IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

CASE NO: 73,629 and 74,398
(TFB No: 88-31,054 (07A)
and 89-31,289 (07A)

vs

WALTER B. DUNAGAN

Respondent

FILED
SID J. WHITE
APR 10 1990
CLERK, SUPREME COURT
By ________
Deputy Clerk

REPLY BRIEF

Submitted by:

WALTER B. DUNAGAN, Esq.
307 So. Palmetto Ave.
Daytona Beach, Fla. 32114
(904)252-8811
Respondent
Fla. Bar #0130531

All references to Respondent's Appendix shall be designated with the prefix "A"; all references to the Findings shall be designated with the prefix **"F";** and all references to the transcript of the proceedings before the Referee shall be designated with the prefix **"TR";** all reference to the transcript of the Grievance Committee shall be designated with the prefix "TG", all references to the depositions had in this cause shall be designated with the prefix **"TD";** all reference to the transcript of the Trial shall be designated with the prefix **"T".**

Respondent below, WALTER B. DUNAGAN, will be referred to as Petitioner herein.

The Florida Bar, will be referred to as "Bar".

Petitioner is unable to comply with the Rules Regulating Florida Bar, Rule 3-7.6(f) and Fla. R. App. P. 9.210(b)(3), completely, inasmuch as there is no index on appeal, nor delineation of the "record" transmitted by the Referee. The Supreme Court's docket sheet is contained in Petitioner's Appendix (A-20).

CASES CITED

Page No.

1. Florida Bar v Carter, 429 So 2d 3 (Fla 1983) 2

2. Florida Bar v Fields 482 So 2d 1354 (Fla 1986) 3

3 Standard for Imposing Lawyer Sanctions:

Standard 4.32 7

Standard 4.33 7

Now comes Respondent, WALTER B. DUNAGAN, and for his reply brief shows:

1. It is a sad day in the history of jurisprudence when an appeal is referred to as an "attack" on the referee's findings.

2. Where the Bar has the burden of establishing a case by clear and convincing evidence, there might be a smaller problem with respect to the delegation of the authority of the court to discipline its officers. However, where the alleged problem does not occur before the court in which the office is appearing, then there is a very real constitutional problem of the authority of any court to regulate an attorneys private conduct, and, were there special powers in the Supreme Court to legislate, execute and adjudge rules concerning the private lives of attorneys, then whether that power is delegable raises a substantial constitutional question.

In the instant case, the Supreme Court not only delegated power but then (- accepting the Bar's citations) review is limited to a cursory examination. The findings of the referee are presumed correct and there is no issue as to whether the evidence was clear and convincing, but the shoe is totally on the other foot and the attorney charged with misconduct must prove error clearly and convincingly. The Bar would even go further and say that if there is any conflict in the evidence then there is apparently, no review because the referee resolves all conflicts.

3. It is submitted that the Bar and the referee have misapplied Florida Bar v Carter, 429 So 2d 3 (Fla 1983). In Carter the Court held that there could be no aggravation or harshen penalty where conduct in the instant case occurred prior to a previous discipline. The referee held to be aggravating what Carter held was, not to be considered.

Moreover the referee should have considered the previous discipline with respect to mitigation. New facts were discovered sufficient to overturn the previous decision and the referee rejected consideration of the same. Moveover, by the erroneous newspaper article Respondent was effectively revoked from the practice of law and his practice closed and terminated for six (6) months, when the Court had decreed only a suspension and reprimand. Despite multiple requests the Bar totally failed to do anything to keep the wrongful penalty from being imposed. It should be self-evident that if a person has been excessively punished, then some sort of retribution should be made to him of the wrong inflicted on him.

Where a public reprimand is ordered and the Court sends a copy to the press it may not idly stand by and do nothing where the reprimand published by the paper is totally different from the court order.

4. All of the cases cited by the Bar except the Carter case

above cited and the case of Florida Bar v Fields 482 So 2d 1354 (Fla 1986) are wholly inapplicable to the instant case. Fields is on point and is cited by Respondent in his initial brief. The Field case containing many aggravating factors without mitigation.

5. The Bar is in total error as to the issue of knowledge (see paragraph 3 of the Bar's brief). The bar maintains that it is totally irrelevant that Respondent had no idea other than that - in accordance with the letter of September 23, 1986 - the Antaleks were securing a loan to pay the $5,240.03 set forth in that letter.

Ordinarily, it is a fundamental rule of ethics that one knows or should know that the act he is about to commit is wrong, but he does it anyway. The Bar's position is that when an attorney advises a client to get a loan to pay fees and costs, and the client follows the attorneys advice and gets a loan, then there is conflict if the Bank calls and asks the amount of the fees and costs or if the attorney goes to the closing expecting to be paid.

If the Bank or the closing agent believed that the attorney was representing the client, then the attorney is guilty of something by his presence at the closing or by his failure to say something of which he is unaware. (See Bar brief page 8).

6. The Bar appears to admit Respondents ignorance and his reliance on the response of his clients to the attorneys letter of

September 23, 1986 (See Bar brief page 24, paragraph 3; page 14, page 1; page 7 paragraph 2 line 9 therein). Thus the Bar finds no difficulty in admitting that the attorney was present at the closing on the well-founded belief that his clients were going to pay him $5,240.03 in accordance with his letter to him of September 23, 1986.

The Bar proceeds from this premise to the conclusion that the attorney knowingly coerced his clients into closing by his presence at the closing. (Bar Brief page 24 paragraph 3 line 9).

Any closing is "coercive" if a broker, realtor, banker or attorney is involved. The broker and realtor "coerce" because they have found buyers or lenders and are entitled to their commissions if the seller wrongfully refuses to close. The Bank is not going to refund any money it collected for the work done to close. The attorney is entitled to a fee for attendance at closing regardless of who fails to close or why.

The Antaleks were knowledgeable as to closings and neither the Bank nor the closing agent would have closed if there were the slightest problem, but any problem would be attempted to be resolved, and, if unsuccessful, the closing would be postponed and reset - without any costs or detriment.

If a Broker's fee agreed to on listing was 6% and the closing statement shows a fee of 10%, no closing is had until the matter

is resolved. Even if the listing agreement were produced there would still be no closing, if both sides did not agree. If one party maintained that the document was altered or the agreement was later modified there would be no closing.

The same is true of any attorney. If the attorney is owed **$300.00** for attending a closing and the closing statement shows **$5,240.03,** even the most timid of souls is going to speak up audibly to question the correctness of the entry and there is no expression of disagreement which will not terminate the closing until the disagreement is resolved.

The clients agreed with the advice of their attorney that they needed to get a loan to pay off some bills and maintain their various law suits. Whenever one secures a loan, one is suffering from some financial pressure. Respondent neither caused the pressure or took advantage of it, but took every step to secure solutions to their financial problems. And, yes, even bankruptcy is preferable to hysteria or death. (See Al).

7. The Bar suggest that the penalty must be severe enough to deter others from like conduct. Since the Bar well knows that I remain ignorant as to the nature of the ignominious act I have committed, it is hoped that the Supreme Court will formulate and express my wrong doing in a manner understandable to Respondent or find that indeed the ignorance was innocent.

The decision of the Court would have a great, incalculable, highly variable impact if it holds that attorneys may not attend closings; or may not attend closings where Brokers or others earn the fees whether there is a closing or not.

As stated previously the worst that can be said is that Respondent thought his clients were getting a loan to pay his fees and costs; the Bank called and asked what those fees and costs were and the Bank was told; and the attorney was invited to the closing at the bank and did attend.

A loan is 100% between the Bank and its borrower. No one may secure a penny of the proceeds without the authorization of the borrower. All parties knew this. Really, the attorney could create no problem for the escrow agent or the Bank, because any claim the attorney had for fees for past services or attendance at closing has no effect on the disbursement of the loan proceeds whatsoever.

I can walk into a bank and say that is my client, don't pay him any money until he pays me the $5,000.00 he owes me? And the Bank will pay attention to me and honor my request?

8. It is disturbing that the Bar suggests that there are so many attorneys in Florida, any penalty is justified because of overcrowding.

9. Where the Bar cites the Standards for Imposing Lawyer

Sanctions it should apply the rules to the facts of the case.

A. Standard **4.32** knowledge of conflict causing injury. The Bar admits that Respondent was unaware of any conflict and no injury was caused where the client paid the fee owed and which was absolutely necessary to maintain litigation. The letter of September **23, 1986** shows thousands of dollars advanced out of the attorneys pocket and unreimbursed, and an unwillingness to continue for any great length of time without some orderly arrangements for payment.

There is however no charge that the attorney coerced the clients to secure loan. Indeed it affirmatively appears that the letter of September **23, 1986** was written after the loan application was made - but pursuant to the attorneys advice.

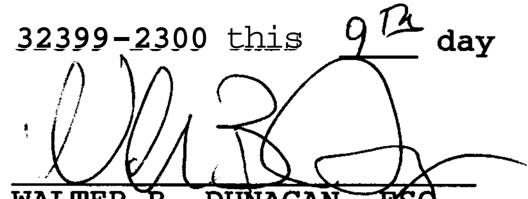
B. Standard **4.33:** A loan is **100%** between a bank and a borrower, so an attorney will find it impossible to secure proceeds not authorized to be disbursed to him. Respondent was interested in being paid. The clients were interested in maintaining the litigation. The clients got the loan to secured the results advised by the attorney

At closing, something horrible happened that the Bank and the closing agent knew nothing about and closed even though they would be liable for every single dime they disbursed without authorization, and despite the fact that their standards prevent

them from closing til all problems are resolved. Nevertheless, the attorney should have been able to see something that all others did not and which went without complaint for a period in excess of two years.

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing has been furnished by U.S. Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32302, Bar Counsel, The Florida Bar 880 No. Orange Ave., Suite 200, Orlando, Florida 32801-1085, and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 9th day of April, 1990.



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