IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THOMAS P. COLCLOUGH,

Petitioner, : CASE NO. 73,404
TFB MP 87,22,562 (06A)

vs

THE FLORIDA BAR,

Respondent : PETITION FOR REVIEW

REPLY BRIEF OF PETITIONER

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ARGUMENT - ISSUE I

CERTAIN FINDINGS OF FACT IN PARAGRAPH II OF THE REPORT OF REFEREE ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The Florida Bar asserts that the issue on review is the question of credibility of witnesses. Although Respondent concedes that credibility of witnesses is the prerogative of the trier of fact and will not be disturbed on appeal, that is not the issue before the Court. The issue before the Court is whether, as required by the Rules Regulating The Florida Bar, the evidence of guilt is clear and convincing. Respondent submits that the quality of evidence in this record does not demonstrate guilt by the required clear and convincing standard. Without a finding that Judge Bryson is not to be believed, the evidence, from the Bar's standpoint, is at best in balance. That does not satisfy the clear and convincing standard.

At page 17 of its brief, the Bar baldly asserts that "(t)he referee obviously believed the testimony of Ms. Craig and Ms. Mansfield and did not believe the respondent and Judge Bryson." (emphasis added.) The Bar then contends at page 20 of its brief that "it is implicit from the findings which were made by the referee that he rejected Judge Bryson's testimony". Respectfully, one does not "implicitly" find that statements made by a circuit judge under oath are not to be believed. If the referee concluded that Judge Bryson testified falsely, surely he was obliged to

reduce such an extraordinary conclusion to an express finding. See Florida Bar v. Lancaster, 448 So. 2d 1019 (Fla. 1984). Absent such an express finding of fact, the recommendation of guilt by the referee is not supported by clear and convincing evidence.

Complainant's statement on page 14 of the Answer Brief that neither Ms. Craig nor Ms. Mansfield reviewed the court file in Holmes v Hustin is not accurate. Ms. Mansfield testified:

Q. At that point had you reviewed the file?

A. Yes, I had.

Q. And the record?

A. Yes

(T-76)

Ms. Mansfield also testified she was familiar with the Motion to Assess Costs and the cost hearing scheduled for September 24. (T-77)

Ms. Craig also reviewed Ms. Barr's file and was familiar with the cost motion and the hearing set for September 24. (T-27-28) Complainant's statement that reliance by Ms. Mansfield or Ms. Craig on Respondent's so called representation may be considered clear and convincing evidence, cannot be sustained in view of the files and record reviewed by them prior to the supersedeas hearing.

Complainant's argument that Judge Bryson had no recall of the August 18, 1986 hearing a few months after the

incident does not discredit Judge Bryson's testimony that he later reviewed the Holmes v Hustin file and refreshed his memory of the events of August 18, 1986. (T-136) Judge Bryson testified concerning the hearing on Ms. Barr's Motion to Vacate the cost judgment as follows:

> By this time this file had gotten voluminous. And I didn't review the file I just told Ms. Barr that frankly I can look at the thing, but I can't really tell you what went on.
>
> And this is true of any number of hearings that I've had this week. But I can go back and look at a calendar and look at the --at this file and study the both of those in combination and come up with a pretty good recollection of what went on.
>
> (T-144-145)

If the referee discredited Judge Bryson's testimony (as argued by Complainant) then he should be obliged by standards of clear and convincing evidence to make clear findings of fact to that effect. A "can't recall" at one point in time does not discredit later testimony based upon a review of the file to refresh memory.

Ms. Mansfield's testimony, relied upon the Bar, that she did not see Judge Bryson execute any documents or orders during the hearing (Answer Brief, page 20) does not constitute clear and convincing evidence that the order was not signed then. Everyone, including Ms. Mansfield and Ms. Craig, agrees that they received the conformed cost order after the August 18 hearing concluded.

Testimony of Ms. Craig and Ms. Mansfield as to an alleged misrepresentation is contrary to their professed

knowledge of the Holmes v. Hustin files, contrary to the court file or record, contrary to Ms. Barr's file, contrary to Mr. Colclough's testimony and contrary to the testimony of the presiding judge. Respondent submits that such evidence cannot support a finding of guilt as it is clearly erroneous and lacking in evidentiary support as contemplated by The Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987).

In Hooper, it was stated:

> Therefore, while the referee must be presented with clear and convincing evidence in order to make a finding of misconduct, on review such a finding must be sustained if it is "supported by competent and substantial evidence." The Florida Bar v Hirsch, 359 So. 2d 856, 857 (Fla. 1978). See The Florida Bar v Abramson, 199 So. 2d 457, 460 (Fla. 1967) (rule that trier-of-fact's conclusions should be sustained if supported by "legally sufficient evidence" is applicable to bar discipline proceedings); Richardson v State, 141 Fla. 218, 192 So. 876 (1940) (reviewing court will not disturb findings of lower court unless standard of proof is applied erroneously). 509 So. 2d at page 291

Here the standard of proof was erroneously applied by the referee.

ARGUMENT - ISSUE II

THE RECOMMENDED DISCIPLINE OF ONE YEAR SUSPENSION AND THEREAFTER UNTIL RESPONDENT SHALL PROVE REHABILITATION IS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE OR FINDINGS OF THE REFEREE

There is no record evidence that Respondent violated standard 6.11 (a), which requires intent to deceive the Court. Judge Bryson testified that the Court was not deceived.

> There was no representation by Mr. Colclough of a previously obtained judgment in the amount of $4,666.50; there was no misconduct or misrepresentation by Mr. Colclough in any manner in that hearing and the Motion to Tax Costs and judgment thereon was entered after affording attorneys for Mr. Hustin to voice any objection they may have had.
>
> (Affidavit of Judge Bryson, Respondent's Exhibit No. 1)

On page 23 of Complainant's brief, the Bar asserts the existence of four aggravating factors under Florida's Standards for Imposing Lawyer Sanctions 9.22. There is absolutely no evidence in this record nor finding of fact to support a finding of:

> (b) dishonest or selfish motive;
> (c) a pattern of misconduct; or
> (f) submission of false evidence, false statements or other deceptive practices during the disciplinary process. (emphasis added).

Moreover, the evidence supports five mitigating circumstances applicable to the Respondent. Florida's Standards for Imposing

Lawyer Sanctions, Standard 9.32(a), (b),(e),(f) and (g).

It is true that Respondent did not acknowledge the wrongful nature of his conduct. He expressly denied the alleged misconduct. However, if the Bar is correct that this brings an aggravating factor into play, then every lawyer who asserts innocence of charges brought against him will automatically be subject to this aggravating factor. By comparison, exercising a 5th Amendment privilege does not work against one invoking that right. The Bar standard goes further than that by seemingly aggravating punishment because a Respondent does not affirmatively acknowledge wrong doing. This Florida Bar standard cannot reasonably, automatically be invoked in every contested grievance proceeding, as it would discourage good faith defenses to Bar complainants.

The Bar's assertion at page 24 of its brief that "(t)he public and the administration of justice must be protected from attorneys like respondent who deceive both opposing counsel and the court" simply ignores the evidence in this record. Judge Bryson affirmatively testified that he was not deceived. (Affidavit of Judge Bryson, Respondent's Exhibit 1.)

Perhaps the most astounding suggestion by the Bar, apart from its contention that the decision of this court in Hodkin v Florida Bar, 293 So. 2d 56 (Fla. 1975) is an aberration, is that the case law relied upon by Respondent has been overruled or supplanted by Florida's Standards for Imposing Lawyer Sanctions.

(Answer Brief, page 24) Surely the Bar cannot seriously contend that a set of "standards" adopted only by the Board of Governors overrules previous decisions of this Court! Even the Standard Jury Instructions which are sanctioned by orders of this Court do not serve to overrule existing case law, but are merely guidelines for trial judges which do not "adjudge(e) that the legal principals embodied in the recommended instructions correctly state the law of Florida." In re; Standard Jury Instructions, opinion filed April 19, 1967, Case No. 36,286. Hence, the decisions relied upon by Respondent in his Initial Brief are alive and well and stand undistinguished by the Bar. Those decisions require rejection of the discipline recommended by the referee.

Since submission of Petitioner's initial brief on August 30, 1989, this Court has rendered its decision in The Florida Bar vs. Randy Fischer, 14 F.L.W. 425 (Fla. Sept. 8, 1989). That decision confirms that the referee erred in his recomendation of sanctions in this case.

In Fischer, the referee found clear and convincing evidence that Respondent Fischer secured a dismissal of his traffic court citation by having his secretary pose as court clerk to call the Highway Patrol Office informing that office that the traffic court hearing had been cancelled and that the

traffic officer did not have to appear. On those facts, the Supreme Court ordered Respondent suspended for ninety one days.

Respectively submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail this the 29th day of September, 1989, to:

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