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IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DONALD McLAWHORN,

Respondent.

CASE NO.: 69,240

RESPONDENT'S AMENDED INITIAL BRIEF

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STATEMENT OF THE CASE

The case sub judice originated by a letter of complaint which ultimately resulted in a probable cause hearing on November 1, 1985. Pursuant to a finding of probable cause the Florida Bar filed its complaint on or about August 28, 1986. On or about September 8, 1986, Respondent filed his Motion to Maintain Confidential Status, followed by the filing of his Answer of September 16, 1986.

On February 5, 1988, the Referee, Judge Frank H. White, conducted the final hearing in this cause, followed by his "Report of Referee" dated March 14, 1988, wherein he found the Respondent guilty of professional misconduct and recommended Respondent be suspended from the practice of law for a period of thirty (30) days; that Respondent pay the COSTS of these proceedings and that the Respondent attend a CLE Seminar on Ethics.

On or about June 2, 1988, Respondent timely filed his Petition for Review.

STATEMENT OF THE FACTS

Symbols and abbreviations used in this brief are as follows:

R. = Page of transcript, February 5, 1988, hearing

Resp. Ex. = Respondent's Exhibit

Bar's Ex. = Florida Bar's Exhibit

In August, 1979, Ms. Bonnie Varon and Mr. Glenn Draughn, Jr. were divorced and final judgment was entered on the disposition of their jointly owned property. Included in the judgment was an order that title to two pieces of real property, one on Rome Avenue and one on West Kirby, was to remain in the names of both parties. The judgment provided that Mr. Draughn would retain exclusive, rent-free possession of the family residence on the Rome property until such time as he remarried or ceased to have custody of the couple's children. Ms. Varon was to have control over the rental property on Kirby and equally divide any rents and profits derived therefrom with Mr. Draughn. Immediately before the summer of 1984, Mr. Draughn and Ms. Varon became involved in a bitter dispute over child support and arrearages in child support because the two children vacillated between the dwellings of the two parents.[R.5-8]. On June 25, 1984 Ms. Varon, by her attorney, Mr. Howell Hart, filed a lengthy request of the Court titled "Motion for Order Requiring Husband to Co-operate with Sale of Home, Motion to Impose Lien on Husband's Share of House Sale Proceeds, Motion for Set-Off Due to Husband's Neglect of House."[R. 8, line 20, Bar's Ex. #1]. A hear-

ing on said Motions was later scheduled for thirty (30) minutes on September 11, 1984.

At the time the June 25, 1984 Motions were filed on behalf of Ms. Varon, the Respondent, Donald McLawhorn, was acting as Mr. Draughn's attorney in this matter. On or about August28, 1984, Mr. Draughn quit-claimed his interest in both the Rome and Kirby properties to Respondent. The purpose of the conveyance was to enable the Respondent, who was representing Mr. Draughn in a criminal charge, to become the sole owner of whichever piece of property that would have otherwise gone to Mr. Draughn either by stipulation and agreement of the parties or Order of the Court. The intent being, the ability of the Respondent to liquidate said property without the signature or presence of Mr. Draughn, who was about to be sentenced to three years in prison, to pay for the cost of appellate proceedings either in State or Federal Court. [R. 16].

Shortly before the hearing of September 11, 1984, Respondent filed a Traverse, paragraph four of which, indicates that Mr. Draughn joined in a request for the sale of the property and it was the intention of Mr. Draughn and the Respondent to relate to the Court, and they did relate to the Court, that the property should be sold. [R. 39, 40].

At the hearing of September 9, 1984, the parties and their attorneys, under the guidence of the Court, attempted to negotiate

a resolution of the question of equities in the property, who should get what property, and the issue of arrears in child support. There was insufficient time set and the matters remained unresolved when the Court adjourned the hearing.[R. 32,49]. The matter was re-set for hearing January 22, 1985 by Ms. Varon's attorney, who reserved one hour. Thereafter on January 22, 1985, during the hearing and at the Court's invitation , the parties retired from the hearing room and came to an agreement, the terms of which gave Ms. Varon all interest on the Rome property, which was the more valuable of the two, and Mr. Draughn was to receive the Kirby property.[R. 33]. Additionally, Ms. Varon waived her claim to some nine thousand dollars ($9,000.00) in back child support, having received the more valuable of the two properties. [R. 16]. The parties returned to the Court Room and asked for a ratification of their agreement by the Court. Respondent drew the appropriate Order effectuating the terms of the agreement and signed the necessary deed of transfer of the Rome property to Ms. Varon. [R. 17, 18]. Ms. Varon refused to sign a deed conveying her interest in the Kirby property to Respondent but eventually conveyed to Mr. Draughn.[R. 18, 19].

At the time of the hearing of September 11, 1984, the Court was aware of the conveyances from Mr. Draughn to Respondent, Donald McLawhorn.[R. 49, line 4]. The Respondent Donald McLawhorn advised the Court that his interest was only for the purpose of securing costs anticipated in other representation of Mr. Draughn, and only

to the extent of any ownership rights Mr. Draughn might ultimately have in either piece of Property by agreement of the parties or Order of the Court. [R 16, 17, line 22]. In fact the Order, drafted by Respondent, ratifying the agreement during the hearing of January 22, 1985, contained language making it clear that the intent of the parties would be carried out by the execution of the appropriate deeds.[R. 38].

Respondent does not have in his possession copies of the exhibits produced by the Bar at the final hearing of February 5, 1988 and requests that those be sought from the record or from the Bar.

DID THE REFEREE ERR IN FINDING THAT THE RESPONDENT'S FILING OF A "TRAVERSE" CONSTITUTED DECEIT OR MIS-REPRESENTATION UNDER D R RULE 1-102 (A)(4)?

The Referee, in his report states as follows:

> "Paragragh #4 of the Traverse alleges a desire on the part of the Husband, along with the Wife to sell the property. It further states in paragraph #5, that the parties are also joint owners of another piece of property. These allegations were not true, which were known to the Respondent, because he had already had the other property referred to transferred to him."

[Bar Ex #3] [R. 9, line 19-25; 10, line 1-10; 29, line 13-17]

While it is technically true that in viewing the deeds, Mr. Draughn had conveyed his interest, however according to all the testimony, the conveyance was only for the purpose of securing monies to fund a criminal representation of Mr. Draughn and it was never the intention of the Respondent to have any proprietary rights in the property as a land owner or land-lord.[R 16, line 4-10]. That further prior to any hearing, Respondent made known the conveyances to Ms. Varon's attorney.[R. 37]. The Court was aware of the transfers.[R. 49, line 4]. In fact, everyone was aware of the transfers and of the reason. There was no deceit, nor was any fact misrepresented to any of the litigants, the attorneys, or the Judge. The "Traverse" was filed to effectuate an agreement between the parties that the property should be sold so as to avoid litigating that issue[R. 16, line 4-10; 40, line 5-19; and 44, line 20-24]. since the hearing was only thirty (30) minutes in length which was insufficient. [R. 49, line 4-19]. There was no deceit, there was

no mis-representation, no one was mis-informed, no one was mis-lead and everyone was aware of the facts. The testimony of Ms. Varon, the Respondent, and the presiding Judge are harmonious on that fact. The Referee apparently did not consider all of the testimony of Ms. Varon, the Respondent, Donald McLawhorn, and Judge Giglio.

DID THE REFEREE ERR IN FINDING THAT THE RESPONDENT DEPRIVED THE COURT OF THE ABILITY TO ORDER THE SALE OF THE PROPERTY BEING LITIGATED IN VIOLATION OF D R 1-102(A)(5);CONDUCT THAT IS PREJUDICE TO THE ADMINISTRATION OF JUSTICE?

In the report of the Referee, the Referee stated as follows:

> "The Respondent did deprive the Court of the ability to order the sale of the property being litigated. The Respondent was not a party to the action and was not present at the hearing as counsel for the litigant he represented, Mr. Draghn. The Respondent was the legal owner of the property and not his client, thus preventing a Court ordered transfer from his client to Ms. Varon until several months later.[R. 21, line 22-25; 27, lint 9-25; 28, line 1-24]."

The Referee relied upon the opinion of Ms. Varon that the conveyances prohibited the resolution of the issues at the September 11 hearing. The Court ignored the testimony of the Respondent that Respondent and Mr. Draughn were unopposed to the actual sale (at R 32,line 9 the word opposed is a misprint and should read unopposed; See R 44, line 20-24) but only disputed the other issues before the Court for which there was insufficient time.[R. 32, line 18-21]. Referee apparently ignored the testimony of Judge Giglio who stated that the reason that the hearing was continued was because Ms. Varon's attorney, who filed the lengthy Motions and set the hearing, failed to reserve sufficient time to cover and resolve the many issues that were before the Court.[R. 49-50].

The Referee also overlooked Respondent's testimony where Respondent explained that he had discussed the conveyances with Ms. Varon's attorney prior to the first hearing of September 11th and that fur-

ther Ms. Varon's attorney had brought up, at that hearing, the inability of the Court to Order a conveyance due to Respondent, Donald McLawhorn's name being on the property. Whereupon, Respondent, Donald McLawhorn explained that his only interest in the property was in the nature of a lien or some security to insure cost funding of other representation of Mr. Draughn. Respondent further told Judge Giglio that he would sign any document necessary to effectuate any agreement of the parties or Court ordered decision.[R. 37; 38, line 1&2]. This same explanation of the facts was again brought to the Court's attention at the January 22nd hearing, all of which is corroborated by Ms. Varon's testimony on direct examination by the Bar. [R. 16, line 4-10].

It is clear from the testimony of Ms. Varon, the Respondent, and the presiding Judge that the continuance was necessitated by Ms. Varon's attorney's failure to set sufficient time on the Court's calendar to resolve all the issues which he presented in his rather lengthy Motions. The delay was not caused by anything done by Respondent, Donald McLawhorn. Certainly there was no prejudice to the Administration of Justice as the parties stipulated and agreed to a resolution of all the issues and problems presented to the Court by Ms. Varon and their agreement was consummated after the issuance of a Court Order that ratified the agreement.

Accordingly, Respondent should not be charged with promoting any delay in the finalization of the matters before the Court when

in truth and fact, if we are to believe Judge Giglio, was caused by an insufficiency of available Court time which, unfortunately, is all too often the situation in our overcrowded Court calendars.

There is no indication in the record that Respondent is responsible for the continuance.

DID THE REFEREE ERR IN FINDING THAT RESPONDENT ACQUIRED A PROPRIETARY INTEREST IN THE SUBJECT MATTER OF LITIGATION IN VIOLATION OF D R 5-103(A)?

The Referee, in his findings of fact, stated as follows:

> " The Respondent admitted that he acquired an interest in the matter, which he knew was the subject of litigation.[R. 27, line 9-25; 28, line 1-24].
> The evidence further established the Respondent knew of a pending hearing involving the subject property when he and his client, Mr. Draughn, transferred said property to him. The Respondent's explanation for his actions fails to meet the required ethical standards of the Florida Bar."

D R 5-103 reads as follows:

DR 5-103. Avoiding Acquisition of Interest in Litigation

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(3) Participate in approved credit plans for financing legal fees, costs and expenses.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses..

Respondent will present to the Court some case law examples of the evils that this Rule is designed to prevent.

In the Hodkin case the charged attorney filed suit to recover damages and punitive damages for the conversion of a stamp collection which he alleged was owned by his housekeeper. In fact, he not only owned that stamp collection but he went through elaborate steps to cover up that fact during the course of the disciplinary proceedings which evolved from the civil action. In short, he filed a fraudulent lawsuit and then lied to the Bar to conceal his wrong doing. In spite of the seriousness of his transgressions he suffered only a public reprimand. Hodkin v. The Florida Bar, 293 So2d. 56(1974). Certainly there is no comparison between the Hodkin case and the Respondent's situation except to say that Respondent was absolutely candid both in his appearances before Judge Giglio and the Florida Bar.

In the Abagis case the charged attorney acquired a proprietary interest "genuine ownership" in a cause of action, failed to effectively represent the interest of the clients, prejudiced the credit standing and mislead the clients for which he was appropriately reprimanded and suspended. The Florida Bar v. Abagis, 318 So2d. 395(1975). In the record in the case sub judice Respondent performed his duties in the best interest of his client without prejudice to the Court or those before the Court and the only interest which Respondent acquired in the property was that which was stated by the Referee in the Referee's exoneration of any violation, by Respondent, of DR 7-102(A)(1), to-wit:

> "... it appears that his primary concerns were to assure payment of fees and costs to be incurred by his client in the criminal case, rather than cause malicious injury to Ms. Varon."

In the Israel case the Respondent attorney was charged with having entered into a business transaction with a client who had differing interest therein, advancing money to the client to allow the client to bring mortgage payments current and receiving in return a quit-claim deed to client's property as security for legal fees and advances and thereafter filing a complaint in ejectment against the client. The discipline was a public reprimand. Florida Bar v. Israel, 327 So2d. 12(1975). Respondent, Donald McLawhorn, entered into no transaction detrimental or adverse to his client's best interest, but rather, according to the testimony and Referee's aforementioned statement, was concerned primarily with his client's current needs at the time and the immediate future.

In the White case the charged attorney purchased a piece of real property from a client in conflict of the client's best interest; and charged a clearly excessive fee for handling the estate of another client. In the matter concerning the property purchase, the Respondent attorney, failed to advise his client of all the appropriate and pertinant details surrounding the purchase and may have purchased the property at something less than fair market value although this was not conclusive. He charged $3,715.00 for the handling of a minimal estate which the Referee

found to be quote "grossly excessive". The attorney received a two month suspension. Florida Bar v. White, 368 So2d. 1294 (1979).

In Respondent, Donald McLawhorn's situation there was no purchase price as the only intent of Respondent was to insure a positive future for the client, Mr. Draughn, by preparing cost funding for appellate review of Mr. Draughn's criminal charges. [R. 16, line 4-10; 37-38].

Finally, in the Wooten case, the Respondent attorney was charged with advancing funds to a client for maintainance and support of the client and his family, to be repaid from proceeds of the clients litigation. Mr. Wooten received a public reprimand. Florida Bar v. Wooten, 452 So2d. 547 (1984). Obviously no funds were advanced, for any reason, by Respondent, Donald McLawhorn but rather his client, was attempting to advance costs for appellate review of criminal charges.[R. 16, line 4-10; 37-38]. Respondent, Donald McLawhorn acquired no proprietary interest in the property that was detrimental to his client, quite the contrary, the lien type interest acquired solely to fund appellate review was for the future benefit of Donald McLawhorn's client.[R. 16, line 4-10; 37-38].

It is quite clear from the reading of these cases that the spirit and intent of DR 5-103(A) was to insure that an attorney whose wisdom and education frequently surpasses that of the client, does not become so intimately involved in business transactions

with the client so that in order to further the attorneys best interest that he must act in a fashion that is necessarily detrimental to the best interest of the client. Basically, D R 5-103(A) is a codification of the ancient adage,"No man can serve two masters". The testimony of the witnesses and the findings of the Referee clearly establish that Donald McLawhorn's efforts and primary concerns were directed towards the best interests of his client, Mr. Draughn. Finding Respondent, McLawhorn, in violation of D R 5-103(A) is not consistant with the obvious intent of the Rule or with the case law cited.

UPON THE FINDINGS OF THE REFEREE, AS STATED, IS THE DISCIPLINE IMPOSED EXCESSIVE UNDER THE CIRCUMSTANCES?

It is Respondent's position that the evidence fails to disclose any violations as charged and as such Respondent feels that this Court should exonerate him of the charges and the dicipline imposed. Never-the-less, in an abundance of caution, Respondent feels constrained to discuss the discipline recommended by the Referee. As to the attendence of a CLE seminar on Ethics Respondent has no objection. Respondent attends seminars to keep abreast in the areas of his practice. As to the discipline of thirty (30) days suspension, in the event that the Court ratifies some or all of the Referee's report, Respondent feels the thirty (30) day recommendation is excessive.

In his final argument the attorney for the Bar asks for a thirty (30) day suspension contingent upon a finding by the Referee that Respondent was guilty of all four charges. He further stated as follows:

> "If, however, there is only a finding of one or two of the disciplinary rules, then a public reprimand and perhaps a period of probation or perhaps some other sanctions could be imposed by the Referee." [R. 55, line 13-22].

Respondent finds himself, according to the Referee's report, fitting into neither one of the categories announced by the Bar's attorney, to-wit:

> "...guilty of all the charges..." [R. 55, line 17].

"... a finding as to one or two of the disciplinary rules,..." [R. 55, line 19 & 20]

Respondent, Donald McLawhorn was found guilty of three violations and not guilty as to the fourth.

Besides the disciplinary sentences discussed in the cases previously cited, Respondent would direct the Court's attention to case citations of other disciplinary actions.

Florida Bar v. Lund, 410 So2d. 922(1982) the offending attorney who gave untruthful testimony to the grievance committee received a ten day suspension. In, Florida Bar v. Baccus, 376 So2d. 5 the Respondent attorney allowed the statute of limitations to run, which is the ultimate prejudice to the clients interest for which he received a thirty (30) day suspension. In Florida Bar v. Ryan, 396 So2d. 181(1981) the Respondent attorney allowed the Statute of limitations to run, failed to deliver securities and or other property and failed to account for trust funds. He received a thirty (30) day suspension and one year probation.

Assuming for the sake of this dicussion, that this Court ratifies the findings Respondent feels that his alleged transgressions are minimal considering the brief examples, supra, and certainly Respondent maintained his clients best interest in mind and it is Respondent's position that he did so without malice or prejudice to the rights of those others involved in the litigation.

If absolutely required discipline should not only protect the public but be fair to the attorney charged with an ethical

violation. Florida Bar v. Hoffer, 383 So2d 639. The Respondent feels that assuming the situation in light most favorable to the Bar's position, (which is contrary to the evidence adduced at the hearing of February 2, 1988) that any suspension is unnecessary to promote the interest of the Bar and the welfare of the public.

The case below is a prime example of an attorney who finds himself as a Respondent before the Florida Bar not for having committed any transgression against his client, nor for having omitted the taking of steps to further the best interest of his client. The Respondent is before the Bar upon the complaint filed by a bitter former spouse of Respondent's client. An ex-wife whose animosity toward her former husband which, according to the record may have had some basis, in fact evolved into a zealous quest for revenge.(Respondent makes no judgment as to the appropriateness of Ms. Varon's feelings towards her former spouse.) Understandably she was frustrated in her pursuit of vengeance since she realized that with her former spouse serving time in the penitentiary there was very little that she could do to him to compound his unpleasant predicament. Though she received all that she bargained for with respect to the tangible things involved in the litigation she was denied the abstract satisfaction of getting even with her former spouse for his real or imagined transgression against her. As is frequently the case in Family

Law litigation she directed her exasperation at her former husband's alter ego, Respondent.

CONCLUSION

The findings of fact of the Referee are inconsistent with all of the testimony of the witnesses when read in para materia. The "Traverse" did not deceive or mislead anyone, including Ms. Varon, in that it actually performed the function of a Stipulation whereby the parties agreed to the sale of real property thereby eliminating the necessity of judicial determination of that issue, a fact appreciated by the Court since the Court had limited time to resolve the remaining issues.

The testimony of Judge Giglio clearly shows that he was not impeded in his ability to rule by any acts of the Respondent, at the time of the hearing of September 11, 1984 but rather too many issues were presented by Ms. Varon's attorney to be handled in a thirty(30) minute hearing, said thirty(30) minute hearing having been set by Ms. Varon's attorney.

Further the fact that Respondent's name was on the deeds did not interfere with the parties agreement to the disposition of the property after the Judge invited them to step out into the hall and see if they could agree. The parties did agree and the terms of the agreement were fully executed and satisfied.

SUMMARY OF ARGUMENT

The testimony shows that the "Traverse" was designed and intended to inform the Court and Ms. Varon that Mr. Draughn agreed with Ms. Varon's request for the sale of the property. The conveyance and the explanation for the conveyance to Donald McLawhorn was made known to Ms. Varon, Her attorney and the Court. No-one was mislead and no-one misunderstood the facts.

The testimony of Judge Giglio makes it clear that his ability to rule on the issues presented was not impeded by any action of Respondent but rather because insufficient time was allocated to all of the numerous issues presented to the Court by Ms. Varon.

Considering the intent of DR5-103(A) as is evidenced by the case law examples in conjunction with the testimony of Judge Giglio, Respondent should not be found in violation of said rule. His actions were certainly guided by his concern for his client's future welfare and did not impede the Court's ability to rule or obstruct the rights of Ms. Varon to pursue whatever remedy she deemed appropriate. The charges should be dismissed.

In the alternative should this Court affirm some or all of the findings of the Referee's report the Discipline of thirty(30) days suspension is unnecessary and inappropriate. The protection of the public, the goals of the Bar, fairness to the Respondent attorney can easily be accomplished by the imposition of a more equitable disciplinary penalty.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Amended Initial Brief has been furnished by U.S. Mail delivery this 17th day of JULY, 1988 to: Richard A. Greenberg, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Fl. 33607.

Michael L. Kinney

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