IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

TERENCE T. O'MALLEY, SR.

Respondent-Appellee.

_____/

TFB File No. 87-26,936 (17D)

Supreme Court Case No. 70,495

REPLY BRIEF OF THE FLORIDA BAR

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ARGUMENT

I. THE EVIDENCE ADDUCED BY THE BAR IN ITS CASE IN CHIEF SUSTAINS THE REFEREE'S FINDINGS OF FACT.

By his answer brief, appellee urges that there was a lack of competent evidence upon which to sustain a conviction. It is respectfully submitted that the referee's report is particularly focused regarding the specific evidence relied upon in arriving at his findings of fact. Appended to each of the eighteen (18) findings of fact are specific references to the precise evidence found by the referee to have supported such findings. This court has repeatedly held that it must defer to the referee, whose conclusions will be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1982); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1981); The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978).

There are a series of allegations appearing in the bar's complaint at paragraphs 8 through 12, inclusive, which were found, as fact, by the referee in paragraphs H. through L., inclusive, in his report. Each of the bar's allegations, which charge that appellee had no knowledge as to the status of the bond concerning its discharge or estreature, when he violated the escrow agreement, was admitted to by appellee in his answer as "probably true." To prove such allegations and meet its burden, the bar introduced into evidence (bar's exhibit 3 in evidence) testimony

given by appellee at the grievance committee hearing wherein appellee admitted each of the bar's allegations, without equivocation. What quality evidence could be considered more persuasive and constitute clearer and more convincing evidence than unqualified admissions by a respondent remains a mystery to the bar.

Appellee urges that In Re: Ruffalo, 399 U.S. 544, 88 Sup. Ct. 1222, 20 L. Ed. 2nd 117 (1968) somehow prevents the bar from using appellee's unqualified admissions regarding his misconduct. Such assertion suggests a miscomprehension of Ruffalo. In that case, the accused attorney was summoned before a board of commissioners on grievance and discipline to defend himself against twelve (12) specific charges of misconduct. In defending himself, the accused revealed a course of misconduct on his part which was not alluded to in the board's notice. The board, then, charged the accused with the misconduct so revealed making it its thirteenth charge, the only charge upon which the accused was ultimately disbarred. The court, in setting aside the disbarment, held:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh (551).

Such holding is totally inapposite to this proceeding. Here, appellee was given specific notice of his alleged breach of the escrow agreement and was put on specific notice of each of the allegations concerning his knowledge regarding the estreature or discharge of the subject surety bond at the time he converted the cash and removed the gold and silver entrusted to him. No allegation appearing in the bar's complaint was predicated upon an indictment of appellee's own manufacture.

II. THE MISTRIAL DIRECTED BY REFEREE LUPO FORMS NO BASIS FOR APPELLEE'S DISCHARGE AND SHOULD PLAY NO PART IN A DETERMINATION OF APPROPRIATE DISCIPLINE.

Appellee has interspersed his brief with references to the mistrial that occurred before Referee Lupo. Thus, at page 6 of his brief, appellee suggests that the bar "sought to enhance discipline by introducing charges not presented at trial" and at page 11, infers that the bar neglected to adduce evidence necessary to its case "waiting until afterwards or waiting for the Court to ask if such evidence existed." This is a perversion of what transpired.

The bar rested upon presentation of its case in chief (80)*. It is respectfully submitted that each and every finding of fact in the referee's report and every reference therein to the evidence upon which the referee relied in reporting his findings of fact, without exception, are taken from the bar's case in chief. No such finding and no such evidence, meticulously set forth by the referee, was as a result of any proof adduced or attempted to be adduced after the bar rested. No such finding or evidence was as a result of intervention by a referee asking for additional evidence.

The colloquy with Referee Lupo, leading to her recusal (See October 30, 1987 transcript), was as a result of certain cross examination of appellee by the bar precipitated by appellee testifying, on his own

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* All page references are to October 19, 1987 trial transcript unless otherwise specifically noted.

behalf, that his actions in giving the cash entrusted to him to his client, were not motivated by personal benefit (108). The bar cross examined appellee regarding certain surety bonds that were supplied to appellee by the same client, without cost, which were used to guarantee personal bank loans to appellee or his professional association (120-122; 136-137). This cross examination was not uncharged misconduct as suggested by appellee. The questions were posed solely and exclusively to test appellee's assertion that he did not benefit from his misconduct. Appellee raised the issue - not the bar.

Bar counsel was satisfied with the bar's case in chief. The bar did not allege in its complaint that appellee had acted with a profit motive. No such information was presented to the grievance committee and the investigation relating to the gratis surety bonds furnished to appellee was not completed by the bar until after the grievance committee made its probable cause findings. The bar had absolutely no intention of alluding to the separate transactions involving the gratis surety bonds and introduced the subject only to refute appellee's disclaimer. The very client who received the cash appellee diverted from the escrow fund, had, in turn, supplied appellee with free surety bonds in excess of $200,000.00 which appellee had used to collateralize loans to himself or his professional association (136).

Referee Lupo detected something in the bar's cross examination and appellee's testimony elicited thereby that aroused her interest. After both sides rested, Referee Lupo expressed concern about the "extent Mr. O'Malley may have been influenced by the collateral provided him by his client to guarantee his obligation to NCNB Bank" (146). She stated:

> If you have that information available, I will be glad to accept it today or hear from you through your argument how you feel I should be concerned or how you view it (146).

Bar counsel responded:

> In other words, your honor, we'll be able to submit some documentation perhaps to you that you might care to consider (146).

Referee Lupo then expressed:

> I don't know, number one, whether you think it's important; number two, whether you have the answer or can get the answer to the question. If both sides think that it's a proper inquiry for the court, then I'm going to ask that evidence be presented to me in some form. I should let you know that there is a cancellation tomorrow morning so if you want to come back tomorrow morning at 9:30 and resolve any loose ends that you haven't resolved today, you are welcome to come back (146, 147).

Bar counsel offered to attend the next morning but appellee's counsel's commitments did not permit such scheduling. The matter was dropped. It was against such backdrop that bar counsel, on notice to appellee's counsel, wrote to Referee Lupo making a written proffer regarding the surety bonds in which Referee Lupo had expressed such interest. It was such proffer that precipitated Referee Lupo's recusal upon the basis that her remarks did not constitute an invitation for anyone to make a proffer unless both parties had expressly agreed thereto; that the bar should properly have elicited such evidence in its case in chief.

With utmost respect for Referee Lupo and mindful that from her perspective bar counsel did indulge in an improper communication, it is nonetheless respectfully submitted that her honor's perception was based

upon a misconception of the bar's burden of proof which, in turn, led her to opine that the bar should have attempted "to bring evidence forward in the case in chief rather than wait for a Court to want to inquire into what is properly for the bar to present in its prosecution ... (October 30, 1987 transcript, pages 19-20) and that due to the bar's having not met its burden the attempted proffer would have been appropriate only if the evidence proved innocuous or helpful to appellee (october 30, 1987 transcript, page 19). The bar simply had no such burden and, save for Referee Lupo's expressed interest in hearing additional evidence, would not have made its proffer.

Bar counsel accepts full responsibility for misunderstanding Referee Lupo's view of the bar's burden, apologized to her at the time (October 30, 1987 transcript, page 18) and apoligizes to this court for causing a mistrial. Bar counsel never considered that Referee Lupo's statement that "if both sides think that it's a proper inquiry for the court ..." (146) constituted a right of absolute veto by appellee unless the evidence in question was innocuous or helpful to him. In any event, it is respectfully submitted that appellee suffered no prejudice warranting discipline mitigation.

So as to minimize any prejudice to appellee resulting from the mistrial, the bar stipulated that Referee Levine could render his report based solely upon the transcript of the first hearing. Because of the vigorous objections to the bar's cross examination and Referee Lupo's suggestion that the bar had some type of burden which it should have met in its case in chief pertaining to its cross examination, the bar further stipulated that all such cross examination be deleted from the

transcript and that Referee Levine be permitted to substitute his judgment and rulings regarding the admissibility thereof. In overruling each of appellee's objections and permitting the cross examination to stand, Referee Levine ruled:

> I understand your point, Mr. Friedman, and I will take a look quickly at the case, but my feeling is that Mr. O'Malley has denied that he had any personal gain from the transactions in question.
>
> The bar is trying to assert that he did have some personal gain as a result, even though it was not directly as part of the transaction in question, however, it had something to do with it, according to the bar's position.
>
> They are not alleging other misconduct. This is really part in parcel of the same point. Did Mr. O'Malley gain personally from the transaction or not?
>
> I think that is certainly relevant and important to the case (March 3, 1988 transcript of hearing before Referee Levine pages 7-8).

Referee Levine's observations and rulings succinctly and accurately reflected the bar's position.

III. IN THE ABSENCE OF DISBARMENT, THE REFEREE'S RECOMMENDATIONS REGARDING PROBATION, ETHICS EXAMINATION AND ALCOHOL REHABILITATION SHOULD BE ADOPTED.

Should the court determine that disbarment is the appropriate sanction, the various conditions recommended by the referee will be rendered moot. The Board of Bar Examiners will certainly insure appellee's ethical awareness and lack of addiction prior to any readmission.

Should the court determine upon a sanction less than disbarment, it is respectfully submitted that the conditions recommended by the referee are appropriate. An attorney who does not recognize his obligations when entrusted with money and property, at very least should revisit the lawyer's ethical code and be examined as to his comprehension thereof.

In its initial brief, the bar requested that the court address the issue of whether or not uncorroborated claims of addiction should be afforded weight in discipline proceedings. Appellee's brief renders the need for judicial pronouncement even more crucial. Here, we have a case where a respondent alleges an addiction and then absolves himself from its consequences. If a bar respondent need only allege a substance abuse problem to have the benefit of the mitigating effect thereof and then, in an equally uncorroborated fashion, testify to his total recovery, thereby relieving the necessity for a rehabilitation program, then, the floodgates will be opened for all respondents to relate their mitigating addictions and recoveries.

CONCLUSION

Appellee's knowing breach of trust, his concealment thereof from the party affected thereby, his willful failure to account and his cover-up perjury warrant imposition of a disbarment.

Respectfully submitted,

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