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**FILED**

SID J. WHITE

JUN 11 1990

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, )  
 )  
 Complainant, )  
 )  
 vs )  
 )  
 JAMES C. MCKENZIE, )  
 )  
 Respondent. )  
 )

CASE NO. 74,292  
TFB Nos. 88-11,260 (6D)  
89-10,228 (6D)

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RESPONSE AND ANSWER

TO

CROSS-APPEAL

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JAMES C. MCKENZIE, Respondent  
P.O. Box 4579  
Clearwater, FL 34618  
(813) 796-4417

ANSWER TO CROSS APPEAL

Complainant, The Florida Bar first says this Court should not change the Referee's Report because of The Florida Bar v Stalnaker, 485 So.2d 815 (Fla. 1986), then asks this Court to change the Referee's Report so as to change it to a harsher punishment. A contradiction. Because respondent appealed it gave complainant opportunity to cross appeal which they probably wouldn't have done without such appeal.

Complainant attempts to point out that there was another reason other than the testimony on the Interrogatories by respondent, that respondent testified contrarily, and complainant by so doing, admits, in effect, that respondent did testify truthfully on the Interrogatories. He spends most of his brief on trying to convince that respondent though claiming there was an agreement for fees in the malpractice case (by counterclaim therein); and, in an objection to discharge indicated such an agreement existed, tries to say in the trial of this case that respondent claims there was no such agreement.

Never did respondent testify that he had no such agreement, in fact he believed he did, but did testify his ability to

prove such agreement was remote and would not stand up in Court, respondent also felt that it would not be worthy of attempting to prove such agreement existed because all he could earn as fees after being discharged was in quantum meruit. As far as testimony is concerned, see T.T. page 48, lines 17-21:

" \* \* \* but I said, 'Well, to be fair' -- 'there was an old minimum Bar fee schedule, and it stated in there what the percentages were.' I said I would do it for that particular amount that was stated in there."

See also T.T. page 68, lines 17-23:

"A. Mr. Ristoff, if you will look at the tenor of that, sir, that is a claim on contract. In fact, as everyone here has agreed, (it was testified), there was no such agreement. It was an attempt by me, sir, in the malpractice case not knowing what evidence that they might have on the malpractice part of it, to run a counterclaim."

And then again, T.T. page 71, lines 4-6:

"A. Mr. Ristoff, it takes two to make an

agreement. I felt I had one. I felt I had an agreement; although, I had nothing specific --"

As far as the Referee's conclusions that respondent testified falsely only about the Interrogatories here is the following: T.T. page 73, lines 13-17.

"THE COURT: \* \* \* and you signed a document that today you are saying, 'You know, not only are they not my answers, but I do not even recognize this stuff as my handwriting.'"

And again T.T. page 74, lines 16-25, page 75, lines 1-6:

"THE COURT: And your testimony is that this whole document other than your signature, sir, does not contain your own handwriting; is that right?"

"MR. MCKENZIE: That's right."

"THE COURT: Some of the answers may be yours, but some of them may not be yours?"

"MR. MCKENZIE: They may be somebody else's conclusion."

"THE COURT: Do you recognize that handwriting?"

"MR. MCKENZIE: No."

"THE COURT: I am not suggesting that it is yours, but you have no idea whose handwriting

that it is?"

"MR. MCKENZIE: No, I do not."

Again T.T. page 74, lines 6-7

"THE COURT: " \* \* \* Do you know if it is  
your answer? Why would you have signed it  
if --"

Later in preparing this brief, respondent came across the letter to him from respondent's lawyer dated October 3, 1983, which enclosed said Interrogatories. Said letter being sent to respondent's old address and didn't reach respondent until October 12, 1983. Since time was a premium, respondent prepared answers thereto on a separate sheet, but signed the Interrogatories in blank and had his signature notarized, sending them back to his lawyer with respondent's correct address. Respondent expected his lawyer to get back in touch with him about his answers, but he never did. This letter follows page 6 in respondent's initial brief. After finding this, (in the malpractice case), correspondence, respondent made timely motion to rehear, but the Referee would not hear same. Certainly respondent was angry, respondent has every right to be angry, to be flatly accused of lying under oath, totally without justification over a matter which occurred over 6 years ago and with which respondent had no independent

recollection other than he knew he didn't write in those answers, deserves an apology at least and a setting aside of her remarks in the Referee's Report that "respondent's testimony was less than truthful, shocking and incredible." She would not even hear respondent's timely motion to rehear. Respondent's written remarks on his lawyer's letter to him in the malpractice case concerning the Interrogatories speak for themselves. There was no other place in the record where the Referee questioned respondent; angry also, because a rehearing would allow respondent to confront the Referee and get her remarks on record.

Who knows what effect the Referee's ill-advised erroneous conclusions had not only on her finding of guilt but on punishment in concluding that respondent, in effect, had lied under oath?

As to complainant's remarks regarding the 10 years time period in this case, to the effect that THE BAR proceeded with all due dispatch since it received the case to prosecute in August, 1989. However that is apparently not the rule as cited in the McCain case, supra, where this Court is quoted on page 705 of its opinion as follows:


"Whenever a lawyer feels that an unreasonable time has passed since the alleged misconduct

for which the Bar brings charges, this  
Court will be open to address that problem."  
(Emphasis added)

Nor, is there any support in the record for the Referee's conclusion that "respondent has practiced law for 30 years." Respondent has been a member of the Florida Bar only since June, 1976.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I sent copy hereof to David R. Ristoff, c/o The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, FL 33607 by U.S. Mail this 8th day of June, 1990.

  
\_\_\_\_\_  
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