

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

v.

BRINLY S. CARTER,

Respondent

FILED

SEP 25 1986

SEP 25 1986

CLERK, SUPREME COURT

CONFIDENTIAL

No. 66,126 deputy clerk

RESPONDENT'S BRIEF IN SUPPORT
OF HIS PETITION FOR REVIEW OF
THE REFEREE'S REPORT TO THE
SUPREME COURT IN THE ABOVE
STYLED MATTER. RESPONDENT
IS THE APPELLANT HEREIN.

BRINLY S. CARTER
P.O. Box 121
DeBary, Florida 32713
Appearing for himself

CONTENTS

Page 1----- Statement of the Case

Page 2-----Summary

Page 3-----Statement of Facts

Page 10-----Argument

a. Item One: Did the Referee Neglect to report all facts pertinent to the circumstances surrounding the charges herein and facts which go in mitigation of the charges made against the respondent? Page 10.

b. Item Two: Did the Referee err in finding the respondent did not supervise, see to compliance, or examine and be responsible for delegated work with respect to estate records? Page 13.

c. Item Three: Did the Referee err as to the discipline recommended to be layed on the respondent? Page 14.

d. Item Four: Did the Referee err in awarding costs to the Bar in the above matter? Page 17.

Page 17-----Conclusion

STATEMENT OF THE CASE

This matter arose pursuant to a letter mailed to the Grievance Committee "A" of the Seventh Judicial Circuit, Daytona Beach, Florida, and either a copy or the original to the Bar office in Orlando, Florida, which was received April 2, 1984. From there the matter proceeded to a grievance committee hearing which resulting in the above entitled case being filed by the Bar and Dominick Salfi, Circuit Judge, Sanford, Florida, being appointed as Referee.

Hearings were strung out from July 22, 1985, to March 7, 1986, encompassing approximately 2 years. The Referee did not file his Report until May 11, 1986, approximately 25+ months after the matter was commenced. It is from that Report that this Petition for Review is filed.

SUMMARY

Respondent's arguments can be summarized as follows:

1. The span of time during which these proceedings have proceeded far exceeds the time constraints guidelines enunciated by this court. Over 25 months from the beginning to the end of the matter has cost the respondent grievously in financial, health and time areas.

2. The referee's comments during the proceedings show a preexisting bias against the Respondent that would preclude a fair analysis of the current situation. In view of his feelings towards the Respondent recusal was probably in order on the Referee's own motion.

3. a. Presuming the truth of the findings, the recommended penalties are extreme and unwarranted when the facts are considered in their entirety. Further, the suspension time would amount to a de facto fine of tens of thousands of dollars, which is also extreme when the only person, if any, injured was me. Another example of the extreme nature of the recommendations is that the virtual cessation of income which would result from a suspension would not harm only me, but eleven other persons, our associate, his wife and baby, my wife and children, my bookkeeper and her child, and my receptionist. That result cannot be what the court intended in a case where no corrupt motives, no misappropriation of funds, nor anything else of that nature was found. All the referee found was that there was a breakdown in internal record keeping as to expenses of the estate advanced by my office, which expenses cannot be recovered by me unless the records can be reconstructed.

STATEMENT OF THE FACTS

Robert Tauber, M. D. Deceased, was an eminent physician in Philadelphia, Penna., having established his medical practice during and after World War II. He had escaped from Vienna, Austria, immediately before the Nazis began the systematic destruction of Jews throughout occupied Europe. The circumstances of his escape seemed miraculous and apparently centered on a "masonic" underground railway.

A stranger in a strange land, his brilliance and industry quickly brought him fame and prominence in the field of OB-GYN. His wife was a pianist and art critic for the New York Times. Retirement came in the early 70's and he and his wife moved to their retirement home in Deltona, Florida. When I came to know him his wife had been dead for about a year and he was living alone in their house filled with antiques, medical books, electronic gear, records, bric-a-brac and clutter. As is the case with many older persons (he was in his 80s) deprived of a helpmate and anchor he had become depressed and chronically despondent. His reason for coming to me was to find out where the assets (stocks, jewelry, etc. worth several hundred thousand dollars) he had inherited from his wife had gone to. Search and enquiry developed the fact that a Philadelphia lawyer named Michael Marchesano had taken his stock certificates and jewelry. After contacting the local court, I found, further, that said lawyer had filed a Petition for summary administration stating that Dr. Tauber's wife's

estate was worth only about \$20,000.00. The probate estate in fact was in the area of four or five hundred thousand dollars. It contained not only the above mentioned stock and jewelry, but three buildings containing 28 apartments in Vienna, Austria, expensive personal property and cash. In addition to the above there was the possibility of extensive land holdings in Lugano.

When Dr. Tauber died about two months later, Marchesano immediately flew to Deltona, entered the house for several hours, refused to see me and left the next day. During his stay he managed to leave a purported will of Dr. Tauber's which made him, his wife and children the primary beneficiaries of the estate. The will was not presented for probate for over two months and that is when, in April of 79, I on behalf of John Beck petitioned for and obtained the appointment of John Beck as Personal Representative of the estate. Because of the fraud against the court in the estate of Violetta Tauber Beck was also appointed Personal Representative of her reopened estate. Beck requested that I go to Austria and Switzerland to ascertain the assets belonging to the respective estates. I did so, travelling first to Vienna to secure the 28 apartments, bank accounts, and personal property belonging to the respective estates. Total value of the Vienna property approximated several hundred thousand dollars. An attorney (Dr. Pritz) was retained to handle the probate of the two estates in Austria.

In Switzerland, bank accounts were found in Zurich and Interlachen and retrieved. I investigated the possibility of land in Lugano but found nothing.

As the several estates continued over the next few years William S. Sherman and Richard Taylor, DeLand, Florida, filed suit on behalf of Marchesano but withdrew before the matter came to trial.

Another claimant against the estates appeared in the Miami area. His claim came to naught.

Still another claimant surfaced in the form of the University of Pennsylvania, represented by Patricia Fawsett, Orlando, Florida.

The estates had to employ counsel in Philadelphia, Penna., to pursue the stocks and jewelry (Edward McDaid; Shrader, Loftus and McDaid). Trial counsel in Florida was Mr. Morris Proenza; Beckham, McAily and Proenza, Jacksonville, Florida. Appellate counsel was also employed; Gurney and Handley, Orlando. The complexity of the estates was incredible. My office was preoccupied with them, the lawyers involved and the innumerable new twists for several years.

During this same period of time, Beck was employed by an airline and could not or would not do most of the duties of the Personal Representative. Thus, he asked me to not only quarterback all the litigation and probate matters as attorney, but to do most of his duties also. I and my office staff under my then able office manager, bookkeeper and secretary Helen Wall, thereupon handled transactions involving the maintenances of assets, sale of assets, negotiations with the Internal Revenue Service, C. P. A. s, and foreign governments and banks, appraisal of gold coins, etc. All in all probably over \$1,000,000.00 in various small and large transactions were handled by my office. When Mr. McGunegal ordered all the accounts audited my office was owe . about \$15.00. An amazing feat of complicated accounts spanning over six years

Mrs. Wall kept all the office books during this time period and at no time was ever accused of negligence or inaccuracy in the estates we're concerned with here or any others. As a matter of fact, during the fifteen years she worked for me she was never accused of negligence or inaccuracy in any way whatsoever.

A brief discussion of Mrs. Wall's qualifications are in order at this point, because few attorneys are able to obtain the services of such a qualified woman. She began her legal secretarial career at 15 as secretary for a lawyer relative and continued to hold such positions till she retired at 71. Her marriage was to a lawyer who became an assistant Attorney General of Indiana. She was secretary to a Supreme Court Justice sitting on the Indiana Supreme Court for many years until he died. Her husband having died prior to the justice she moved to Miami, Florida, where she was secretary for the senior Ward of Ward and Ward, Attorneys, at the time a prominent law firm in Miami. After a boat accident in which she was injured, she came to her sister's home in Volusia County to recuperate. I hired her in 1970, February 1st. Mrs. immediately displayed the talent, competence, honesty and diligence her background indicated. I and all clients who dealt with her developed the greatest confidence and trust in her and her abilities.

It was not until March 13, 1984, that any diminution of her abilities made itself felt or apparent. On that day John Beck and I received an estimate of the costs to our office for the handling of the various matters involved in the estates. The estimate was to be finalized at a later date by Mrs. Wall. Beck and I well knew the immense complexity of the cases spanning 5-6 years, having assets and probate procedures in three countries, litigation in two states,

Beck and I well knew the immense complexity of the cases spanning 5-6 years, of having assets and probate procedures in three countries, litigation in two states and assets which had to have special appraisals and handling. However, before Mrs. Wall could anything about the matter or even discuss it with me Beck filed his infamous complaint which gave rise to this matter. Being neither by inclination nor training either a CPA or bookkeeper I relied on trained office help and CPA's for accurate bookkeeping and tax work. I reviewed the work of Mrs. Wall and our CPA, John Brim, Orange City, Florida, after they had finished with it. Mr. Beck was advised at the March 13, 1984, meeting that Mrs. Wall would finalize the cost statement when she had completed her yearly accounting and tax matters which were being done at the time.

I was assured a number of times thereafter by Mrs. Wall that she was in the process of preparing the cost statement, but eventually became aware that at 70 years old she might not be able to pull it all together alone. She was told to use another girl in the office to help her. The then manifest symptoms of increasing age, coming about insidiously, gave me cause to worry for her health. She finally said the complaint of Beck being filed within days of when he was informed by her that she would be finalizing the costs before the estates were closed completely demoralized her and that she wanted to retire. She had had a close and pleasant relationship with Beck up to that time and felt that, in view of the fact that we had done so much successful work in his behalf furthering his and his relatives interests, the complaint and all the stress and anxiety it would cause, whether true or not, was the

lowest of blows.

Martha Brown, Helen Wall's sister, had been hired by me a year or two after Helen. She assumed the position of receptionist, including the duties of keeping telephone records and copy records. Not as broadly trained as her sister, she, nonetheless, was intelligent, diligent and honest. For eight years there was no fault with her performance. Then, during the course of the Tauber Estates, a temporary breakdown happened which I thought an aberration, but which led to the matters in 429 So2d 3. In that case she was given the job of recording sales in an estate sale. While I was at a hearing she stopped. I was extremely disturbed when I found what had happened, but ultimately decided it was a momentary lapse. She, being under the direction and control of Helen Wall, would not make such a mistake again. I was the only lawyer in the office at the time and was extremely busy with clients' business, appointments, hearings and the like. Martha Brown had a continual break down in health after that time and retired. She died not too long after she retired. She was 75 years of age.

After the birth of our fourth child, Addison Chapman, in 1983, my wife made plans to return to work in the law office. Joan, a competent legal secretary, worked her way back in and succeeded Helen when she retired in February of 1985. She was a Merit Scholar Finalist in High School, graduated from Vassar College, awarded several post-graduate scholarships, been appointed to positions of trust and responsibility by the county council of Volusia County and the Volusia County School Board, is a member of the Volusia Land Trust, and is one very good legal secretary.

Our new bookkeeper, Jeanette Weber, was employed as head bookkeeper for Albertson's, Inc. in Altamonte Springs, Florida, and had five other bookkeepers to supervise. She has shown herself to be competent and thorough.

During the period I have practiced law I have been active in civic and professional matters. I incorporated and sat on the Board of Directors of Volusia County Legal Services (later, Central Florida Legal Services), was on the judicial liason committee of the Volusia County Bar, belonged to several Bar Committees, served as President of the DeBary Civic Association for four years, served on the Chamber of Commerce Board of Directors (DeBary), was a charter member of the DeBary-Deltona Rotary Club and served as Secretary and Director, was on a Volusia County Zoning Board, was attorney for and ex officio member of the DeBary Public Affairs Council (the town government of DeBary, an unincorporated community of 7,000), organized and obtained quarters for an organization which oversees adequate nutrition for elderly persons, belong to The Explorers Club, New York, N. Y., am a Mason and Shriner, have raised with my wife four children, son Brinnen, who graduated from Bowdoin College at 19 years old and will go to graduate school, Abigail, who is a sophmore at Sweetbriar College, Virginia, Julia, who is in the gifted program at DeLand Jr. High School, and the aforementioned Addison Chapman, incorporated and served as first President of the West Volusia Historical Society, and many other things and duties. I was taught to help my community, government and profession and have done so without neglecting my family.

ARGUMENT

ITEM ONE:

DID THE REFEREE NEGLECT TO REPORT ALL
FACTS PERTINENT TO THE CIRCUMSTANCES
SURROUNDING THE CHARGES HEREIN AND FACTS
WHICH GO IN MITIGATION OF THE CHARGES MADE
AGAINST THE RESPONDENT HEREIN?

Consider of this point and question starts with the Report of the Referee. In Paragraph 2 of Section II the Report states that I was retained as attorney by John Hans Beck in February, 1979. Such is not the case. I was initially retained by the decedent, Robert Tauber, during November 1978. Then, in February of 1979 after the death of Dr. Tauber, I was asked by Charles Beck, John Beck's cousin, to be attorney for him. John Beck ended up as Personal Representative when it appeared that Charles could not, because of age handle the matters which needed to be handled in any estate. (Transcript, October 11, 1985, pages 89-90)

Despite a lengthy description of the complex matters which transpired during the course of the estate the Report fails to linger on just how complex it really was. (Transcript, October 11, 1985, pages 90-97) It is highly improbable that a lawyer will handle one estate that will be as complicated as the Tauber estate turned out to be, much less two of them. It was an estate which consumed time and effort for extended periods of time and with regularity developed twists and unusual problems. In conjunction with all the other estates, guardianships and clients which I had to service it was necessary to have competent assistants to manage the bookkeeping and clerical side of the practice. These I had. (Transcript, Nov. 11, 1985, pages 15 et. seq.)

The intense nature of the case continued for about three years and gradually eased off. There were many other things to do in the estate and a routine set in. In late 1983 the matter of costs was addressed and Helen Wall was instructed to begin the assembling them first for the IRS and then for the court to approve at the end of the probate. She prepared such an item for the IRS in which I estimated the closing amount and calculated the mileage. Other than the total figure I was not aware of the other costs. Some of the figures had to be estimates, as was conceded by all who testified at the hearings about such matters. However, the fact was that there was no finalization of the estate in view at the time and our cost statement was not an urgent matter. Cleaning up the tax matters was the prime concern. John Beck and I saw the figures for the particular costs as calculated or estimated by Mrs. Wall. She was competent (Transcript, Ibid.), and had responsibility and control of all the office records from shortly after she was hired in 1970 to that date. With the complexity of the estate there was no reason to think her estimates inaccurate to any significant degree. And, indeed, most of them may turn out not to be when the estate is finally closed. Mister Beck admitted that he knew that the amounts had to be estimates because some were round figures, plus the fact that the estate was not over. (Transcript, October 11, 1985, page 33-34)

It is true, as the Report of the Referee states that the office personnel were not keeping adequate records as to some expenses in the Tauber estate. However, to extrapolate that all estates suffered the same problem is ridiculous. There was no examination of any other estates or files by the Bar

nor anyone else. The most that was stated about the keeping of phone records, copy records and the like was that very few estates generated enough copies or phone calls (other than long distance) or the like to warrant the bookkeeping necessary to itemize them. Thus, they were included in the fee charged to do the labour in the estate. (Transcript, November 11, 1985, page 8)

The Report then, is not reflective of the true situation as regards records in my office. Further, without a computer system there virtually is no way to calculate total costs in such a large complicated estate on a month's notice when you are running an office with many different clients and estates going on at any one time. Especially if the hand of Time is weighing heavily on your shoulder. I would not and have not asked for recompense for expenses not due me. If all the expenses as to the telephone and copies cannot be verified at the closing of the estate the court will not be asked to award them.

It should be noted that despite the fact that I offered to withdraw as counsel for the estate Mr. Beck begged me not to in light of the excellent results obtained for his family and himself. I think he is sorry for what he precipitated and the grief and harm done Helen Wall.

ITEM TWO:

DID THE REFEREE ERR IN FINDING THE RESPONDENT DID NOT SUPERVISE, SEE TO COMPLIANCE, OR EXAMINE AND BE RESPONSIBLE FOR DELEGATED WORK WITH RESPECT TO ESTATE RECORDS?

One can dispense with the last part of the above question with the simple statement that noone in an attorney's office is ultimately responsible for what is done there other than the supervising attorney. The buck stops with him or her. This applies to all records and conduct of cases. He obliged to obtain the best persons possible to assist him in the running of his office, train them if need be, and consult with them regularly about the progress of matters. If persons of specialized knowledge are needed he is obliged to obtain the services of them. He is obliged to obtain the services of a CPA for tax matters if he is not by inclination or training able to do tax work. The record shows that I did all of the above as to lawyers, competent secretaries, bookkeepers and the other specialists one needs to run a law office. The one thing that broke the system in the Tauber case was aging. The one thing I did not expect as to Helen Wall and her sister. Neither did they expect the insidious small wounds inflicted by the rats of death to bleed away their talents. We all three were victims, just as all men and women must ultimately be victims if they survive long enough. Experience can be a savage teacher, as I have come to know through the two years of this ordeal. The Bar and the Court must find a better way to treat their compatriots in matters like this one. To me the procedure became nothing more than an inquisition with attempts made to turn the CPR into "The Hammer With Which to Kill Witches".

ITEM THREE:

DID THE REFEREE ERR AS TO THE DISCIPLINE
RECOMMENDED TO BE LAYED ON THE RESPONDENT?

When the transcript is considered in its entirety there can be no doubt that the recommended penalties recommended by the Referee are excessive, presuming his findings of fact were essentially correct. The most that was shown by the testimony was that two competent employees fell down on the job as to one estate. Their failure was in all probability due to the inescapable onslaught of the last of life. As to the case 429 So2d3 the same parties were involved during the same time frame as this matter. Martha Brown, after I had gone to a hearing, had failed to continue keeping records of sales in an apartment sale. The case had nothing to do with keeping records in the office. However, the record keeping was not completed and the Bar had its ounce of flesh and pound of publicity out of me due to that oversight or neglect by one of my employees. I thought it an aberration in the course of conduct which in every other way was excellent. The family matter which gave rise to 410 So2d 920 (Fla. 1982) was made out to be an awful thing but resolved itself in the fact that the ill complained of was that I did not immediately give \$4,000.00 which was held in trust to my aunt after an order to do so. It must be stated that the same William Sherman who filed that particular complaint with the Bar at the behest of Sidney H. Taylor did so at the same time he was employed by Michael Marchesano in this case. It also must be stated that the same Sherman was called by the woman who filed the complaint in 429 So2d 3 immediately before she filed the same.

The Referee's comments on the record (Transcript, November 11, /page 38 et seq.) 1985) in regard to the Respondent fully show that somewhere in his mind he held the opinion that the Respondent was in some manner wicked and that some way must be found to punish him. The recommendations reflect that feeling, not the facts in the case. The true result of the recommendations is to impose a defacto fine on the Respondent (me) of several tens of thousands of dollars, essentially close my office for three months or more, financially injure my young associate, his wife and baby, disassemble my office staff, throw my wife out of work, possibly cause my two college age children to drop out of college for a semester or year and smear me as much as can be done on such facts as appear in the record.

Further, it is not the position of the Bar, this Court, nor the Bar membership that lawyers be treated in these matters as quasi-criminals if the facts do not show actions involving moral turpitude. The entire thrust is to correct mistaken or negligent actions if they exist and to try to insure they don't happen again. In the instant case the Referee grudgingly admitted that the office personnel problem had been corrected, but still wanted to impose draconian punishment and rehabilitation after that punishment, entending and making worse the punishment. In fact the rules state that if the punishment is 3 months or less no rehabilitation is due. The Referee further states that "respondent's actions did not cause his client to lose money directly." My client did not lose any money nor did any other heir. I am the only one who has been financially penalized by this matter. Neither the client, nor society has suffered from any unethical conduct my me that in any way was wilful or negligent or in fact existed. I discovered and negated unethical

conduct by another attorney, Michael Marchesano, and saved Florida society and the courts from the results of unethical conduct. I conducted a winning strategy in the various litigations involving the estate and benefited the very person who began this matter. Society in no way has been threatened by my actions.

It is interesting that in V of the Report that so little is said concerning the person to be affected so much by the Referee's recommendations. "The respondent is married with minor dependents." There was no other enquiry as to how many dependents, how old, what is your reputation in the community, do you have any other skills or talents which can be utilized if you don't practice law, who besides you and your family will bear the impact of you not working, nothing. Except in matter involving moral turpitude I
but
cannot/believe that all the above are highly important to a just recommendation.

ITEM FOUR:

DID THE REFEREE ERR IN AWARDING COSTS
TO THE BAR IN THE ABOVE MATTER?

Costs should not be awarded to the Bar in this matter because it failed to bear the burden and show that the Respondent violated any of the CPR regulations claimed to be violated by the Bar. Indeed, the Bar, through its counsel, may be the blame for part of the attitude of the referee towards the Respondent. In each and every case brought against me by the Bar, Mr. McGunagle has used the shotgun approach--accuse him of every possible thing and settle for minor success. This approach is wrong and should not be allowed. It is the old "vilify, vilify, some of it will stick" trick used in politics. It also allows counsel the luxury of not having to work too hard in ascertaining what the truth really is. It also is a trial tactic used in Volusia county (I know about that county) ^{by} unethical lawyers. It is wrong to do such a thing to fellow lawyers and cause this court to be burdened with unnecessary procedures.

CONCLUSION

For all of the above reasons the Report of the Referee should be reviewed by this Court and the findings rejected. Costs should be awarded to the Respondent. The Report is not founded in fact and in fact reflects a prejudice against the Respondent that precluded justice being done on the referee level.

Respectfully submitted.



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Copy to:

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I HEREBY CERTIFY THAT A TRUE copy of the foregoing has been served by mail on the abovenamed David G. McGunegal this 22nd day of September, 1986.

