IN THE SUPREME COURT OF FLORIDA

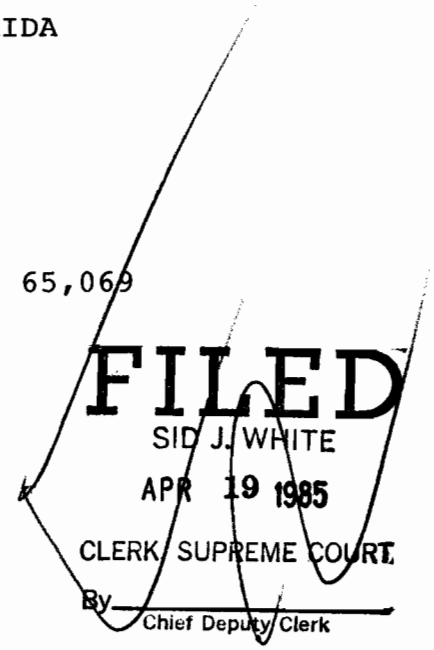
THE FLORIDA BAR, :

Complainant, :

vs. : Case No. 65,069

WILLIAM HUGH PRICE, :

Respondent. :



REPLY BRIEF IN SUPPORT OF
PETITION FOR REVIEW

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IF A REFEREE READS THE TRANSCRIPT OF A TRIAL, THREE YEARS AFTER IT TOOK PLACE, TAKES NO LIVE TESTIMONY EXCEPT THAT OF RESPONDENT, THEN REJECTS THE FINDINGS OF A TRIAL COURT JURY, SHOULD THE REFEREE'S RECOMMENDATION TO DISBAR RESPONDENT BE REJECTED?

ISSUE I

ARGUMENT

IF A REFEREE READS THE TRANSCRIPT OF A TRIAL, THREE YEARS AFTER IT TOOK PLACE, TAKES NO LIVE TESTIMONY EXCEPT THAT OF RESPONDENT, THEN REJECTS THE FINDINGS OF A TRIAL COURT JURY, SHOULD THE REFEREE'S RECOMMENDATION TO DISBAR RESPONDENT BE REJECTED?

Respondent agrees that the burden of proof in a disciplinary proceeding is less than the rigorous standard of beyond and to the exclusion of every reasonable doubt. However, as the court held in The Florida Bar v. Quick, 279 So. 2d 4 (Fla. 1973), disciplinary proceedings are penal in nature, and the burden on the Complainant is "most certainly more than the contradictory and inconclusive testimony adduced in the instant case.", at 9. The Florida bar v. Rayman, 238 So. 2d 594 (Fla. 1970), cites Zachary v. State, 43 So. 925 (Fla. 1907), for its holding that where the evidence is conflicting, "there must be a clear preponderance against the accused attorney", at 596.

That is the exact situation in the case at bar. The evidence was conflicting. The Referee did not take live testimony from any of the State's witnesses. If he had, perhaps he would have come to the same conclusion as that of three (3) different juries who heard the underlying case:

some or all of the State's witnesses were not worthy of belief. The juries had the benefit of observing the demeanor of all of the witnesses.

Respondent also agrees that a disciplinary proceeding should be a trial de movo, but in the case at hand, it was not. With the exception of Respondent's testimony, the Referee was in the same position as an appellate court reviewing a written record. Respondent would submit that the same standard should therefore be applied.

Complainant alleges that the reading of the testimony was no different than having a trial using only depositions and testimony of a defendant. It is submitted that such a trial would be highly suspect. Use of depositions at trial is frowned upon, Rule 3.190 (j), F. R. Cr. P., and is forbidden if the attendance of the witness can be procured.

Complainant argues that the Referee's findings of fact should be accorded the same weight as a jury verdict, but, as argued in Respondent's initial brief and above, the findings are not really of fact, but of opinion. As the Referee says in his findings, "I elect (emphasis supplied) to believe the testimony of the Customs agents and to reject the testimony of Respondent and James Devlin." (Paragraph 2, page 2, Referee's Report). This election, or opinion, is lacking in evidentiary

support, because there were substantial conflicts in the evidence; The Florida Bar v. Carter, 410 So. 2d 920 (Fla. 1982), and the Referee was merely reviewing a record and reweighing testimony from a cold, written page.

Complainant cites several cases as authority for the weight to be given a Referee's report, however, Complainant neglected to point out that in each of those cases, proof of the Respondent's guilt was either admitted or was overwhelming, Carter, supra; The Florida Bar v. Wagner, 212 So. 2d 770 (Fla. 1968); The Florida Bar v. Hirsch, 342 So. 2d 970 (Fla. 1977); The Florida Bar v. Hoffer, 383 So. 2d 639 (Fla. 1980); The Florida Bar v. Rose, 187 So. 2d 329 (Fla. 1966).

Rose, supra, cites State ex rel The Florida Bar v. Grant, 85 So. 2d 232 (Fla. 1956) as follows:

> When a trial ensues it will be incumbent upon the Complainant to establish its allegations by sworn testimony of witnesses and other competent evidence. During such trial, Respondent will then be entitled to confront the witnesses and cross-examine them-- at 238.

As noted several times, Respondent was not confronted with any witnesses. To hold that the testimony of the witnesses in the criminal trial accorded him this right would be a denial of due process. If that were acceptable, then the transcript of

the first trial could have been read at the second two (2) trials instead of having the witnesses appear.

On Page 11 of Complainant's brief, five (5) cases are cited which ordered the disbarment of attorneys for involvement with drug offenses. It should not be inferred from this that all attorneys are involved with drugs, therefore Respondent must be guilty. Complainant neglects to point out that in all of those cases, the Respondents had plead guilty, been tried and convicted, or failed to appear for their criminal trials. By contrast, the case at bar is an attorney who was tried by three (3) separate juries and ultimately found not guilty.

The instant case should be judged by the standard adopted by this court in State ex rel The Florida Bar v. Bass, 106 So. 2d 77 (1958), "the power to disbar should be exercised only in a clear case for weighty reasons and on clear proof." (emphasis supplied).

CONCLUSION

Based upon the foregoing argument and law cited, the Recommendation of the Referee should be rejected. His judgment should not be substituted for that of the jurors, because he was not able to cite any clear and convincing evidence that their verdict was one which no reasonable man could reach. The Referee could only state that he did not believe Respondent's defense. To disbar an attorney on one man's opinion as to the veracity of witnesses, when competent jurors have already judged the witnesses to be credible, would be an unconscionable result.

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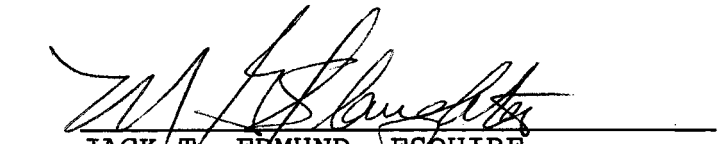
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished to David G. McGunegle, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801, by U. S. Mail, this 16th day of April, A. D., 1985.



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