credit card and sign your father-in-law's name?

A. Sir, I had permission. And I didn't bring it with me today. I could bring a letter stating - -

THE COURT: He's not claiming you did anything wrong. He is just asking whether you had done that.

THE WITNESS: Yes. We - -

BY MR. POWELL:

Q. Please, Mrs. Baker, I just wanted to ask a limited question.

A. The answer is yes.

...

Q. Did you sign his name or not?

A. Once, yes. All the other times, I signed my own.

Q. On his credit card?

A. Yes, sir.

Q. But it was his credit card?

A. Yes, sir.

Q. So your relationship with him was good enough where you could sign on his credit card:

A. Yes, sir.

(Tr. page 72, line 14 - page 73, line 18)

Based upon the above, the inescapable conclusion is that, since Respondent's wife was accustomed to signing other people's names for her own personal use and financial advantage, she would have permitted Respondent to sign hers. It is erroneous to conclude that, even though she was accustomed to such a practice with

an in-law, she would not be accustomed to such a practice with her husband.

Additionally, in light of the fact that the wife had exited the marital home and the marriage and was already involved with another man, the only conclusion to be drawn is that she had exited and abandoned all other vestiges of the marriage, especially including a significant marital debt that was then in foreclosure. Respondent's testimony that his wife told him that she didn't care, that it was his problem, and that he was to handle it (Tr. page 35, line 25 - page 36, line 3) was unrebutted and shows that she was literally fleeing a sinking financial ship and did not want to be in any way liable for it (notwithstanding the probability that she caused the foreclosure to begin with, since she was responsible for paying the mortgage each month and had probably received each late notice and each demand letter sent which preceded the foreclosure). Further, there is no evidence of a motive or intent of Respondent to defraud anyone, including his wife. Respondent used the proceeds to pay off a marital debt which inured to the benefit of the wife in the marital dissolution proceedings.

III. IF THIS COURT FINDS A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR, THE RECOMMENDATION OF DISBARMENT BY THE REFEREE IS EXCESSIVELY HARSH, ERRONEOUS, AND NOT SUPPORTED BY THE RECORD, CASE LAW, AND FLORIDA'S STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Referee recommended that Respondent be disciplined by disbarment for

a period of five (5) years and assessed costs without holding a hearing on sanctions or costs. As was previously stated in this brief, Respondent was not afforded the opportunity to present mitigating evidence at a separate hearing and, other than noting that Respondent had no disciplinary record, the Referee made no other findings as to any of the factors of mitigation as set forth in Subsection 9.32 of Florida's Standards for Imposing Lawyer Sanctions or otherwise.

This Court has previously stated that disbarment is the most extreme form of discipline and should be reserved only for the most egregious misconduct by an attorney. The Florida Bar v. Summers, 728 So.2d 739 (Fla. 1999). *See also*, The Florida Bar v. Cox, 718 So.2d 788, 794 (Fla. 1998) (disbarment is appropriate where there is a pattern of misconduct and history of discipline); The Florida Bar v. Kassier, 711 So.2d 515, 517 (Fla. 1998) (“extreme sanction of disbarment is to be imposed only in those rare cases where rehabilitation is highly improbable.”); The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977) (“disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.”). In Summers, *supra*, this Court reiterated that, because it has the ultimate responsibility to determine the appropriate sanction, the scope of review of a Referee's recommended discipline is much broader than that of the findings of fact.

The Referee's recommendation of disbarment in this case is excessively harsh and erroneous, especially in light of case law involving similar allegations of attorney misconduct for which far lesser sanctions were imposed. In The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997), the attorney was found to have presented false evidence to the court; misrepresented to an individual that he would be arrested if he did not provide \$4,000 by certain time; misrepresented to opposing counsel that his trust fund contained sufficient funds to cover settlement; and misrepresented to the court that opposing counsel had agreed to the proposed orders. After finding the attorney guilty of these multiple violations, the Referee recommended that Kravitz be placed on probation for one year, take a course in ethics for attorneys, and pay the costs of the proceeding.

Upon review, this Court found that the Referee's disciplinary recommendation was not supported by the findings of fact in the report and remanded the disciplinary matter to the Referee to hold a hearing on sanctions. The Referee was instructed to allow and consider evidence of mitigation and/or aggravation offered, provide in a supplemental report his findings as to aggravation or mitigation including any prior misconduct by Respondent, and advise the Court of any change in his recommendations as to sanction to be imposed. The Referee's second disciplinary recommendation was very similar to the first. Although recognizing that a Referee's

recommendation of discipline is to be afforded deference unless the recommendation is clearly erroneous or not supported by the evidence and, citing to The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994), the opinion held that the Referee's second recommendation of discipline was clearly erroneous and that the pattern of knowing misrepresentations to the court and the attorney's misconduct warranted a suspension.

Upon examination of the record in that case, while concluding that there was insufficient basis for accepting the Referee's disciplinary recommendation of probation, the opinion noted that the attorney's actions were as egregious as the misconduct in The Florida Bar v. Myers, 581 So.2d 128 (Fla. 1991), in which the attorney received a 90-day suspension for his misconduct, which included submission of a settlement agreement to the court in a dissolution matter without advising the court that the spouse had retained counsel and that the child custody agreement the attorney had submitted was contrary to the couple's most recent agreement. This Court imposed a 30 day suspension upon Kravitz, rather than 91 days requested by the Bar, and recognized that, as in the instant case, the attorney had no prior disciplinary record. In this case, Respondent did not engage in a pattern of knowing representations to the Court, and his actions were in the context of a personal and volatile dissolution matter.

Other cases involving attorney misconduct which was much more egregious

than that of the Respondent in this case and which resulted in far less severe discipline than disbarment include Centurion, supra; The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000) (lying to defense attorney about improper communications with attorney's client warranted public reprimand); and, The Florida Bar v. Sweeney, 730 So.2d 1269 (Fla. 1998) (defrauding Medicare by redirecting settlement funds warranted a 91-day suspension).

In requesting disbarment in this matter, Bar counsel relied upon The Florida Bar v. Kicklighter, 559 So.2d 1123 (Fla. 1990), in which the attorney perpetrated a fraud upon the court by filing forged estate documents. In that opinion, this Court referred to specific and substantial mitigating factors, including absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of criminal penalties.

Unlike Kicklighter, Respondent did not prepare and file forged documents with a court and did not perpetrate a fraud on any court or individual. Further, Respondent was not afforded an opportunity to present any mitigating evidence prior to the Referee making his recommendation for disbarment.

Florida's Standards for Imposing Lawyer Sanctions sets forth the mitigating factors to be considered before discipline is determined:

Subsection 9.32 Factors which may be considered in mitigation. Mitigating

factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical or mental disability or impairment;
- (i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
- (j) interim rehabilitation;
- (k) imposition of other penalties or sanctions;
- (l) remorse;

- (m) remoteness of prior offense;
- (n) prompt compliance with a fee arbitration award.

In addition to the foregoing, in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this Court held that the sanction imposed in an attorney disciplinary case must serve three purposes: first, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty; secondly, the judgment must be fair to the attorney, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and, thirdly, the judgment must serve enough to deter others who might be prone or tempted to become involved in like violations. *Id.* at 132. In Pahules, the attorney was adjudged guilty by The Florida Bar of mishandling client trust funds and ordered disbarred. This Court subsequently held that the attorney's misconduct warranted a suspension rather than disbarment in light of mitigating factors such as the attorney having made restitution to the client; the attorney being cooperative with The Florida Bar during its investigation; the attorney being a member of The Florida Bar for nineteen (19) years without previously committing any impropriety; the attorney supporting four (4) minor children. This Court also noted the attorney's argument that "[t]he penalty of disbarment is too extreme for a lawyer who had voluntarily made full

restitution, admitted his misconduct, ceased commingling funds, who presented an attitude of repentance, and gave evidence of rehabilitation.” This Court, after examining the facts of the case and in light of the attorney’s record, agreed that disbarment was too severe a penalty. *Id.* at 131. This Court went on to state that

“disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him.”

Id. at 131.

See also, The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) (attorney’s failure to provide competent representation and act with reasonable promptness, failure to keep clients informed about the status of clients’ matter and to explain matter to clients, failure to abide by clients’ decision regarding settlement, and dishonest conduct

warranted a ten (10)-day suspension from the practice of law, which suspension was fair to society, fair to the attorney, and severe enough to deter others). In Glick, this Court affirmatively noted that, when entering into the settlement agreement with the attorney, the client/wife had acted on behalf of her husband and herself. Likewise, in this matter, Respondent had acted on behalf of his wife and himself.

In The Florida Bar v. Rose, 607 So.2d 394 (Fla. 1992), the attorney was found to have signed his ex-wife's name, more than two (2) years after their divorce, to client agreement forms, stock certificates, and checks in order to obtain their children's money for his personal use and did so without her authorization as the custodian of an irrevocable trust of the stock which was created for the benefit of their children. This Court found that the attorney's conduct constituted misrepresentation and warranted a thirty (30)-day suspension. This Court stated that, even in the absence of a prior disciplinary record, the thirty-day suspension was appropriate and approved the referee's recommendation as to same. In Rose, the Bar and the attorney stipulated that the transaction in question occurred more than two (2) years after the divorce between the attorney and his ex-wife; that the attorney did not have his ex-wife's authority to sign her name on the checks; that she did not give any consent to signing her name at the time of the sale or to the sale of the stock; and that the attorney used the proceeds for his own personal benefit. Unlike Rose, the marketing and sale of the

Dade County home occurred while they were still married; the signing by Respondent of his wife's name was consistent with their previous marital custom and practice; the sale proceeds were used not for Respondent's own personal benefit but to pay off marital debt for which they both received a benefit; there is no evidence of motive or intent of Respondent to defraud his wife; and the consent and authority of Respondent's wife to sign her name subsequently became an issue. Even if this Court were to find that Respondent's actions constituted misconduct, Respondent in this matter did not conduct himself with any of the intent and fraudulent purposes exhibited by the attorney in Rose.

Notwithstanding the failure of the Referee to hold a separate hearing on mitigation, Respondent would submit that the following mitigating factors apply in this matter: absence of a prior disciplinary record; absence of a dishonest or selfish motive; personal or emotional problems; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; character or reputation; and, remorse.

In this matter, Respondent has been a practicing attorney in the State of Florida since October 18, 1990, and has no prior disciplinary record. Respondent is also admitted in the State of Connecticut (since 1989), the Federal District Court in Connecticut, the Federal District Court in Florida for the Middle District, and the Second United States Circuit Court of Appeals in New York City (Tr. page 17, lines

4-17) and has no disciplinary record in any of these other jurisdictions. Respondent did not have a dishonest or selfish motive and used the proceeds to pay a portion of the marital debt. Additionally, the sworn testimony of Respondent's wife was that she herself previously had a history and practice of using her father-in-law's credit cards and signing both his signature and her own name as a party authorized by her father-in-law on the credit card receipts (Tr. page 72, line 14 - page 73, line 11.)

The uncontroverted facts in the record further show that Respondent's actions did not involve the Court or a client but rather, involved personal matters of his marriage and family and were related only to a pending foreclosure upon a second home in which his own parents were residing. If anything, Respondent's actions were open, forthright and responsible and, but for the buyer that Respondent's father was instrumental in locating, the Dade County home would have been lost to the mortgage company. The uncontroverted facts in the record also show that the proceeds from the sale of the Dade County home were used by Respondent to pay off marital debt for which Respondent's wife received a benefit (i.e., the reduction in the total marital debt owed).

With regard to personal and emotional problems, the record is clear throughout that all of the allegations in question occurred within the context of a volatile and contentious divorce between Respondent and his wife. The fact that Respondent's

wife and her boyfriend had threatened Respondent, or at least his job, only compounded an already heated situation.

The record also clearly shows that, throughout the proceedings, Respondent had consistently made full and free disclosure to the Bar and Referee and demonstrated a cooperative attitude toward the Bar and Referee proceedings.

As this Court stated in Pahules, *supra*, Respondent should be given the benefit of every doubt, particularly since he has a professional reputation and a record free from offense. However, since there was no hearing on mitigating factors, Respondent had no opportunity to address his character, reputation or remorse, and it is submitted that these mitigating factors apply to Respondent in this matter.

To disbar Respondent would not accomplish the objectives set forth in Pahules. This matter occurred entirely within a personal context and Respondent was not representing his wife or his parents in any formal capacity; rather, every member of his family was similarly situated in that each of them equally faced the consequences of the pending foreclosure. Respondent was acting as a husband, father, son, property owner and client of another attorney trying to salvage what he could from an already bad financial situation while providing for and protecting his family, which included his wife, children and parents, as best he could in the midst of a family crisis which was threatening great financial loss to his immediate household and the loss of a home to

his own parents. Because of the purely personal nature of this matter, no discipline imposed here would deter the actions of other attorneys in their dealings with the public. But for the fact that Respondent is an attorney by profession, this entire matter would have been addressed solely within the confines of divorce court. Respondent's conduct occurred as a single event and was confined to the boundaries of his personal, marital - albeit deteriorating - relationship; his was not conduct waged against society at large or against a client specifically; and his actions were not part of a pattern of wrongdoing or misconduct. Consequently, disbarring Respondent would deprive our society of a competent and qualified attorney, would be unfair to Respondent, and would not serve to deter others from future conduct.

CONCLUSION

Respondent was deprived of his right to due process of law when the Referee failed to hold a hearing to allow Respondent to explain the facts and circumstances and provide mitigation evidence and testimony.

The Referee's findings of fact are erroneous and unjustified and do not support a finding that Respondent violated any Rules Regulating The Florida Bar.

In the alternative, if this Court finds that Respondent violated any of the Rules Regulating The Florida Bar, Respondent should be disciplined with an admonishment for minor misconduct or a public reprimand after consideration of the true and correct facts, case law, and mitigating factors, and to serve the three purposes for attorney discipline which have been enumerated by this Court.

DATED this _____ day of February, 2001.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original and seven copies of the foregoing has been furnished by U.S. Regular Mail to: Thomas Hall, Clerk of the Supreme Court of Florida, 500 S. Duval St., Tallahassee, Florida 32399, and a copy by U.S. Regular Mail to: Stephen Whalen, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida, 33607, and John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this __ day of February, 2001.

JOSEPH A. CORSMEIER, ESQUIRE

APPENDIX

Unsigned letter dated July 16, 1997.