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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

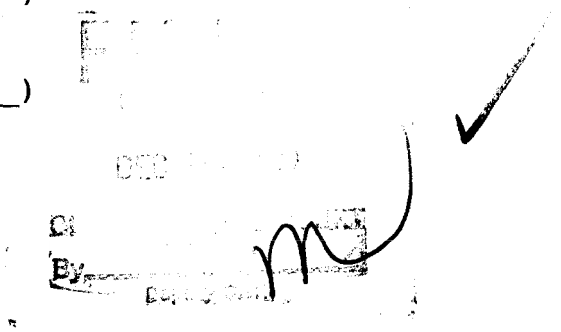
Complainant,

vs.

JAMES C. McKENZIE,

Respondent.

Case No. 72,575
TFB Nos. 87-23,020 (06E)
87-23,023 (06E)



RESPONDENT'S REPLY BRIEF

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REPLY TO FLORIDA BAR ANSWER BRIEF

Sticking out like a sore thumb in Bar counsel's Answer Brief is her total non-mention or defense to the key issues; to wit, the perjured testimony of Ms. Shrock and Bar counsel's deceitful introduction of Ms. Shrock's 1984 Petition to attempt to gain the marital home, as proof showing Ms. Shrock knew nothing of her later attempt to have her rehabilitative alimony of 2 years converted into permanent periodic alimony, or her suit to negate her signed agreement to sell her home with a realtor. Thereby attempting to make respondent the "fall guy", so to speak, for doing things his client did not authorize or even know about. Its introduction has no relevance except to deceive.

Perhaps Bar counsel felt if she didn't mention or defend same or call attention thereto, (because she really had no defense) any attempt by her to defend would only spotlight the matters further and call attention to her role therein. Sort of the ostrich head in the sand approach.

REPLY TO BAR'S STATEMENT OF THE FACTS

Bar Counsel MAHON'S account as stated in her Statement of the Facts and of the Case shows again her deceitful conduct of this case beginning on page 1 of her Statement. She attempts to prejudice by using matters not found as violations. Not only did the Referee not find Bar's Exhibit No. 16 of any consequence nor find Bar's Exhibit No. 17 of any consequence (as found on page 2 of the Bar's Brief), but that Bar Counsel MAHON omitted significant language relating to Bar Exhibit No. 16; to wit, that said letter states after her quoted first paragraph as follows:

> "Instead of his sending you an order which denies Mr. Lanham's Motion for Contempt and an order requiring him to produce various documents which would appear on said Order - he totally ignores same and refuses to draw up an appropriate order which the court reporter has in her notes".

Said letter further goes on to state as follows:

> "Mr. Lanham certainly has the right to appeal whatever order that may be entered regarding same and until Mr. Davis draws same and presents it to you for signature this case will continue to stagnate."

Counsel certainly has a right to object to any proposed order (here an "arrest" order before any order was entered telling client what he was supposed to produce).

Then as regards to Bar's Exhibit No. 17, also one in which the Referee found no cause, that letter of February 7, 1986 was a memorandum written by respondent having solely to do with the proper procedure under the rules to be followed on discovery matters. It was regarding the merits of the case pertained to the law and was accordingly quite appropriate. As we have seen before in respondent's Initial Brief, it is perfectly proper according to the Canons on Ethics to communicate with the court provided copy is sent to opposing counsel.

Then on page 3 of Bar Counsel MAHON'S Statement, she talks about the letter that Mr. DAVIS purportedly claimed to have sent to The Florida Bar in which she states on page 3, as a fact, that Mr. DAVIS "did not receive a copy of the same." That should have a correction to it. It is not a statement of fact it is simply a claim by Mr. DAVIS he did not receive a copy of the same; however, she further states on page 8 thereof, that Mr. DAVIS testified he sent "a copy of his grievance letter to Judge O'Brien because he wanted the respondent's letter writing to the

court to stop and he felt the court should know he had taken the matter to The Florida Bar." Well, that wasn't his testimony at all, in fact, he testified as follows:

> "Because I felt like the court should know that I was - - - or what I had done that I was taking the matter to The Florida Bar." (Using the symbols in the Bar's Brief TR 2,p.139,L 23-25).

Even this statement by Mr. **DAVIS** looks like it may contain a Freudian slip, where he made the statement that "Because I felt like the court should know that I was - - -" what he probably was going to state was that he "was going to take the matter to The Florida Bar.", admitting that he had in fact not yet already taken it to The Florida Bar, an admission by him that he in fact did not write such letter to The Florida Bar. The only word that fits the "- - -" is the word "going".

Further, on page 4 of Bar Counsel **MAHON'S** Statement she makes this following remark:

> "The respondent testified at the final hearing that he sent a copy of his letter dated April 18, 1986 to Judge O'Brien in order to make Mr. Davis look bad in the eyes of the judge. (TR2,p268,L 1-9)"

In fact, her statement in that regard is totally false when she says the testimony was "to make Mr. DAVIS look bad in the eyes of the judge". In fact, lines 1-9 of her reference is as follows:

"Q. Why do you think he did that?

A. To make me look bad in his eyes so he could get his way with my client.

Q. Do you think that is why he did it?

A. Well, certainly. There was no other reason to.

Q. Is that why you sent a copy of your April 18th letter to the judge?

A. Sure because if he attempts to diminish me in the judge's eyes, I have to fight that."

She concludes on page 5 of her Statement of the Facts that Steve Rushing's letter "only indicated that respondent failed to enclose a copy of Mr. DAVIS'S letter of April 14, 1989." Not that they had never received it. Steve Rushing had from April 17, 1986 to April 25, 1986 to locate Mr. DAVIS'S letter which respondent identified as being from RICHARD C. DAVIS and dated April 14, 1986, yet, it was not located in the offices of The Florida Bar, nor was it ever mentioned that they had received this letter up and through the trial of this matter of April 6, 1989. Steven ***Rushing's*** letter of April 25, 1986, speaks

for itself. Respondent felt, that at the time he wrote the letter of April 17, 1986, to The Florida Bar, that if he enclosed a copy of said letter, that The Florida Bar would use respondent's copy and reply that they had in fact received that particular letter. Needless to say, after these many years of dealing with The Florida Bar, and the harassment of respondent, that respondent certainly didn't want to give them something to state that they had in fact received such letter. Again, on page 7 of Bar Counsel MAHONS Statement she brings up testimony of Mr. DAVIS that "it is not a local custom or practice to write letters to a judge." This was specifically found by the Referee not applicable. That relates to DR 7-106(C)(5) as found on page 1 of the Referee's report. Further, the only reason The Florida Bar took this case up in the first place, is not because of Mr. DAVIS'S letter of April 14, 1986, which they never received, but it was taken up from respondent's letter of April 17, 1986 to The Florida Bar in which respondent made inquiry of that letter purportedly sent to The Florida Bar by Mr. DAVIS, in which respondent complained about Mr. DAVIS'S conduct. From that point on The Florida Bar went berserk in attempting again, to find grievances against respondent. This has taken place over the past 11 years. Better than

anything, respondent believes that this quite clearly shows the "selective prosecution" of respondent in this matter. What lends further credence to respondent's assertion that the Bar's harassment treatment of respondent is "selective prosecution" in this case, is when one considers the Referee's finding, "that respondent in the letter exhibits, found that respondent had violated DR 7-106(C)(1)." This is the disciplinary rule only applicable in a trial, that a lawyer shall not state or allude to any matter that he "has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidencs". Bar Counsel's assertion that because these letter exhibits were not relevant to the issue or not supported by admissible evidence, that therefore DR 7-106(C)(1) is violated. It is indeed obvious, not only from the heading of this disciplinary rule, which is titled TRIAL CONDUCT, but all of the subheads thereunder, unquestionably refer to matters during the course of a trial, which makes the Referee's finding of respondent's violation in this instance totally unwarranted, but it proves again the point that the Bar here has chosen to selectively prosecute respondent and not Mr. DAVIS because Mr. DAVIS'S letters would be equally not "relevant to the case and will not be supported by admissible evidence."

As to COUNT II as contained on page 8 of Bar Counsel's Statement of the Facts, there is an attempt to

gloss over the document that Bar Counsel used during the trial to indicate that respondent's client had no desire to obtain permanent periodic alimony. Bar Counsel states that in September 10, 1984 there was a Petition of Modification filed in which the attempt was made to secure lump-sum alimony, which as was stated on page 8, was denied. However, she vaguely mentions that there was another Supplemental Petition for Modification seeking permanent alimony, but it doesn't say when. As contained in respondent's Appendix, that motion and accompanying motion for temporary alimony was dated and presumably filed September 23, 1985. Which, at the trial of this matter Bar Counsel totally sloughed over as though it didn't exist, so as to indicate that respondent's client was never interested and didn't know anything about the later Petition for permanent alimony. This was pure and simple deceit on the part of Bar Counsel, attempting to make the Referee believe something other than the fact that respondent's client was interested in seeking periodic permanent alimony.

On pages 9 and 10 of Bar Counsel's Statement of the Facts she goes into the witness THOMAS COLCLOUGH'S testimony stating that respondent treatened the said THOMAS COLCLOUGH, when in effect, on cross examination, THOMAS COLCLOUGH testified that he was not threatened with physical violence and that he had no idea what respondent was referring to when those specific remarks were made. Using Bar Counsel's terms of reference see (TR 1,p.27,L 4,5, L.10,11).

As to page 11 of Bar Counsel's Answer Brief in her Statement of Facts, she refers in the second paragraph that the lawsuit "was filed against Judge Walker and the other parties in order to intimidate Mr. COLCLOUGH into not moving forward with the partition action, in order to cause Judge Walker to have to recuse himself from the partition action and in order to delay the sale of the home, so that he could claim the home as permanent alimony for his client in a supplemental modification action." As reference to these remarks, she points to the Referee's report, and to Volume 1 of the trial transcript and certain pages therein. Everything she states therein is false, because it is not that way in the record. As far as the Referee's report is concerned, that is not evidence. As far as Volume I, TR. I, of the trial transcript is concerned on page 90 lines 10-12, the only testimony there is that respondent stated

that he wanted to help his client to delay the partition action if there was any possible way to delay so that she could proceed on her periodic alimony case. On page 93 of Volume I which Bar Counsel refers to as TR 1 lines 5-11, respondent merely stated in response to questions from Bar Counsel who asked respondent;"So, its your testimony today that you didn't intend or think about filing such a lawsuit prior to August 9, 1985 hearing"; to which respondent replied that he had not or hadn't given it any thought particularly since respondent had hoped to intimidate Mr. COLCLOUGB from going further with selling this property in that fashion. Referring only to the conversation respondent had with COLCLOUGH after the August 9, 1985 hearing. Bar Counsel further refers to Volume I, (TR.1 page 105 lines 5-19) as supporting these remarks also. The only thing on page 105 was when respondent answered Bar Counsel's questions in which she asked respondent if respondent had filed a lawsuit against Judge Walker and the other parties in order to obtain permanent alimony for your client to which respondent replied "no, that wasn't the gist of the action." There is absolutely no support in the record in Bar Counsel's reference thereto to support any of the remarks that she made on page 11 as contained in her Statement of the Facts. The balance of Bar Counsel's

Statement of Facts are mainly concerned with matters trival to the merits.

That trivia dealt with the statement on page 12 of the Answer Brief that "Ms Shrock would pay $20,000.00 to her ex-husband for the marital home * * *" Now, even though this is trivia and irrelevant, it is in her Brief for only one particular reason, and again only to prejudice and deceive. It is supposed to prove that since Ms. Shrock had money to purchase her ex-husband's interest in the marital home, it shows respondent lied when he says he charged her no fees or costs for such litigation because she had no money to pay for same. If she had $20,000.00 she certainly could pay for fees and costs.

However, if the court would look at the deposition taken of Meriam L. Shrock February 24, 1989, which is in the record of this case, it will be found on page 39 and 40 of said deposition, commencing on page 39, line 23 and on page 40, lines 1 to 11, as follows:

"Q. Would it be safe to say you made less than $5,000. a year after you were divorced from George?

A. Oh, yes. That is probably so.

Q. And you didn't have any money of your own?

A. NO.

Q. In other words, you couldn't have bought this property if someone didn't help provide the money; Is that correct?

A. That is correct.

Q. So, it was your mother or your folks, one or the other, unless you got someother - -

A. Or, sugar daddy?"

REPLY AS TO BAR COUNSEL'S ARGUMENT

Enough has been said before regarding Disciplinary Rule 7-106(C)(1) regarding the fact that a lawyer shall not state or allude to any matter that he has not reasonable basis to believe is relevant or will not be supported by admissible evidence. It is clear, 7-106(C)(1) is entirely based solely upon Trial Conduct. We also know that it is perfectly permissible to communicate with the judge in the case if the otherside is copied. Where Bar Counsel says on page 20 and 21 of her Brief that respondent knows that his conduct in the LANHAM case was improper, there is no way that respondent ever stated or alluded to the fact that his conduct was improper in the letters as contained in Exhibits 19, 21, 22, and 25. Enough' has already been said regarding those letters and the other letters prompting those letters. But to classify or catagorize respondent as knowing that his conduct was improper because he knew that something had to be done to counteract the scurrilous attacks upon him by opposing counsel is strictly a non-sequiter. All respondent could do was to fight fire with fire because it was apparent opposing counsel Mr. DAVIS was attempting to prejudice and diminish repondent in the eyes of the presiding judge. If respondent says nothing in response

to those scurrilous letters, what is the trial judge to think? By not responding, the only thing the trial judge can conclude is that Mr. DAVIS is correct. The practice of law is not for wimps or namby-pambys because if you cannot stand up for yourself as an attorney the opposing attorney is going to take advantage of you and of course ultimately harm the client. Certainly, if the trial judge here had felt there was anything improper in respondent's attempt to defend himself and his client from the attacks of opposing counsel Mr. DAVIS, isn't it clear that he could have written to The Florida Bar himself? If all he concluded was that these fellows are having a fight between themselves, not giving either side the benefit of the doubt, then respondent has done his job so that his client will be able to obtain a fair trial when the matter comes up for the final hearing. Let no one be mistaken, the trial of a case is a contest.

RESPONSE TO ARGUMENT ON PAGE TWENTY-TWO

It appears that Bar Counsel defends her right to ask questions pertaining to respondent's prior reprimands during this trial prior to finding of guilt, despite all the procedural rules against it, by stating first that respondent's objection to those questions regarding his disciplinary record was not timely. As to the timely nature thereof, is it not prejudicial to merely ask the question? If respondent immediately claims the privilege (if he knows) as contained in the Bar Rules, the Referee immediately thinks that respondent has something to hide. Secondly, respondent's objections were in fact overruled. In fact the Referee did overrule those objections and let Bar Counsel MAHON even go on further with her questioning. Her second attempt to justify her asking these questions during the trial of the matter has even less merit, when she says that respondent opened the door to those questions about his disciplinary record. There is absolutely no justification for Bar Counsel to state that her questions during the trial of respondent as to his past disciplinary record that respondent himself had opened the door to Bar Counsel's questions by filing an affirmative defense (which simply stated the fact that respondent has been harassed for years by The Florida Bar

because he advertises). There is absolutely no testimony in the record of this case where the respondent spoke or in any other manner indicated his past disciplinary record in any shape, manner or form. Even respondent's affirmative defense did not make mention therein of any past disciplinary records. Certainly, if respondent had stated in said Affirmative Defense that he'd never had any kind of discipline, as a result of the Bar's actions, then it might have perhaps been timely or used for impeachment purposes.

REPLY TO BAR'S ARGUMENT COMMENCING ON PAGE TWENTY-FOUR

Bar Counsel seeks to justify the Referee's findings of fact based upon the case of FLORIDA BAR v STALNAKER, 485 So.2d 815,816(Fla.1986), which is all well and good, but when it came to the case of FLORIDA BAR v McKENZIE, 442 So.2d 934, the referee's report in that case clearly stated that respondent had no conflict of interest at the time he was retained by one of the beneficiaries of a will to protect her interest, yet this court did proceed to find respondent guilty despite the referee's finding as a fact that there was no such conflict.

Bar Counsel goes on in attempt to justify the Referee's findings in her Brief on pages 24 through 30. Clearly, Judge Walker initially had subject matter jurisdiction over the selling of this property by public sale in a partition action. However, when the parties stipulated to sell it at a private sale rather than through the partition action, and required that appraisals be made of the property which respondent's client did not agree with in any sense, as her reason for not agreeing to list the property on the basis of the 3 appraisals, Judge Walker clearly went beyonds the bounds of subject matter jurisdiction by ordering

her to sign a listing agreement or be faced with the threat of going to jail. The only subject matter jurisdiction Judge Walker retained in his original judgment, was to revert the matter back to a partition action if the property was not sold within six months. The parties by their act can never grant to a court jurisdiction, where there was none before. Ms. Shrock felt at the time of the August 9, 1985 hearing, that she would not be getting enough for her property due to the erroneous appraisals thereof, and told the court that that was the reason why she would not list the property with a realtor. (TR 1, p.63, 6, 8) As stated before, what you cannot do directly cannot be done indirectly. There is no subject matter jurisdiction over parties who attempt to sell property at a private sale. No jurisdiction at all is provided under the Statues or the Common Law.

Again, on page 27 of Bar Counsel's Answer Brief, commenting on the Referee's report as mentioned on page 2 thereof, in the second paragraph, Bar Counsel once again stated that there was evidence for the Referee to conclude that the "lawsuit as filed against Judge Walker, et al was done merely to harass counsel and Judge Walker to force them to take some action to be of benefit to respondent's client." There is no such evidence or

testimony whatever, in the record to so indicate, The only testimony at all even close to that subject, is found elsewhere in this Brief p.9,10. This is a finding by the Referee wholly unsupported by any evidence. And on page 28 of Bar Counsel's Answer Brief she quotes testimony as indicating what the Referee had found was not erroneous, when she comes to the last series of the questions, particularly the question which begins with the language "But you knew that before you filed, or you * * *, Bar Counsel fails to include as part of that testimony at the bottom of page 107, TR 1 L.23-25, the following testimony of respondent as relates to the recusal of Judge WALKER:

"Q. And that is one of your purposes or was one of your purposes for filing this lawsuit: Wasn't it?

A. No, no, it wasn't".

Further, on page 29 of her Brief, Bar Counsel says that the Referee finding that respondent filed a lawsuit against Judge Walker and others solely as a "vendetta and out of spite," was supported by the testimoney of THOMAS COLCLOUGH. And then, as proof, she recites the testimony as provided by THOMAS COLCLOUGH. Such testimony is in no way material or relevant to the Referee's finding of "vendetta and out of spite." This was a

conversation between COLCLOUGH and respondent after the August 9, 1985 hearing, cited verbatim on pages 29 and 30 of the Answer Brief. There is no support in the record in any respect for the Referee to conclude as he did, that this matter was started solely as a "vendetta and out of spite." The only matter would give the Referee support for this finding is contained by the false evidence and false testimony provided by Bar Counsel MAHON in which she used perjured testimony and admitted into evidence an earlier effort by Ms. Shrock to obtain the marital home by lump-sum alimony, ignoring the one-year later petition by Ms. Shrock in which she sought permanent periodic alimony. Bar Counsel asks, (TR 1, p.60, L.10)"Were you seeking to get it (the home) as your alimony, as permanent alimony. A. yes." All to show that Ms. Shrock had no interest in periodic alimony, and therefore respondent was doing other things on her behalf without her knowledge or authority. See her testimony (on page 72, lines 6-8, trial transcript Vol.1):

> "A. I did not want temporary alimony, or I didn't want permanent alimony. I mean, all I wanted was just to remain in my home."

Also her testimony on page 72 and 73, TR 1, L25 etc about not "being charged any fees or a filing fee in the case that she commenced against Judge Walker and others,"

that respondent was doing this all by himself, when obviously this was not true because that lawsuit shows clearly on its face that she had read the lawsuit, stated that the matters contained therein were true, signed it, and knew that it was according to her testimony at the deposition which is entirely contradictory of her testimony at the trial.

REPLY TO BAR COUNSEL'S COSTS AS CONTAINED ON PAGES THIRTY-ONE - THIRTY-FOUR

On pages 31 through 34 of Bar Counsel's Answer Brief, she speaks of the costs of this matter as found by the Referee. And, speaks of an amended rule which took effect April 20, 1989, as an attempt to justify the costs. Of course, this matter was tried April 6, 1989, and therefore the Referee did rule that the costs as amended April 20, 1989, did not apply and struck out the $500.00 charge which reverted it to the $150.00 level charge, which was the rule at the time this case was tried.

However, he was not consistent therewith and allowed Bar Counsel to charge something according to the amended rules of April 20, 1989. That is, relating to "Investigator costs". Obviously, this does not apply to the case which was tried April 6, 1989, but even if did apply, respondent should have been charged $500.00, as "administrative costs." Spending just a moment on the amended rule of April 20, 1989, where it says "the cost of the proceeding shall included investigator costs, * * *, these were more than investigator costs because the amended rule speaks only to traveling and out-of-pocket expenses", and if one looks at the staff investigator expenses as contained on page 102 of respondent's Appendix, it will be seen that there is no sum listed there which

are "staff investigator expenses" except mileage. The time that was claimed for them to do this work of "serving subpoenas" would not qualify as investigator expense. These are people employed by the Bar as direct employees thereof. Further, as stated in respondent's Initial Brief, it is quite obvious that no subpoenas in fact were ever served, because there is no claim in any of the Bar's Statements of Costs showing there was any witness fees or travel expense therein for any of the witnesses who testified at the trial. Nor is there any claim that these investigators had anything to do with getting the subpoenas served, etc. In fact, any subpoenas that were signed was accomplished a long time ago before Bar Counsel MAHON came on to this case, when it was being tried by Attorney GREENBERG.

I HEREBY CERTIFY that a copy of the foregoing was sent by U.S. Mail to Bonnie L. Mahon, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607, on this 18th day of December, 1989.

James C. McKenzie

JAMES C. McKENZIE, Respondent