IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Supreme Court
Case No. 76,158

HOWARD NEU,

Respondent.
_____/

REPLY BRIEF OF CROSS/CLAIMANT

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SUMMARY OF ARGUMENT

The Bar has chosen to ignore Respondent's Point I on Cross-Appeal and rather re-emphasize its position in favor of a three year suspension. However, the Bar has not met its burden to overcome the referee's findings of fact by competent substantial evidence to show that said findings were clearly erroneous, unlawful and unjustified. The cases cited by Respondent which were not rebutted by Complainant, reflect that a public reprimand is the proper discipline to be imposed.

The Respondent was acquitted on the most serious charges brought by the Bar. Further, the Bar incurred substantial costs after the Respondent had agreed to a consent judgment in an attempt to have the Respondent disbarred. Those costs should be borne by the Bar.

ARGUMENT

I

A PUBLIC REPRIMAND IS MORE APPROPRIATE DISCIPLINE THAN THE 90 DAY SUSPENSION RECOMMENDED BY THE REFEREE.

The Bar seeks to impute corrupt intent to the Respondent through the stipulation of the facts that occurred. The referee did not believe however, that there was sufficient evidence to find the Respondent guilty of violation of DRI-102(A)(4) which proscribes conduct involving dishonesty, fraud, deceit or misrepresentation. The Bar cites The Florida Bar v. Saxon, 379 So2d 1281, 1283 (Fla. 1980) to support its position. However, in that case, this court held:

> "It is apparent that the referee's recommended discipline was based on his conclusion that the Respondent's conduct, although highly improper was committed without corrupt intent. The referee had the opportunity to directly evaluate the testimony of the witnesses, and his findings of fact are entitled to a presumption of correctness. Florida Bar Integration Rule Article XI, Rule 11.06(9)(a)."

In a more recent case, The Florida Bar v. Scott, 566 So2d 765, (Fla. 1990), this court further stated:

> "A referee's finding of fact will be upheld unless it is clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So2d 1147 (Fla. 1990); The Florida Bar v. McKenzie, 442 So2d 934 (Fla. 1983). The burden is upon the party seeking review to demonstrate that the referee's report is erroneous, unlawful or unjustified. Rule Regulating Florida Bar 3-7.6(c)(5). This court cannot reweigh the evidence or substitute its judgment for that of the trier of fact."

Respondent does not seek to overturn the referee's findings

of fact and accepts the referee's determinations of guilt as to those disciplinary rules that the referee found to have been violated. The Bar's argument for stronger penalties is based on the premise that the referee's findings of fact are clearly erroneous and that therefor the recommendation of 90 day suspension is insufficient. However, the Bar has been unable to demonstrate that the referee's report is not substantiated by the evidence and is therefore erroneous, unlawful or unjustified.

There was competent substantial evidence to support the referee's findings of fact. He did not find the Respondent's actions to be fraudulent in nature. See The Florida Bar v. Davis, 419 So2d 325 (Fla. 1982). Thus, the cases cited by Respondent, which were not refuted nor distinguished by Complainant in its Answer Brief, must control the penalties to be asserted. Those cases all indicate that the proper penalty to be imposed in this case is a public reprimand.

II

FLORIDA BAR COSTS OF $3,555.99 ARE PROPERLY CHARGEABLE AGAINST THE BAR.

The referee found that Respondent was not guilty of the most serious charges brought by the Bar in this disciplinary proceeding. The referee specifically found Mr. Neu not guilty of three of the six charges in Count I of the Complaint and one of the two charges in Count II of the Complaint. (RR 5 and 6).

In The Florida Bar v. Davis, 419 So2d 325 at 328 (Fla. 1982), this Court indicated how costs should be taxed in disciplinary proceedings.

> "We have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule in regard to costs is that they follow the result of the suit, section 57.041 Florida Statutes (1981), Dragstrem v. Butts, 370 So2d 416 (Fla. 1st DCA 1979) and in equity the allowance of costs rests in discretion of the court. Nation Rating Bureau v. Florida Power Corp., 94 So2d 809 (Fla. 1956).
>
> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the code of professional responsibility, the Bar should be awarded its costs. At the same time the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. The amount of costs in these circumstances should be awarded as sound discretion dictates.... We find that the referees recommendations of allowing one third of certain costs where there has been a finding of guilt on one charge but not on two others to have been reasonable." (emphasis supplied).

See also The Florida Bar v. Lehman, 485 So2d 1276, 1278 (Fla.1986).

Therefore, at least 50% of the costs incurred by the Bar should not be taxed to the Respondent.

CONCLUSION

The findings of fact and determinations of guilt and non-guilt by the referee should be upheld by this Court as the Bar has not met its burden of proof that the referees report was not clearly supported by substantial evidence. Based upon these findings and the unrefuted cases cited by the Respondent in his Initial Brief on Cross-Appeal, the penalty imposed by the referee was too harsh and that the proper discipline to be imposed should be a public reprimand. The Bar's costs should be borne by the Bar, or at worst, apportioned between the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the foregoing Reply Brief of Cross-Claimant was mailed to: Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duvall Street, Tallahassee, Florida 32399-1927 and that a true and correct copy of the above and foregoing was mailed to: Paul A. Gross, Bar Counsel, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and John A. Boggs, Director, Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Floridsa 32399-2300 this 29 day of April, 1991.

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