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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case **No. 76,154**

THE FLORIDA BAR,

complainant, :

vs. :

THOMAS P. MURPHY, :

Respondent. :

The Florida Bar File No. 89-71,566 (11D)

REPLY BRIEF OF RESPONDENT, THOMAS P. MURPHY

By: BURTON YOUNG, ESQ.
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ARGUMENT

I. THE FINDING BY THE REFEREE THAT MURPHY COERCED HIS CLIENT TO PAY HIM ADDITIONAL UNEARNED PAYMENTS OUTSIDE THE CLOSING STATEMENT IS CLEARLY ERRONEOUS AND NOT SUPPORTED BY THE FACTS

THE BAR is incorrect when it asserts on page 4 of its Answer Brief that it "has consistently maintained throughout these proceedings and continues to maintain to date that Respondent's taking fees over and above the amount provided for in the closing statement was a violation of Rules 4-1.5 and 4-8.4..." THE BAR would have this Court believe that MURPHY was ***charged*** with that portion of Rule 4-1.5, specifically 4-1.5(f)(5), dealing with the obligation of a lawyer to "prepare a closing statement reflecting an itemization of all costs and expenses, together with the amount of fee received by each participating lawyer or law firm." He was not.

The Complaint makes clear that MURPHY was charged with violating Rule 4-1.5 because he extorted "additional unearned monies from WAGNER." See paragraph 16 of the Complaint. Section "a" of **Rule** 4-1.5 provides that "an attorney should not... collect an illegal, prohibited, or *clearly* excessive fee..." That was THE BAR's theory of the case. When THE BAR ***stipulated*** (correctly) that MURPHY was entitled to a 40% ***fee under Count I,*** it completely undermined its case against him because he received exactly 40%. In fact, MURPHY immediately filed a Motion to Dismiss Count I, which was never ruled upon below, but implicitly denied.

To avoid the effect of its stipulation, THE BAR now argues that "the terms of the contingency fee agreement were completely irrelevant to the issues of whether Respondent extorted unearned fees from his client in violation of Rules 4–1.5 and 4–8.4..." Respectfully, we disagree.

The kind of extortion alleged to have occurred here is defined generally as "any oppression under color of right; but technically it is the corrupt demanding and recovery by an officer, by color of his office, of money or other things of value, that is not due at all, or more than is due, or before it is due." *LaTour v. Stone,* 190 So.704, 709 (Fla. 1939). Although this definition involves public officials, this Court, in Bar disciplinary matters, has similarly understood an extortionate fee as an exorbitant or excessive fee to which the lawyer is not entitled. See The *Florida Bar v. Winn,* 208 So.2d 809 (Fla. 1968).

By definition, therefore, one cannot "extort" from another that to which he is entitled. Since MURPHY was *entitled* to 40% of The Hartford settlement and since he received *exactly* 40%, he cannot be guilty of extortion as a matter of law. ***At best,*** there was a dispute between MURPHY and WAGNER over the fee he charged her on The Hartford settlement. Overall, MURPHY received only 29% of WAGNER's total recovery from her accident case, which is hardly consistent with the mala motives that THE BAR attributes to him.

Our next point is that THE BAR is using discredited evidence to prove its case that MURPHY coerced excessive fees from WAGNER. On page 7 of its brief, THE BAR discussed the facts according to ***WAGNER.*** It cites the alleged phone call she

received from a vice president of her bank informing her that a cash transaction with **MURPHY** would not be acceptable and further that **MURPHY** instructed WAGNER, through Pam Palerrno, to write three **(3)** checks to **MURPHY** instead of one. The problem is that THE BAR's own investigator interviewed the "vice president" referenced by WAGNER, a Mrs. Budde, who said she never called WAGNER and never made such a statement. (T. 270). **Ms.** Palermo testified that Ms. WAGNER didn't want to give one (1) check to **MURPHY,** "because she **WAGNER]** was afraid that *she* would have a problem..." (T.468). WAGNER's testimony about **MURPHY** pulling her into an adjacent office demanding $20,000.00 cash (T.142) was also refuted by **MURPHY** and witness Palermo who testified that Ms. WAGNER was "obsessed" with limiting the fee payment to her California counsel, not **MURPHY.** (T.464–466).

Equally unpersuasive is THE BAR's insistence that **MURPHY** was motivated by a desire to evade income taxes. (Bar Br. at 8, note 1). He testified to the contrary (T.749) and there was no evidence to refute his testimony. That suggestion is not only illusory and defamatory, it falls short of professional propriety for **THE** BAR to impute such criminal intentions to an officer of this Court who has heretofore enjoyed a clean disciplinary and professional record. In fact, THE BAR monopolized its time and money (two [2] investigators were hired) zealously trying to find a motive for **MURPHY** to support **Ms.** WAGNER's "story" because without a motive her story was incredulous. It never did! **MURPHY** enjoyed a spotless reputation despite THE BAR investigator's efforts to tarnish it by suggesting he had problems with sex, drugs, gambling and

alcohol.' THE BAR's failed effort at establishing a motive for MURPHY's alleged demand for an unearned cash fee from WAGNER is proof positive that his testimony, and that of Ms. Palermo and Mr. Ron Hooper, is more credible than Ms. WAGNER's. She had the motive. She didn't want the California lawyer to get as much attorney's fees and sought to limit his recovery.

This discussion flows into our final point: THE BAR has failed to prove the charges by clear and convincing evidence. We fully discussed this issue in our Initial Brief and do not wish to repeat that analysis here. We merely point out that THE BAR continues to rely entirely upon the discredited evidence of WAGNER[2], together with circumstantial evidence (i.e. the closing statement). We do not believe that THE BAR's evidence can produce "in the mind of the trier of fact a firm belief of conviction, without

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[1] THE BAR's investigator even had the temerity to inquire of Ms. Palermo's estranged husband whether she was having an *affair* with MURPHY. ***(T.576).*** He asked Tony Rodham, MURPHY's process server, whether MURPHY was a gambler, had an alcohol or drug problem. (T.595). All answers were negative. It is simply wrong for THE BAR to use these tactics without a scintilla of evidence that such onerous conduct is a contributory cause of the alleged acts under investigation. The effect of the Investigator's inquiries could have deleteriously impacted without cause or concern on innocent third parties. The questions suggested or impugned improprieties in that they were prejudicial to the reputation of Mr. MURPHY and the witness, Pam Palermo. It would have been ethically wrong for a lawyer to ask such a question, see Oath of Admission to The Florida Bar, viz:

> . . .
>
> "I will abstain from all offensive personality ***and*** advance ***no fact prejudicial to the honor or reputation of a party or witness,*** unless required by the justice of the cause with which I am charged."
>
> . . .

and it is equally egregious for THE BAR to employ such ***tactics.***

[2] Ms. WAGNER has undisputed mental problems. (T.221, Respondent's Ex.1).

hesitancy, as to the truth of the allegations sought to be established." *Slomowitz v.* Walker, 429 So.2d 797 (Fla. 4th DCA 1983)(setting forth standard of clear and convincing evidence).

The volume of favorable character evidence from a highly credible and distinguished group of lawyers and judges submitted on behalf of MURPHY should be compelling[3]. Such unrefuted evidence not only goes to issues of mitigation, but also to whether he is telling the truth. Even if this case was a close call – and we believe it is not – this evidence should be weighed to tip the scales in favor of Mr. MURPHY.

II. THIS COURT SHOULD NOT INDULGE THE USUAL PRESUMPTION OF CORRECTNESS OF THE REPORT OF REFEREE DUE TO THE LENGTH OF TIME BETWEEN THE TRIAL AND THE FILING OF THE REPORT

THE BAR's response to this argument offers no method for enforcing the rules of this Court pertaining to the administration of disciplinary matters. It completely ignores the issue of how to ensure that the procedural rights of the accused lawyer are protected. We submit that the public will be no more harmed by stripping away the presumption of correctness usually attached to a Referee's findings, when the report is

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[3] **The evidence spoke not only to MURPHY's impeccable reputation for honesty and integrity – one affidavit stated he doesn't even cheat at golf – but also his superb reputation for *truthfulness.***

not timely filed, than it is when the exclusionary rule prevents introduction of evidence essential to convict a criminal default. In fact, the public is afforded much more protection under our scenario because a) no evidence is excluded and b) a judge, not a lay police officer, is charged with carrying out due process.

The fact remains that the delay could have served, and we submit did serve, to the detriment of the accused lawyer. The memory of a trier of fact as to 1) the demeanor of the witness on the stand, 2) intonations of a witness' speech, 3) witness' facial distortions while testifying is weakened by delay. A cold printed record has no restorative effect. A lawyer's most precious professional right is the right to practice. It should be afforded all reasonable safeguards including that of assuring that all rules are observed when that right is placed in jeopardy. Even the rules as prescribed by this Court for the Finders of Fact.

CONCLUSION

The Referee's findings are not supported by the required burden of proof, viz: clear and convincing evidence, **and** therefore should be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 9 day of December, **1992** to Arlene K, Sankel, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, STE M–100, Miami, FL **33131.**

By _____
ANDREW S. BERMAN