IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

EDWARD J. WINTER, JR.,

Respondent.

_____/

Supreme Court Case No. 72,406

INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

The Florida Bar, Complainant, will be referred to as the "the Bar" or "The Florida Bar". Edward J. Winter, Jr., Respondent, will be referred to as "Winter" or "Respondent Winter". The symbol "R" will be used to designate Report of Referee dated January 4, 1989. The symbol "T" will be used to designate Transcript of the December 23, 1988 referee hearing before Judge Miette K. Burnstein. All emphasis has been added.

STATEMENT OF THE CASE AND OF THE FACTS

On or about January 28, 1988, the Supreme Court of Florida considered the petition of Edward J. Winter, Jr. to resign permanently from The Florida Bar. Said petition was not opposed by the Bar. (R-3).

At the time of filing said petition, Respondent Winter had pending against him no less than seven disciplinary actions which were being investigated. Further, he had a past disciplinary record which included two public reprimands, a private reprimand, and a ninety-one day suspension. (R-8,9).

The Respondent's petition was accepted by the Supreme Court and the permanent resignation was to begin thirty days from January 28, 1988. (R-3).

On or about May 13, 1988, The Florida Bar filed a Petition For Order To Show Cause why Respondent, Edward J. Winter, Jr. should not be held in contempt of court.

The basis of such petition was the Respondent's failure to comply with Rule 3-5.1(h) of the Rules Regulating The Florida Bar by his neglecting to file an affidavit of notification to clients of the disciplinary order and the closing of his practice. A further basis of said petition was Respondent's continuation of the practice of law in direct contravention of the Supreme Court order.

The Honorable Miette K. Bernstein was duly appointed as Referee for the Supreme Court to conduct contempt proceedings

provided for by Rule 3-7.5 of the Rules Regulating the Florida Bar (R-1) and Article XI of the Integration Rule of the Florida Bar. Final Hearing was set for December 2, 1988. Respondent failed to appear despite actual notice of the date and time of hearing. (R-1).

The hearing was held and the Referee recommended a twenty-five year disbarment, effective December 23, 1988. (R-9) (T-24,25).

Indirect criminal contempt of Respondent, Winter was also sought by The Florida Bar. However, because of the potentially serious consequences of Respondent's alleged actions, the Referee entered an order dated December 13, 1988, attaching a Proposed Report of Referee, requiring that Respondent personally appear within ten days of said order to contest the findings and recommendations contained in the Proposed Report of Referee. Hearing was set for December 23, 1988. (R-1) (T-3).

At the hearing of December 23, 1988, Respondent filed a "Sworn, Verified Answer of Respondent" dated December 22, 1988. During this hearing, Respondent admitted that he had filed pleadings after February 27, 1988, the effective date of his permanent resignation. (R-2) (T-7-9). The Referee's order was considered by the Board of Governor's at its meeting held January 25-28, 1989. The Board approved the disbarment and further directed the filing of the instant petition for review to contest the failure of the Referee to find Respondent in indirect criminal contempt of court and impose a definite term of incarceration.

The Florida Bar recommends a rejection of the Referee's recommendation that Respondent not be held in indirect criminal contempt and serve a definite term of incarceration and in lieu thereof recommends that Respondent be held in contempt of this court and incarcerated for a period of not less than thirty days.

SUMMARY OF ARGUMENT

Edward Winter violated the Supreme Court's order dated January 28, 1988, that is a fact. What remains to be considered is the penalty for this violation.

At the time that Edward Winter filed his petition to permanently resign, he had multiple disciplinary actions against him both past and present. The purpose of allowing Winter to resign was to avoid the stigma of disbarment. This was not a right, but a privilege afforded to Winter, and this privilege was abused by Winter's intentional misrepresentation to the general public that his resignation was for health reasons rather than disciplinary actions. Such is not the case.

To date, Winter has failed to abide by the terms and conditions of his resignation. He has failed to pay the disciplinary costs assessed against him and has failed to properly notify his clients of his resignation and inability to accept and represent clients. But most of all, he has continued to practice law; represent clients and generate legal fees. This is in direct contravention to this Court's order.

Given the prior disciplinary history of Respondent, Winter, (a private reprimand in 1971, ninety-one day suspension in 1976, two year probation in 1980, public reprimand in 1985, public reprimand in 1987, and finally his petition to resign in 1988) his familiarity with the disciplinary system of the bar is

unquestioned yet he maintains that he "did not know" what the order of the Court relative to his resignation meant.

The law is clear. In rendering discipline, the Supreme Court considers Respondent's prior disciplinary history and increases the discipline where appropriate. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983). Cumulative misconduct is treated more severely than isolated conduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

The Referee considered the prior discipline of Winter in rendering her decision. But more importantly, she based her finding of a twenty-five year disbarment on Winter's direct contemptuous actions/inactions relative to his continuation of the practice of law. Normally, this would be enough. But when viewed in toto, the depravity of the man and the actions he took warrant more than disbarment.

The recommendation by the Referee for disbarment only rectifies half the problem. It prevents Edward Winter from misrepresenting to the general public the reason for his resignation. It also helps to protect the general public from Edward Winter. But this is not enough.

Edward Winter, through his own admissions, acknowledges that he knew to close his practice by February 28, 1988; he admits filing pleadings after this date. These actions/inactions of Edward Winter are contemptuous. As such, contempt warrants incarceration for a definite period of time.

At hearing, thirty-one exhibits were introduced by The Florida Bar establishing intentional systematic and continuing

instances whereby Edward Winter engaged in the practice of law in direct contravention of this Court's order. This evidentiary support was overwhelmingly conclusive and uncontraverted by Winter.

It is said that the penalty imposed as punishment for contempt should correlate to the nature and scope of the act complained of and the wrong done to the Court. State ex rel Backsley v. Boyer, 187 So.2d 185 (Fla. App. 2nd DCA, 1965). The wrong done to the Court by Winter was not only broad, but intentional. Contempt as a remedy as requested herein is not sought as an alternative to another form of punishment, but rather as a sanction to punish for the willful acts committed. Three criterion must be considered. First, the judgment must be fair to society both in terms of protecting the public from unethical conduct and in not denying the public access to a qualified lawyer. Second, the judgment must be fair to the attorney and sufficient to punish for the breach of ethics while at the same time encouraging reformation and rehabilitation. Thirdly, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

The disbarment of Respondent serves to protect society from further misrepresentation by Edward Winter. The contempt finding of incarceration for not less than thirty days would hopefully serve as a deterrent to others who may be prone to follow the same path as Edward Winter. The power of the Court to incarcerate for contempt is a power that should not be used freely but only when warranted. In the case at issue, the use of this power is warranted.

ARGUMENT

I. AS A RESULT OF THE ACTIONS OF EDWARD WINTER IN VIOLATING THIS COURT'S ORDER THE COURT HAS THE POWER TO MODIFY OR SUBSTITUTE PENALTIES.

Even a cursory review of the case at bar reveals the blatant and intentional disregard by Respondent Winter of this court's order granting Respondent's Petition to Permanently Resign as a member of The Florida Bar.

The purpose of allowing Winter to permanently resign was to avoid the stigma of disbarment. Rather than abide by the order of discipline which he requested and submitted, Winter chose to purposely and intentionally misrepresent to the general public that his resignation was due to health reasons. This is not only uncontraverted by members of the general public, but by Edward J. Winter himself.

Aside from this misrepresentation, Winter also failed to abide by the terms and conditions of his resignation by his failure to file an affidavit with The Florida Bar as required by the Rules Regulating The Florida Bar indicating that he has fully notified his clients of the disciplinary order and has effectuated the closing of his practice. To date, Winter has further failed to pay those disciplinary costs assessed against him.

Procedurally, Winter was afforded the opportunity to resign without leave to reapply and avoid the no less than seven pending complaints filed against him at the time. The effect of this

assures that Edward Winter will no longer practice law and the public will therefore be protected. The reality of this is that Edward Winter continued to openly practice law in direct contravention to this court's order.

What Edward Winter has attempted to do is to use the disciplinary privilege of resignation afforded to members of the Bar to avoid having to answer for those pending complaints. Further, he has disregarded his prior disciplinary actions, and deceived his clients and the general public into believing that Edward Winter was magnanimous, and because of his alleged ailing health, could no longer effectively and to the best of his ability service his clients. These actions are beyond harmless error or misunderstanding of this court's order as alleged by Winter, but rather evidence a calculated, strategic and well-planned attempt by Edward Winter to thwart those guidelines established to regulate the privilege of practicing law in the State of Florida.

In the case of The Florida Bar v. Hefty, **220** So.2d **368** (Fla. **1969)** the Supreme Court held that where an attorney had previously been disbarred and subsequent disciplinary action was brought, no further judgment was necessary in that the subsequent proceedings would be consolidated with the previous disciplinary actions for consideration should the respondent make application to be reinstated.

The Hefty court attempted to impose sanctions and discipline on Respondent therein commensurate with the charges assessed against him. So, too, did the Referee attempt to impose initial sanctions against Edward Winter; those sanctions being disbarment.

Before this recommendation was considered, his permanent resignation was accepted. We must go beyond the four corners of Respondent's contemptuous actions in violating this court's order, and consider the totality of Edward Winter's prior disciplinary actions and their effect on his clients and the general public.

In reaching its holding in Hefty, the court commented that:

> "This decision is not to be stretched so that any peccadillos of a member of the Bar may result in disciplining the member, but is reached because of the enormity of the depravity of the man with whom we are dealing".
>
> Id., at 369.

The actions of Edward Winter speak for themselves. It is these actions that we must consider. A private reprimand in 1971, ninety-one day suspension in 1976, two year probation in 1980, public reprimand in 1985, public reprimand in 1987, and finally his permanent resignation in 1988. It is these prior disciplinary actions which warrant the incarceration of Edward Winter. No other disciplinary action imposed has served its intended purpose as evidenced by the repetitive actions of Edward Winter.

The law is clear. In rendering discipline, the Supreme Court considers Respondent's prior disciplinary history and increases the discipline where appropriate. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983). Cumulative misconduct is treated more severely than isolated conduct. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). Although it is important to look at the offense and circumstances surrounding it in a bar disciplinary case, it is also important to consider the effect of the dereliction of duty on others, as well as the character of the

wrong-doer and likelihood of further disciplinary violations. The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985).

Edward Winter claims that he was unaware of what he was supposed to do relevant to the court order of January 28, 1988 concerning the notification to his clients and closing of his practice. The order is clear. Given the prior sanctions imposed against him, he was more than aware of the procedures to be followed and the scope and time frames in which he was to act.

Edward Winter acknowledged his understanding of the court order as follows:

> Mr. Thaler: So you received notice of the Supreme Court's opinion in Case No. 71,150 dated January 28, 1988?
>
> Mr. Winter: Yes, sir. It specifically says that the respondent, me, should close his law office in an orderly fashion, taking steps to protect his clients, thirty days from the date of this order, January 28. So your answer to this question is that it became effective February 28, 1988.

(T-7).

This statement and admission by Winter is indicative of the character of this man. He knew the effective date in which his practice was to cease. He submitted his petition for permanent resignation on October 31, 1987; four months prior to the effective date of the order. As such, he was afforded over 120 days to at least take steps to wind down and close his practice, notify his clients, and secure substitute counsel for them. None of this was done. Therefore, his argument to the Referee that he was forced to represent clients after February 28, 1988 because they had no one else to represent them lacks merit and validity.

The Referee, after affording Winter the opportunity to explain his position, gave no credence to this explanation

either. The Referee stated that:

> I listened to Mr. Winter's explanation of why he appeared, and frankly, that is no excuse to willfully flaunt orders of the court and to willfully say to the Supreme Court, "I am going to do it in a roundabout way." There is no roundabout way. You can not appear as a lawyer, period. Not under the guise of being a United Father and not under the guise of being amicus curiae, and not under the guise of being an assignee or an assignor -- but under no guise at all. I do not know how to make it any clearer.
>
> If the orders of the court mean nothing to you, they do mean something to me, and I will be required to enforce an order....I am not going to give you an opportunity to say it is knowingly or willfully or not. If you step foot in a courthouse and it is not for yourself or something that you are personally involved with, I am going to come down with both feet.
>
> I just do not know how else to get your attention. You ignore settings for trial dates. You send in motions, and not withstanding the fact that they are denied or have not been heard, you assume they have been heard. That is inappropriate conduct.
>
> (T-16,17).

The discipline accorded Edward Winter, the granting of his petition to permanently resign, would normally have been sufficient and serve its purpose had it been imposed on any other member of the Bar. Edward Winter is not the norm. This sanction did not serve its purpose.

The recommendation of the Referee of a twenty-five year disbarment only rectifies half of the problem. It prevents Edward Winter from misrepresenting to the general public that he resigned due to health reasons. But more importantly, it protects the general public from Edward Winter. The stigma associated with disbarment will now follow Edward Winter. But this is not enough.

Through his own admissions, he acknowledges that he knew to close his practice by February 28, 1988. He admits that by filing a pleading after February 28, 1988 he was deliberately violating the law. (T-7-9).

The actions/inactions of Edward Winter were contemptuous. As such, contempt warrants incarceration for a definite period of time.

This court has authority to administer appropriate punishment for contemptuous conduct of parties bound by its decree. South Dade Farmers v. Peters, 88 So.2d 891 (Fla. 1956). Edward Winter was bound by this courts order of January 28, 1988, and should be held accountable for willful violation of that order.

ARGUMENT

II. FINDINGS OF FACT SHALL ENJOY THE *SAME* PRESUMPTION OF CORRECTNESS AS THE JUDGMENT OF A TRIAL COURT IN CIVIL PROCEEDINGS.

Rule 3-7.6(c)(5), Rules Regulating the Florida Bar states:

> Burden: Upon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful or unjustified.

The case at bar is unique in that Respondent argues in his Objections to Report of Referee that there is no substantial competent evidence to sustain the findings. Such is not the case.

Edward Winter was afforded multiple opportunities to dispute or challenge the findings of the Referee. As pointed out by the Referee, "Respondent's failure to appear at the final hearing (December 2, 1988) was without excuse." (R-2). Nevertheless, Winter was afforded another opportunity on December 23, 1988 to explain his position. On this date, he admitted that he had filed pleadings after February 28, 1988, the effective date of his permanent resignation.

This court stated in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968), "in disciplinary matters, the ultimate judgment remains with this court. However, the initial fact-finding responsibility is imposed upon the Referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support".

At hearing, thirty-one exhibits were introduced by The Florida Bar establishing intentional, systematic and continuous instances whereby Edward Winter engaged in the practice of law in direct contravention of this court's order. The evidentiary support offered by the Bar was overwhelming and conclusive and admitted by Winter.

The court went on to say in The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978) that:

> It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for the violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. (emphasis added).

It has been established that the evidence is conclusive, the only remaining consideration is the appropriate penalty for violation. That penalty should be indirect criminal contempt and incarceration for a period of not less than 30 days.

ARGUMENT

III. THE SUPREME COURT HAS THE POWER TO HOLD RESPONDENT IN INDIRECT CRIMINAL CONTEMPT *AND* AS SUCH INCARCERATE RESPONDENT FOR A DEFINITE PERIOD OF TIME.

It is said that the penalty imposed as punishment for contempt should correlate to the nature and scope of the act complained of and the wrong done to the court. State ex rel Backsley v. Boyer, 180 So.2d 185 (Fla. App 2d DCA, 1965).

The scope of what Edward Winter did is vast, the wrong done to the court was intentional.

Given the facts as they have occurred and the prior disposition of Winter, a finding of indirect criminal contempt is not only warranted, but is the only remedy available given the current disposition of Mr. Winter.

Contempt as a remedy as requested herein is not sought as an alternative to another form of punishment, but rather as a sanction to punish for willful acts committed, as a prevention for the reoccurrence of those acts and as a protection to those persons who have and would suffer by the actions/inactions of Edward Winter.

It is generally accepted that contempt can be defined or described as a disobedience to a court, an opposing of authority, justice or dignity and consists of a party doing otherwise than he is enjoined to do or not doing what he is required to do by process, order or decree of court. South Dade Farmers, supra.

The actions/inactions of Edward Winter are on all fours and "custom tailored" to fit this widely held definition. Winter

disobeyed a direct order of this court by holding himself out as an active lawyer. Further, he was engaged in activity which he was otherwise enjoined to do by representing clients in litigation and charging fees and by failing to do what he was required to do by not closing his office and practice on or before February 28, 1988.

The effect of resignation is in essence the same as disbarment. Both prevent an attorney from practicing law. One is generally accepted and treated as voluntary, the other is mandated and carries with it a stigmatization.

Practicing law after disbarment warrants an adjudication of contempt. The Florida Bar v. Zyne, 276 So.2d 9 (Fla. 1973).

In the case The Florida Bar v. Roberts, 161 So.2d 211 (Fla. 1964), an order was directed to attorney Roberts who was disbarred to show cause why he should not be held in contempt of court for practicing law contrary to the disbarment. This court held that practicing law in spite of the disbarment constitutes contempt. Id. As a result, Roberts was ordered jailed for three months.

The apparent parallel between Roberts and Winter is not coincidental, it is dispositive of a course of conduct and the penalty for this conduct.

The Referee indicates in her report that if Respondent, Winter ever does the acts complained of again, incarceration for contempt will then be considered. This action (or inaction) lends itself to the supposition that the Referee could not punish for "I didn't know" conduct as maintained by Winter. Such is not the case. The Referee did have the power to hold Respondent in

indirect contempt and impose jail time for Winter's past actions, that is the basis of contempt. State ex rel Byrd v. Anderson, 168 So.2d 554 (Fla. App. 1st DCA, 1964) (holding that where the punishment for contempt is for a past defense, as for the past violation of a Court order, the term of incarceration should be definite).

Three criterion must be considered in disciplining for ethical conduct:

First, the judgment must be fair to society, both in terms of protecting the public from the unethical conduct and not denying the public access to a qualified lawyer by imposing an unduly harsh penalty. Second, the judgment must be fair to the attorney to be sufficient to punish for the breach of ethics while at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

The disbarment of Respondent serves to protect society from further misrepresentation by Edward Winter while at the same time punishes for the breach of ethics. The contempt finding and incarceration for not less than thirty days would hopefully serve others who may be prone to follow the same path as Edward Winter did; I regretfully feel that Winter is beyond reformation and rehabilitation given his prior disposition and prior opportunities to reform.

The power of the Court to incarcerate for contempt is a power that should not be used freely but only when warranted. In the case at issue, the use *of* this power is warranted.

CONCLUSION

The Florida Bar recommends a rejection of the Referee's recommendation that Respondent not be held in indirect criminal contempt and serve a definite term of incarceration and in lieu thereof recommends that Respondent be held in contempt of this Court and incarcerated for a period of not less than thirty days.

Respectfully submitted,

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