

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

vs.

TERENCE T. O'MALLEY, SR.,

Respondent-Appellee.

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

Supreme Court Case No. 70,495

**FILED**

SID J. WHITE

JUL 18 1988

CLERK, SUPREME COURT

By

Deputy Clerk

REPLY BRIEF OF TERENCE T. O'MALLEY, SR.

Respectfully submitted,

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The Florida Bar has filed a brief denominated as its "Reply Brief", which serves both as a reply brief and the answer brief to our Cross-Petition. This Brief is filed as a reply to those portions of the Bar's Brief which form the answer to our Cross-Brief. In the alternative, it is requested that this be regarded as a Motion to Strike the Reply Brief of The Florida Bar.

ARGUMENT

THE REPLY ARGUMENTS OF THE FLORIDA BAR ARE  
FALSE AND MISLEADING AND SHOULD BE  
DISREGARDED OR STRICKEN

The Referee in the case below found the following:

"I am convinced, however, that the Respondent did not act with bad intent or to directly benefit himself. Respondent turned the escrow cash and precious metals over to the surety company because he mistakenly believed it was part of some oral agreement between the parties and because he thought it may have been required by law, despite the clear language of the escrow contract. Respondent's testimony and deposition was an attempt by him to protect a client or former client. His answers were intended to be evasive or narrow, but they were in fact misleading and false. The Respondent did not benefit financially from his actions, and his motives were not dishonest or selfish."

(Referee's Report at Pg. 9) In addition, the Referee specifically found that there was evidence that Respondent had marital problems and a serious alcohol problem at the time. As previously indicated, this evidence was specifically corroborated by the testimony of Attorney Joseph Boyd (transcript of October 19, 1987 at Pgs. 139 through 143).

The Florida Bar did not call any witnesses to rebut the testimony of Mr. Boyd or Mr. O'Malley with respect to these

matters. Contrary to the express findings of fact of the Referee The Florida Bar continues to abuse Respondent with charges of the criminal offense of perjury (Pg. 9 of its Reply Brief). Contrary to the findings of the Referee and the testimony of both Mr. O'Malley and Mr. Boyd, The Bar continues to falsely argue that there are "uncorroborated claims of addiction" (Pg. 8 of The Bar's Reply Brief). The Bar seems to feel no impropriety in using arguments which are "in fact misleading and false" while calling it perjury and prosecuting my client and seeking his disbarment for the same conduct. Such tactics are unworthy of The Bar and their use of these unfounded arguments in their Brief should be stricken.

Finally, The Bar seems to admit relying almost entirely on its having read into evidence its Exhibit No. 3, consisting of testimony given at the Grievance Committee allegedly "without equivocation" (The Florida Bar's Reply at the bottom of Pg. 1 and top of Pg. 2). As the transcript of October 19, 1987 shows at pages 71 through 75, The Bar in Answers to Interrogatories did not list Mr. O'Malley as a witness, and was in fact not permitted to call him in their case at chief. Nonetheless, over objection, permitted to use the Grievance Committee transcript which they claim to be clear and unequivocal evidence of Mr. O'Malley's testimony.

At the time, however, it was pointed out to the Court on page 79 of the transcript of October 19, 1987 that the statements made before the Grievance Committee were not "without equivocation" but were in fact subject only to information and belief, but not of

personal knowledge. Inasmuch as The Bar, over objection, was permitted to introduce this record, notwithstanding failing to list Mr. O'Malley as their witness, the entire transcript was ultimately admitted into evidence. The Grievance Committee transcript of April 10, 1987, at Pgs. 35 through 39 shows that the testimony of Mr. O'Malley was only based upon information and belief.

It was the obligation of The Florida Bar to carry its burden, like any other party in any other litigation. When, in response to their Complaint and Request for Admissions, the matters were not admitted, The Bar needed to affirmatively provide the strict proof. Before being allowed to take away the license of a lawyer, the heavy burden of a clear and convincing standard must be met by The Bar. In this case, their evidence was insufficient.

CONCLUSION

The arguments of The Bar contradict the findings of the Referee below and are scandalous and unfounded claims which should be disregarded or stricken.

Respectfully submitted,

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By:   
\_\_\_\_\_  
Nicholas R. Friedman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to David M. Barnovitz, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 15<sup>th</sup> day of July, 1988.

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