IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

J. B. HOOPER,

Respondent.
_____/

Case No: 68,954

(Florida Bar
Case No: 13D86H17)

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RESPONDENT'S REPLY BRIEF

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ATTORNEYS FOR RESPONDENT

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Bar." The Respondent, J. B. Hooper, will be referred to as the "Respondent." The Disciplinary Rules of the Code of Professional Responsibility of the Florida Bar will be referred to as the "Disciplinary Rules" or "DR." The symbol "R" will denote the record from the referee hearing of October 10, 1986. "TR(1)" will denote the transcript of proceedings from the grievance committee hearing of February 6, 1986, and "TR(2)" will denote the transcript of proceedings from the grievance committee hearing of April 10, 1986.

STATEMENT OF THE CASE AND FACTS

The Respndent would refer the Court to its Initial Brief of March 22, 1987, which contains an accurate statement of the case and facts and to the Bar's Answer Brief, of April 11, 1987, which confirms that probable cause was found by the grievance committee "only after requesting legal research on the Mechanic's Lien Statute," notwithstanding the Bar's position that the statute "clearly" does not apply to attorneys. Bar's [Appellee's] Answer Brief, p. 2.

It should be pointed out, however, that the Bar in its brief erroneously states that the $8,500 owed Dr. Kassels by his former wife and from which the Respondent attempted to obtain his $1,900 fee for services had nothing to do with the pending partition proceeding. Id. at 1. No citation is offered by opposing counsel and this is a serious misstatement of fact. The $8,500 payment was directly related to the efforts of the Respondent during his eighteen months of representation of Dr. Kassels for which he was never paid and was but a small part of the settlement which was negotiated by the Respondent prior to his court approved withdrawal. Dr. Kassels also received his choice of one-half of very valuable thirty-six acres of Northwest Hillsborough County real estate. R-207. The record throughout is very clear on these points.

One other point which the Bar makes is worth noting when it states that, "Dr. Kassels did not refuse to pay any additonal attorney's fees, but did question the reasonableness of those fees charged." Id. at 1. During a year and a half of diligent representation, Dr. Kassels paid a total of $400, i.e., the initial retainer. Now, almost four years later, nothing more has ever been paid. The Bar just doesn't make

it clear when Dr. Kassels plans to pay the remainder found by the grievance committee to be a reasonable fee.

The Bar (not surprisingly) did not file a Cross Petition for Review of the Report of Referee or his recommendation of a one year suspension.

Since the Bar's Reply Brief addresses those same points set out by the Respondent in his Initial Brief, this Answer Brief will simply respond to those arguments offered by the Bar in support of the Report of Referee.

SUMMARY OF ARGUMENT

The Respondent seeks to show that the allegations of wrongdoing against him are clearly erroneous and are completely absent of support in the record. The Respondent further seeks to show that where the referee in this matter was duly requested to remove himself from these proceedings, he elected instead to remain and joined with the Bar in its prosecution, thereafter reflecting his prejudicial propensities by his recommendations to the Court. Finally, the Respondent seeks to show that as a duly licensed practitioner, he enjoys the constitutional protections associated therewith -- including the right to an impartial hearing by a fair and impartial referee -- but, whose rights are preempted in a case that is totally void of evidentiary support.

It is acknowledged by Respondent that the findings of fact by a referee are to be upheld unless they are without support in the record or clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). This case is not only wholly lacking in evidentiary support but in establishing the above test, it must surely be assumed that the referee would meet the requirements set out in Eastmoore, Post, wherein this Court stated from State ex rel. Davis v. Parks, 141 Fla.516, 520, 194 So. 613, 615 (1939) as follows:

> "It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefullness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies--purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this. Inquiry Concerning a Judge, Judge E. L. Eastmoore, No. 69,754 (Fla.March 27,1987)[12 F.L.W. 145]."

Absent such a standard, all else becomes rather meaningless. By (a) his refusal to remove himself followed by (b) his conduct during the hearing and (c) his recommendation to this Court, the Referee in this matter has allowed his own prejudices to override the absolute right the Respondent has to a full and fair hearing and therein has fallen far below the standard set out in Davis as adopted in Eastmoore, Supra.

Although given ample opportunity, first at the referee hearing and subsequently in its reply brief, the Bar has yet to offer a single citation from the record, any ordinance, statute or rule, or other evidence which would support the proposition that the action of the Respondent was in any way improper, much less of the type which would warrant discipline. The Respondent has failed to find, and the Bar has failed to cite, a single case from Florida or any juridiction remotely on point. Until this Court orders otherwise, the burden is still upon the Bar to prove its case with competent evidence. Not only must there be proof of a breach of the Code of Professional Responsibility, The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), but the proof must be clear and convincing, The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973), and free from doubt. Charlton v. F.T.C., 543 F.2d 903. In fact, the Bar has cited no compelling authority from any source for the proposition that Respondent's action was in some remote way improper.

POINT I

"WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR."

In its brief, the Bar uses the term "clearly" (or variations thereof) numerous times as if saying, it made it so. For example on **page 3**; "The violations against the respondent were proven by 'clear' and convincing evidence," but fails to suggest what the clear and convincing evidence was. Continuing on **page 3**, it states that "The filing of a Mechanics Lien for attorneys fees is 'clearly' not within the parameters of the Mechanics Lien Law," but fails to remind this Court that it was not so clear to the grievance committee who requested legal research on the question from The Florida Bar. On **page 4**, it is stated that the "respondent took a position 'clearly' unsupported by statutory authority and case law," but fails to offer a cite to either one. On **page 5** the Bar states rather emphatically that the Report of Referee was "supported by competent and substantial evidence which 'clearly' and convincingly showed that Respondent violated the Code of Professional Responsibility. . . ," but fails to give even a tiny hint as to what evidence it relies upon for such a statement; referring instead in its brief to a single, brief, misleading, out of context quotation from Respondent's own expert witness, Mr. Musial to wit:

> "Q: [by Bar counsel]...are you familiar with any section of the Mechanics Lien Law that would allow for an attorney to legitimately and affirmatively file a Mechanics Lien?" (sic)
>
> A: [by Mr. Musial] No, I am not aware of any provision in the statute. (sic) R-220.

Interestingly, though, the only testimony which the Bar felt worthy of citing directly is grossly misleading. Therefore, two very important points must be made. **First** of all, Mr. Musial's testimony cited by the Bar was taken out of context and gives the erroneous impression of contradicting other extensive testimony by himself as well as Mr. Deason, (the other expert real estate attorney and witness), as to the fact that not only was there no specific prohibition against the filing of the lien, R-221-222, R-241-242, but that it could easily have come under the exact same law as an equitable lien. R-223-225, R-239-241.

Secondly, the above quotation from the record on page 220 was preceded by the following exchange at page 219:

> "Q: [by Bar counsel] So after refreshing your recollection after 713.03, is your opinion now different as to whether or not an attorney may file a Mechanic's Lien in reference to a fee?
>
> MR. MITCHAM: I would object to that based upon the cursory reading by this witness of that particular provision unless the question is directed to the whole act as a whole, because of the case law that says that the act is being taken as a whole, not looking in on one little provision.
>
> THE COURT: Objection is overruled. Only direct his attention to that particular section. (Emphasis added.)"

That's it! No other support of any kind except the bare allegation of misconduct itself and the simplistic suggestion that if a law does not specifically allow for some action, it must therefore be illegal. Nonsense! There is not space in this brief or a hundred like it to set out all of the constitutional arguments against the Bar's position. Any lawyer could name a thousand things which are accepted modes of behavior, but are not specifically set out in some statute, ordinance or law. If the Bar still is unclear on this point, perhaps a

brief review of the Bill of Rights of our Constitution and the underlying case law would be helpful when confronted with questions like these.

How then can the Bar suggest that the Respondent has committed some wrong by acting within an area that is grey at best; an area, according to expert testimony, that is governed by a statute which is "complex and prolix;" an area, in fact, where even grievance committees and referees are void of all the answers? See Attorney's Right to Charging and Retaining Liens After Mones, (Spring 1987) Stet.L.Rev.521, for an excellent discussion of the dilemma of attorneys who have earned fees from clients who refuse to pay reasonable attorney fees.

POINT II

"WHETHER THE REFEREE IN THIS MATTER ACTED IMPROPERLY AND IN VIOLATION OF CANON 3C(1)(a) IN REFUSING TO REMOVE HIMSELF FROM THESE PROCEEDINGS AND THEN EXPRESSING HIS PREJUDICIAL PROPENSITIES THROUGH HIS CONDUCT AT THE HEARING AND THE RECOMMENDATIONS CONTAINED IN HIS REPORT."

Four very important points need to be addressed in response to this issue in the Bar's Answer Brief.

First, the Bar sets out what it states to be the test of "legal sufficiency" in an affidavit in support of a motion to disqualify, to wit:

> "The test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge." (cites omitted.)

The Respondent adopts the test offered by the Bar.

But now, the question is whether or not the Respondent had a "well-grounded" fear that he would not receive a fair trial. In his Motion to Disqualify, Appendix A-1, the Respondent offers the following allegations after which any reasonable person is likely to conclude that he had a legally sound basis for serious concern regarding a fair hearing:

a) Respondent brought to the attention of the Court evidence of perjury supported by testimony from other independent witnesses in a different unrelated matter heard by this Referee.

b) The allegations of perjury were further set out in Respondent's trial brief.

c) The Referee elected not to acknowlege these allegations.

d) The use by the Bar and introduction into evidence of perjured testimony was highly prejudicial to the Respondent.

e) The Referee was further accused of ex parte communications with Bar counsel during the previous matter.

If these serious allegations against the Referee do not support Respondent's "well-grounded" fear that he would not receive a fair

trial, it is difficult to imagine how such a test could ever be met. The Bar argues that, "It may only be presumed that the Referee considered the entire Motion for Disqualification to be 'frivolous or fanciful,' and lacking in legal sufficiency." Bar's Answer Brief at 8. One would certainly hope and pray that such serious allegations would never be considered frivolous or fanciful by any independent and honorable member of the judiciary. See Code of Judicial Conduct, Canon 1. As the trite saying goes, "The proof is in the pudding." The Respondent certainly does not consider the Referee's conduct in "whiting out" the Bar's recommended discipline of a "Public Reprimand," Appendix A-3, and the insertion of his own recommendation of a one-year suspension, Appendix A-4, frivolous or fanciful but rather nothing less than arbitrary, capricious, and improper conduct.

Secondly, the Bar in a rather cavalier fashion suggests that the Respondent could have applied for a writ of prohibition with this Court following the denial of disqualification by the Referee. And further, upon his failure to seek such a writ, it is not now appropriate for the Respondent to argue that the Referee should have disqualified himself. This kind of legal game playing does not belong in the arena of lawyer prosecution and the Bar should know better, (not to mention the weak legal basis for such an argument.) Quite simply, when improper conduct surfaces, the lawyer has a duty and a right to seek review. The rules which have been approved by this Court in proceedings of this nature allow for flexibility in matters where a lawyer's right to practice law is at stake. Why has not the Bar sought to determine the truth or falsity of the serious allegations made against one of its own prosecutors involving the use of perjured testimony and ex parte communications with a judge? What ever happened to the quest for truth and justice

which all lawyers are allegedly in search of?

The Bar's statement that the "record is replete with evidence that the Referee conducted a fair and impartial trial" is just simply untrue. Bar's Answer Brief at 9. The record as cited herein and in Respondent's Initial Brief reflecting the predisposed attitude of the Referee, his conduct of the hearing, and his recommendations to this Court indicate otherwise. As further stated in Eastmoore, Post, there can be little confidence in the impartiality of a decision when the "decision maker's demeanor bears all the indicia of prejudice and a closed mind." Inquiry Concerning a Judge, Judge E. L. Eastmoore, No. 69,754 (Fla. March 27,1987)[12 F.L.W. 145]

Thirdly, the Bar includes in its brief another serious misstatement of fact when it states that, "Ironically, on page 12 of Respondent's Initial Brief, it is alleged that the Referee acted improperly during the course of the instant proceeding because he did inquire of witnesses." The record must be set straight in order to prevent further misleading of the Court. The Referee's improperly interposing himself into the interrogation of witnesses as set out on page 12 of Respondent's Initial Brief is clearly unrelated to the Referee's failure to acknowledge allegations of perjury and ex parte communications with Bar counsel brought to his attention after the hearing in an unrelated matter. For the Bar to suggest otherwise is seriously misleading and improper argument.

And **finally,** the Respondent believes he has a constitutional right to a fair hearing by an impartial referee. All of the evidence so far would seem to suggest otherwise. In fact, our United States Supreme Court has addressed the constitutional issue several times when it has stated that among those privileges long recognized at common law as

essential to the orderly pursuit of happiness is "the right to hold specific private employment and to follow a chosen profession," Greene v. McElroy, 360 U.S. 474; including, "the practice of law." Schware v. Board of Bar Examiners, 353 U.S. at 238. It has gone on to state that "The right to procedural due process . . . is conferred, not by legislative grace, but by constitutional guarantee. . . . As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. Arnett v. Kennedy, 416 U.S. at 167.

This Court has endorsed essentially the same concepts of due process when it states that a license to practice law "should not be withdrawn by a governmental authority save by proper application of traditional concepts of due process." The Florida Bar v. William T. Fussell, 179 So.2d 852 (Fla. 1965). With this in mind, how can the Bar argue in good conscience that the Respondent should be estopped from raising the issue of obvious referee prejudice, (even though it was previously raised in a timely fashion), and then to urge that the decison of the Referee in this case be upheld? Such attitudes on the part of the Bar and any suggestion that the Respondent should be burdened with the improper conduct of this Referee brings into question the integrity, fairness and equality of the entire attorney disciplinary process!

CONCLUSION

Among those duties with which the Bar is charged by this Court, the prosecution of frivolous complaints and rubber stamping of referee misdeeds are surely not within the list of those responsibilities. Although the Bar has offered absolutely no substantial, competent evidence supporting the referee's determination of wrongdoing, it has nevertheless supported the unwarranted recommendation of the referee, and in the process, has failed to honor its duty to this court and the lawyers of Florida to lift up and maintain a high standard of lawyer and judicial conduct. The extreme prejudices of the referee in this matter would be obvious to the casual layman, and would certainly be overwhelmingly apparent to any member of this Bar. To call the conduct of the Bar improper in its acquiescence in this matter is an understatement. To suggest that it breaches the same rules which it is charged with upholding leaves open the question of who should be held responsible for such misdeeds. To simply urge that this court find for the Respondent fails to repair the irreparable damage done by such wrongdoing.

The actions by the Bar in bringing this action, (based upon a split decision by the grievance committee and only after the Bar prosecutors researched the law for two months), and then supporting a one year suspension by the Referee, who failed to see fit to remove himself are simply ludicrous. As the Bar is well aware, when an action is filed against an attorney, he must take time from his practice, his family, his social life and his civic responsibilities in order to prepare a defense -- no matter how totally lacking in credible support the charges might be. Actions brought by the Bar, (even those without merit), must be defended at great sacrifice both in time and money. Just the filing

of a charge of misconduct has the potential to damage the reputation and financial well being of the attorney. Should not then the Bar accept the responsibility of separating the chaff from the wheat before it brings all its resources to bear upon an attorney with the very clear possibility of undermining his reputation within his community, irreparably damaging his practice and destroying his financial resources?

The Bar in this case lacks any substantial, competent evidence supporting the referee's determination. If the primary purpose of attorney discipline is the protection of the public, as has often been stated by this Court and our Federal courts, one must again ask why a cloud should be placed on an attorney's reputation and why his livelihood and his financial resources should be impaired in a matter that is not only petty but violates no law, disciplinary rule or even an ethical consideration. When the Bar comes down on lawyers and moves forward with disciplinary cases of this nature, and therein urges this Court to take away a lawyer's livelihood, it must be assumed by this Court that the behavior of the Bar is appropriate and the actions of the Referee are above reproach. In this case, neither existed. When a referee, appointed by this Court, acts with such extreme prejudices toward another member of the Bar, who but this Court can say that such actions are inappropriate? But on the other hand, what right does the Bar have to urge a result which is totally inconsistent with constitutional mandates and basic rules of fair play by supporting a Referee when he makes such an inappropriate finding without the thinnest thread of evidence but arising instead from purely prejudicial propensities. Respondent has failed to find a single case on record in Florida or anywhere else where an attorney has been persecuted to such an exteme with such a total absence of any proof of wrongdoing.

The Bar's handling of this case just does not comport with those constitutional cases cited herein or with current notions of justice, equity, fair dealing and due process. The Bar would be well served to read and carefully follow the mandate in Murrell, wherein it is stated that if the charges against the attorney are found to be without merit, the lawyer should be exonerated. The Florida Bar v. Murrell, 122 So.32d 169 (Fla. 1960). There is certainly no rule which states that the Bar is required to seek extreme and severe sanctions against every attorney appearing before a grievance committee or any requirement that the Bar improperly support wrongdoing by a referee.

While it would certainly be appropriate, it is not enough that the Court dismiss these charges against the Respondent for that fails to right the wrong which has been done to his personal and professional life by these groundless allegations. The Bar and the Referee should be chastised for joining in such an inextricably intertwined charade. Should this kind of behavior be allowed to go unchecked, the opportunity for mischief by grievance committees, Bar prosecutors and referees is limitless.

As this Court further stated in Eastmoore, "We take this opportunity to remind ourselves as judges that tyranny is nothing more than ill-used power." Inquiry Concerning a Judge, Judge E. L. Eastmoore, No. 69,754 (Fla. March 27,1987)[12 F.L.W. 145]. Should not the same principle apply to The Florida Bar?

WHEREFORE, the Respondent respectfully prays that this Honorable Court find the Report of Referee to be clearly erroneous and wholly lacking in evidentiary support, and thereafter to dismiss these charges and order that all costs be borne by the Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing with seven copies has been furnished by Express Mail to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, with a copy to David R. Ristoff, Esquire, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, and to John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226 this 14th day of April, 1987.

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