33,443

IN THE SUPREME COURT OF FLORIDA

CASE NO. 33,443

THE FLORIDA BAR,
Complainant,
vs.
HAL H. McCAGHREN, Esq.
Respondent.

BRIEF OF COMPLAINANT

W. C. OWEN, JR.
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West Palm Beach, Florida
Attorney for Complainant

I N D E X

TABLE OF AUTHORITIES

PREFACE

This matter is before the Court on petition for appellate review in a disciplinary proceeding under the Integration Rule. The parties will be referred to as they were in the proceedings below, eo wit: Hal H. McCaghren, Respondent and The Florida Bar, Complainant. The following symbols will be used:

A- Appendix to brief filed on behalf of Respondent.

TR- Transcript of proceedings before the Referee.

CX- Appendix to Complainant's brief.

STATEMENT OF THE CASE

The Florida Bar adopts the statement of the case as set forth in the brief filed on behalf of the Respondent.

POINTS INVOLVED

Respondent sets forth in his brief six points to each of which Complainant will respond but Complainant says that the point actually involved on this appellate review should be stated as follows:

POINT VII

IS THERE SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUSTAIN THE FINDINGS AND RECOMMENDATIONS OF THE REFEREE AND THE JUDGMENT OF THE BOARD OF GOVERNORS.

STATEMENT OF FACTS

The statement of facts set forth in the brief filed on behalf of Respondent is accepted as a correct statement of the testimony of the particular witness quoted, with the exception of the statement appearing on page 10 of such brief that the law firm by which Mr. Sales was employed decided not to represent Mrs. Daly due to her history of adultery. As to this particular item we believe that the testimony shows only that the law firm declined to continue with the representation because of the photographic proof that Mrs. Daly had been guilty of adultery on the occasion upon which the picture was taken.

The statement of facts should be supplemented with the following additional matters:

The private detective employed by the Respondent could not recall whether Respondent had given him the name of the man whom he expected would be caught in the act with Mrs. Daly, but it was the detective's belief that the Respondent had given him the name of such man. (TR-28) The detective, Donald C. Ehrler, also testified that when the Respondent called him to come to the office for a conference on the evening upon which the pictures were actually taken, Respondent told the detective"... it would definitely have to be done that night, that he had previously employed some agency in Miami and that he had tried to contact them and they were

unable to come up or something or other, I don't know what the difficulty was, that he said it had to be done that night" (TR- 28-29) On that same occasion Respondent informed the detective that Mrs. Daly sometimes leaves the door open. (TR-29) The detective did find the kitchen door unlocked. (TR-31) The Respondent also gave the detective a description of the man for whom they were to be on the lookout that night (TR-32) and whom they subsequently photographed in bed with Mrs. Daly. The detective described this as a "pretty detailed description of the man". (TR-36)

When Mrs. Daly's attorney, Mr. Ronald Sales, spoke to the Respondent in the Respondent's office a few days later the Respondent told Mr. Sales that he did not know the man who was shown in the pictures which had been taken by the detectives on or about October 14th. (TR-45) Attorney Sales described Mrs. Daly as an elderly, unattractive person physically whereas Mr. DeSarro was described as a handsome man in the prime of his life. (TR-46)

Respondent when called to testify at first could not recall having advised his client that his best grounds for divorce would be his wife's adultery, (TR-85) but after refreshing his recollection through means of deposition taken previously in the common law action which Respondent had filed against Mr. Daly for certain fees, Respondent did recall advising his client along these lines as being the

most economic way of obtaining the divorce. (TR- 85-88) Respondent did know DeSarro "to see him as to who he was", (TR-89) and in fact had spoken to him on at least one occasion when he had come to the office with Mr. Daly. (TR-90)

Respondent also testified that the detectives called him at 2:00 A.M. on the morning following their successful attempt to secure the picture of Mrs. Daly. (TR-93) Prior to the time Respondent was able to secure the pictures of Mrs. Daly in the compromising situation, he stated that he had other evidence of adulterous conduct on her part but not such that he would consider sufficient proof of that grounds (TR-96), or not sufficiently conclusive (TR-99). Respondent testified that on every occasion that Mr. Daly left home to go out of town Mrs. Daly "played at home" and when Mr. Daly was in town, Mrs. Daly "played at a place down in the Boynton area", (TR-101).

Respondent testified that on the day of filing the Complaint in the divorce case he paid to Mr. DeSarro the sum of $1,500 in cash, (TR-103) and that at the time Respondent made the payment to DeSarro on October 23rd he knew that DeSarro was the man who appeared in the compromising picture with Mrs. Daly. (TR-110) Respondent admitted that the payment of $1,500 to DeSarro was suspicious (TR-110) and also unusual (TR-111). At that time the Respondent also "suspected an awful lot". (TR-111)

Respondent also testified that in paying the money to DeSarro he had the opinion that Mr. Daly had hired him (DeSarro) or had agreed to pay him if he would continue his conduct because Mr. Daly knew his conduct had been going on but that the Respondent was short of the necessary or what he felt to be positive proof. (TR-160)

ARGUMENT

POINT I

THERE WAS NO CONNIVANCE PROVEN.

Although the Referee found that Respondent had not been guilty of connivance himself, and also found that Respondent had not allowed or permitted his client to connive with DeSarro to commit an adulterous act with Mrs. Daly, nonetheless the Referee found from all of the evidence, that the adulterous act had been committed through the connivance of someone, as set forth in paragraph 18 of the report of the Referee as follows:

> "18. It is the opinion of the undersigned that Respondent was guilty of chicane and misconduct in taking advantage of a known connived adulterous act (i.e. adultery committed by the connivance of someone and known by Respondent to have been connived at the time Respondent took advantage of it)....." (A-16)

This appeal is, of course, from the judgment of the Board of Governors of The Florida Bar dated May 1, 1964, in which judgment the Board of Governors of The Florida Bar

stated:

> "The Referee found that the Respondent had obtained photographic evidence of an adulterous act by the estranged wife of his client and that he knew that the adultery and proof thereof were brought about by the connivance of the client." (A-25)

While the judgment is at variance with the report of the Referee as to who brought about the connivance to have the adulterous act committed, the question of who connived is not essential to a finding that Respondent knew of the connivance.

What is important is that in both the report of the Referee and the Judgment from which the appeal is taken there is a finding that there was connivance to bring about the adulterous act. Under Rule 11.11 (3) (e) the burden is upon the Respondent to show that the judgment from which the appeal is taken is erroneous, unlawful or unjustified.

The express wording of this rule is in line with the law which was in effect prior to the adoption of the Integration Rule where, in disciplinary proceedings had before a Circuit Court, it was recognized that the Appellate Court should not interfere unless it was clear that the trial Court had ruled erroneously. Zachery vs. State, 53 Fla. 94, 43 So. 925 (1907); In Re: Harrell, 156 Fla. 327, 23 So. 2d 92 (145)

It is true that the Referee did state in his report

that "connivance was a fact which itself was not positively proved" (A-9) but Complainant submits that the proper interpretation of this is simply that there was not irrefutable evidence on the question. The ultimate finding and conclusion of the Referee to the effect that there had been connivance by someone would otherwise be an inconsistancy.

Circumstantial evidence may be proof of a fact equally as effective as direct evidence may be. Whetson vs. State, 31 Fla. 240, 12 So. 661 (1893) and although the Referee made reference to this in Paragraph 12 of his report (A-10) he erroneously applied the more strict rule pertaining to the use of circumstantial evidence in criminal cases as compared with the use of circumstantial evidence in civil cases. In disciplinary proceedings a Referee is not bound by technical rules of evidence, State vs. Dawson, 111 So. 2d 427 (Fla. 1959) nor is the Supreme Court concerned with application of laws and rules governing the administration of criminal law in such proceedings, In Re: Harrell, 156 Fla. 327, 23 So. 2d 92 (1945).

Giving the Respondent benefit of the Referee's finding that the Respondent himself did not actively engage in connivance, nor knowingly permit or allow his client to do so, nonetheless the overall picture of connivance by someone, although established by circumstantial evidence, is so strong as to clearly outweigh any other reasonably hypothesis or conclusion.

Although Respondent testified that every time his client, Mr. Daly, was out of town, the wife "played at home" (clearly inferring that she was guilty of numerous acts of adultery during the husband's absence,) the fact remains that in all the period of time that Respondent had been conducting an investigation he had never obtained photographic proof of the same. It is more then coincidence that on the night his client should again leave town, Respondent is able to contact detectives at approximately 6:30 in the evening, which detectives then wait until approximately 9:30 that evening to commence surveillance, and at or near midnight are able to find an unlocked door through which to enter the house, and secure flash pictures of the adulterous act.

What must also be considered more than mere coincidence is the fact that Respondent told the detectives that he had previously had detectives from Miami working on the case, but that he did not have time to get them back up to West Palm Beach and that "it had to be tonight" the plain inference being that there would be little doubt of the success of the mission.

Regardless of who brought about actively the alleged connivance and giving the Respondent benefit of the Referee's finding that it was not the Respondent, the overall picture amply supports the finding that there was in fact connivance by someone to have the adulterous act committed.

The referee rejected the proffered testimony of William DeSarro (TR- 167-174) in which proffered testimony the witness DeSarro testified to a telephone conversation with the Respondent on the evening in question during which the matter of DeSarro going to Mrs. Daly's residence that evening was discussed and the Respondent stated that he would arrange for surveillance. The witness testified also that in a subsequent telephone call that same evening the Respondent asked that the witness arrange to leave a door open. Had the proffered testimony, which was erroneously excluded by the Referee, been considered by the Referee, it would undoubtedly have resulted in the Respondent having been found guilty on the first two counts of the Complaint as well.

POINT II

THE RESPONDENT COULD NOT HAVE HAD KNOWLEDGE OF ANY CONNIVANCE.

Simply stated, Respondent's argument is that proof of connivance having occurred is an essential predicate for proof of knowledge of such connivance, and that since it is argued under Point I that no connivance was proven, then it logically follows that there could be no adjudication of guilt of knowledge of such connivance.

Assuming the correctness of the major premise, to wit: That there was no connivance proven, the Respondent's reasoning and conclusion is sound under ordinary criminal practice and procedure. On the other hand, if the major premise

is not established, or if Respondent is to be judged by ethical standards that would not apply in a normal criminal proceeding, Respondent's argument must fall.

Respondent's major premise, to wit: connivance was not proven, will stand or fall on the argument made under Point I hereof.

The standard of conduct by which Respondent should be judged is discussed in argument under Points III and IV hereof.

POINT III.

THE "KNOWLEDGE" IMPUTED TO THE RESPONDENT BY THE REFEREE WAS NOT SUFFICIENT KNOWLEDGE TO HOLD RESPONDENT LIABLE.

POINT IV.

THERE WAS NO PROOF OF RESPONDENT HAVING KNOWLEDGE OF ANY CONNIVANCE.

Points III and IV as stated by Respondent are sufficiently similar that they will be argued jointly.

The Referee, in his report, distinguished between a person having actual or direct knowledge of a fact, of the type required to inable a witness to state a fact under oath, from knowledge of the type that would in law be considered as implied, imputed or constructive in nature. Just as the law holds one to have seen that which by the exercise of his ordinary sense of sight he could and should have seen, so the law holds one to know that which by the exercise of

ordinary care, skill and senses one ought to know.

By his own admission Respondent was an intelligent, well-educated practicing member of the Bar for a period of approximately 19 years at the time of the transaction involved here. By his own admission he had suspicion "of a lot of things" and he admitted that the entire transaction with DeSarro was "unusual".

Respondent denied, however, that he had any proof or knowledge of connivance or of the fact that the payment to DeSarro was for "getting caught in the act". Accepting for the purpose of this argument the Respondent's statement that he had no proof or knowledge, were not all of the circumstances such as to put a reasonably prudent and intelligent practicing lawyer on notice that the entire transaction smacked of connivance and impropriety? May a lawyer sit in the middle of such a situation and like the three monkeys, suddenly become deaf, dumb and blind, neither seeing that which was clearly to be seen, hearing that which was to be heard nor speaking out when it became his duty to do so.

For Respondent to say under such circumstances that he did not know what was transpiring, he would have to be unbelievably naive. The Referee obviously did not feel that such was the case, but on the contrary concluded that from all of the evidence the Respondent did have knowledge that he was paying off the man who had been a part of the connived adultery.

The evidence substantiating this finding of the Referee is not only clear and convincing, but overwhelming.

POINT V.

THE EVIDENCE OF THE CIRCUMSTANCES SURROUNDING THE DISBURSEMENTS TO DE SARRO WAS NOT SUFFICIENT EVIDENCE TO SUPPORT A JUDGMENT AGAINST THE RESPONDENT.

There is little benefit to be gained by again summarizing in full the circumstances surrounding the payments by Respondent to DeSarro. Suffice to say that the payments were made under very surreptious circumstances and in two principal installments so closely coinciding with the filing of the suit for divorce and the entry of final decree therein respectively as to be more than mere coincidence.

DeSarro did occasionally chauffeur Mr. or Mrs. Daly around the area. While the record does not indicate the exact period of time that DeSarro had performed any services for Mr. or Mrs. Daly, nor the nature or extent of those services such as full time, part time, etc., it is difficult to conceive that Mr. Daly would pay DeSarro $3,500 (or rather $3,750 as it subsequently developed) for chauffeuring duties for a few months. On the other hand, if this type of service extended over a period of a year or more, it is contrary to human experience that DeSarro would have worked such a period of time without expecting or receiving periodic compensation for such services.

While Daly himself may have conducted all of his business by cash payments during his lifetime, good business practice would find lawyers paying out funds from their trust account by checks drawn on such trust account rather than through cash payments. Conceding that DeSarro wanted cash and that Daly instructed the Respondent to pay in cash, this alone should have been sufficient to put Respondent on notice of impropriety, as an entirely legitimate transaction such as payment of wages for chauffeuring service would not likely find the parties wanting or demanding cash payment.

Respondent argues in his brief that he would not have produced receipts for payment of the money to DeSarro if they were in fact receipts of a "payoff". In answer to this it should be kept in mind that Respondent testified that he would not pay out this "kind of money" (meaning amount) without obtaining a receipt. (TR-137) Secondly, it should be kept in mind that the receipts were not produced voluntarily by the Respondent in this case, but were offered by the Complainant after copies of such receipts had been obtained from the common law file on the case between the Respondent and his former client, Daly.

POINT VI

THE PROCEEDINGS HELD IN THIS ACTION AND THE DELAY THEREIN WERE NOT CONSISTENT WITH JUSTICE AND THE LAW.

Respondent points out that although the complaint was

filed on May 28, 1962, the hearing was not held until January 3, 1963. A summary of the docket sheet in this matter on file with this Court will show that approximately four months delay in that time was occasioned by the necessity for appointing substitute Referees because of the Respondent's objections to the Referee originally appointed, and to the Referee appointed as the first substitute. Thereafter, some two and one half months delay was brought about by the inability of counsel for the Complainant and the Respondent to find a trial date which avoided conflicts with their schedule of civil trials.

There was a delay of approximately twelve months between the date of hearing and the filing of the report of the Referee, but with this exception, all other aspects of this proceeding have moved along substantially in accordance with the time schedule provided for under the rule governing disciplinary proceedings. Complainant agrees with the statement of the Court in State vs. Oxford, 127 So. 2d 107 (Fla. 1961) to the effect that disciplinary proceedings should be handled with dispatch. Complainant respectfully submits to this Court that delay in this case was neither wilful nor done to intentionally harass the Respondent, and the Respondent has not shown that he was prejudiced in any manner by such delay.

Pages 37 to 40 inclusive of Respondent's Brief refer

exclusively to matters which would not appear to have any place in these proceedings, and consequently it is respectfully submitted to the Court that this portion of Respondent's brief should be stricken. Neither the identity nor the motive of a complaining witness before the grievance committee is material to the issue. Rule 11.04 (4) It is respectfully submitted that if in fact the complaining witness has himself been guilty of improprieties, the proper forum to determine such is not in connection with Respondent's matter but by appropriate disciplinary proceedings in a separate matter.

POINT VII

IS THERE SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUSTAIN THE FINDINGS AND RECOMMENDATIONS OF THE REFEREE AND THE JUDGMENT OF THE BOARD OF GOVERNORS.

Since under Rule 11.11 (3) (e) the burden is upon the appellant to show wherein the judgment from which the appeal is taken is erroneous, unlawful or unjustified, it necessarily follows that the judgment of the Board of Governors of The Florida Bar comes before this Court with a presumption that the same is correct.

As a necessary corollary, it must also follow that unless such judgment is shown to be erroneous, unlawful or unjustified the judgment should be approved and affirmed.

The judgment from which the appeal is taken finds the Respondent guilty of having violated Canons 15, 16, 22, 31

and 41 of the Canons of Professional Ethics.

Canon 15 expressly prohibits any manner of fraud or chicane. The Referee found that Respondent used the pictures to force a property settlement and subsequently allowed or permitted such property agreement to be incorporated into the final decree.

Canon 16 requires the lawyer to use his best efforts to restrain clients from committing improprieties and wrong doing particularly toward Courts and suitors. The evidence clearly discloses that Respondent made no effort to restrain or remonstrate with his client on the payments to DeSarro, even though they were under such suspicious or unusual circumstances as should have put the Respondent on notice of an impropriety being involved.

Canon 22 requires candor and fairness on the part of the lawyer before the Court and with other lawyers. The Referee having found that the Respondent had knowledge that the photographic evidence he possessed was obtained through connivance, it follows that Respondent was guilty of breaching this Canon of ethics when he failed to disclose to either the Court or his adversary the circumstances which he himself felt to be suspicious and unusual.

Canon 31 places directly upon the lawyer responsibility for litigation and for advising as to questionable transactions, etc. Respondent's attempt in this case to avoid any

responsibility by urging that he was merely following his client's instructions in making payment to DeSarro, flies directly in the face of the expressed working of the Canon that such excuse does not relieve the lawyer of his responsibility.

Canon 41 places a duty upon a lawyer, upon discovering some fraud or deception to have been practiced, to endeavor to rectify it, first by advising his client and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel. The Referee found that the Respondent discovered or should have known of the fraud and deception and yet in spite of such knowledge on his part, rather than immediately making steps to rectify the same, he proceeded to use such information and such fraudulently obtained evidence to his client's advantage and without making any disclosure.

The transcript of the proceedings before the Referee contains explanations by the Respondent for the various circumstances that have been previously described in detail in this brief. The Referee found in favor of the Respondent on a portion of the charges but found Respondent guilty on the others. The evidence being clearly susceptible of an interpretation which sustains the findings and conclusions of the Referee, the Board of Governors (in entering the judgment herein) approved and adopted the same. The judgment, therefore, is substantiated by substantial competent evidence

in the record, and should be affirmed by this Court.

Respondent insists that before the occasion of securing the picture of his client's wife in an act of adultery, he had already accumulated a substantial amount of evidence to show that the wife was guilty of adultery. Ironically, the testimony of the witness DeSarro which was proffered and rejected by the Referee, would have clearly substantiated the fact that DeSarro had committed acts of adultery with Mrs. Daly on other occasions prior to the night the pictures were taken. Respondent could have simply called DeSarro as a witness. He did not actually need the pictures and if they added anything to the probative value of his evidence, it was merely "to put frosting on the cake".

While DeSarro's testimony could adequately corroborate Respondent's position that Mrs. Daly had been guilty of other acts of adultery and hence she really gave up nothing when she signed the property settlement agreement, the same testimony would clearly show that Respondent had been a part of the whole nefarious scheme. Thus, the real evil of the entire affair was not in the result it ultimately produced on Mrs. Daly (who by previous course of conduct had lost any standing to complain) but rather it was that a member of the profession would permit himself to become involved, and to sanction or condone the affair.

The conduct of the Respondent in this situation was

below the standards set for the profession, and such conduct was and is hurtful to the public appraisal of the legal profession and violated the duties which Respondent owed to the Courts and to the profession.

CONCLUSION

The Referee carefully considered all of the evidence after hearing and viewing the witnesses first hand. There is ample competent evidence in the record to sustain his findings and conclusions, and the judgment of the Board of Governors of The Florida Bar which adopted the same and found the Respondent guilty of violating Canon's 15, 16, 22, 31 and 41 of the Canons of Professional Ethics. The punishment set forth in the judgment is not too severe for the offense committed, and the judgment should be affirmed.

Respectfully submitted,

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507 North Olive Avenue
West Palm Beach, Florida
Attorney for Complainant

I DO HEREBY CERTIFY that a copy of the foregoing Complainant's Brief has been furnished by mail this 20th day of July, 1964 to JOS. D. FARISH, JR, 316 First Street, Denco Building, West Palm Beach, Florida, as Attorneys for Respondent.

Attorney