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IN THE SUPREME COURT OF FLORIDA

The Florida Bar,

Case No.: 81,809

Complainant,

Florida Bar Case No.: 91-71,669 (11D)

vs.

Michael A. Catalano,

Respondent.

_____ /

**A PETITION FOR REVIEW FROM A FINAL RULING OF A REFEREE
IN A FLORIDA BAR DISCIPLINARY PROCEEDING**

REPLY BRIEF OF RESPONDENT

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INTRODUCTION

The Respondent, Michael A. Catalano, pursuant to Fla. R. App. P. 9.210(d) hereby files this Reply Brief, in rebuttal to the Answer Brief filed by the Florida Bar as follows. The Florida Bar will be referred to as the Bar in the body of this brief and Catalano by name.

ARGUMENT

I and II

FALSE STATEMENTS OF MATERIAL LAW OR FACT TO A TRIBUNAL AND TO THIRD PERSONS

The gravamen of the charges found to be sustained by the Referee is that Catalano a) alleged in a verified motion that a prosecutor agreed to have witnesses (listed by Catalano as his witnesses and, up to that point, unservable by subpoena) contact his office in addition to the State Attorney's office before trial and b) wrote to these witnesses and informed them that there was a court order directing them to contact him before trial. Both the Bar and Catalano agree that the transcript of October 13, 1989 (found at SR, Pp. 9-18) is central to this case. The Bar, however, reads Catalano's motion and letters without regard to the complete circumstances of the surrounding *Stidham* case.

As is clear in the record, Catalano entered the October hearing seeking to get his subpoenas served. SR Pp.11-2. These "stand-by" subpoenas each contained the direction that the witness contact Catalano for scheduling purposes. SR p.31. Initially, Judge Lebow ordered these same subpoenas to be served. SR p.13. Prosecutor Milian, ostensibly concerned about witness availability for the scheduled date, offered to issue mandatory state subpoenas and, in his own words, "the remedy would be the same." SR p.16. The question thus becomes whether Catalano could reasonably believe that the "remedy" he was to be given was that which he sought

when he entered the courtroom that day, subpoenas to his witnesses and the ability to schedule their appearance in an orderly and convenient manner.

Catalano argues in his Initial Brief that he had no intent to misrepresent but sincerely believed that his statements were correct. In fact, he cited the transcript of the October, 1989 hearing immediately following the "offensive" statement in his verified motion, SR p.21, believing that Prosecutor Milian really did intend to provide him with the same remedy as his subpoenas.¹ An absence of intent is fatal to these charges. *Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991); *Florida Bar v. Weidenbenner*, 630 So.2d 534 (Fla. 1993). Catalano also argues that, based on the prosecutor's statement, the subpoenas served would contain the same order of the court that the witnesses contact him for scheduling.

In *Florida Bar v. Burke*, 578 So.2d 1099 (Fla. 1991) this Court found that intent is "a major and necessary element in a finding of guilt for dishonesty, fraud, deceit, or misrepresentation." *Id.* at 1102. The Bar attempts to distinguish *Burke* by arguing that the instant case involves a *different* rule than that addressed in *Burke*. The Bar does not, however, assert that offense of "knowingly making a false statement" does not require intent on the part of the transgressor. Clearly it does. Thus, the Bar has identified a distinction without a difference.²

The Bar's citation to *Florida Bar v. O'Malley*, 534 So. 2d 1159 (Fla. 1988) is misplaced. Although no one can dispute the proposition that a lawyer may commit no greater professional wrong than deliberately and unequivocally lying under oath, *Id.* at 1162, the facts in *O'Malley*

¹ It is quite clear now that the cooperation one might expect from a reasonable prosecutor could not be expected from Milian. See, *Klepak v. State*, 622 So.2d 19 (Fla. 4th DCA 1993) and *Landry v. State*, 620 So.2d 1099 (Fla. 4th DCA 1993).

² The Bar's attempt to distinguish *Florida Bar v. Weidenbenner*, 630 So.2d 534 (Fla. 1993) is similarly flawed.

are not applicable to the instant case.

In *O'Malley*, the attorney was to hold money, gold and silver for a criminal defendant's bond. On the same day the property was placed in the safe deposit box, O'Malley removed all the cash and gave it to a third party. At a later date he removed the gold and silver. When O'Malley refused to return the property suit was filed. During his deposition O'Malley stated under oath:

Q. Are you-In terms of the location of the collateral, is any body else, other than yourself, in possession of the collateral?

A. No. It's in my care, custody and control.

Q. Did you ever remove anything from the safety deposit box?

A. No. Well nothing that relates to this law suit.

Q. And you are saying that you never turned it over to anybody? You have kept it yourself?

A. Yes. You are correct in that. (emphasis supplied.)

Id. at 1160-1. O'Malley's answers at the deposition were directly contrary to the truth. He deliberately and unequivocally lied under oath. O'Malley had reason to cover up his conduct as it clearly constituted violation of bar rules and probably criminal statutes as well. The instant matter is very different.

In the instant matter, the Catalano had no reason to be dishonest. In his verified motion Catalano cited directly to transcript where he believed the authority for his statement resided. The judge to whom his motion was directed had presided over the October 1989 hearing. No motive existed for Catalano to knowingly and intentionally utter a false statement. As to the letters in Count II of the Bar's Complaint for Minor Misconduct, the order to which Catalano referred was that which was ordinarily contained within the subpoenas that he routinely served. The witnesses to whom he wrote were listed on his witness list, had been the subject of

depositions already taken, and their testimony expected to be favorable to his client. The purpose of having these witnesses contact his office was spelled out in the letter: to "minimize the amount of time you have to spend at the courthouse waiting to testify." SR p.29. This reasonable motive was not rebutted or disproved at the hearing in this matter. Thus, no motive existed to falsify. In the instant case, there is not clear and convincing evidence of *intentional* dishonesty by Catalano.³

Perhaps the most telling indication of the lack of bad intent on the part of Catalano is the support received by the trial court in his efforts to conveniently schedule the witnesses. Judge Lebow testified:

That's why I'm saying I really don't have any problem with the letter in really trying to help the witnesses at their convenience so that they wouldn't have to spend as much time waiting in the hallway or whatever. I think that in that respect it's very considerate of them and I don't have a problem with it.

ST-E Pp.25-6.

Consequently, where Catalano directed the court to a transcript arguably supporting his assertion in the verified motion, clear and convincing evidence of knowingly and intentionally making a false statement of fact to a tribunal is not present. (Count I) Further, where Catalano had reason to believe that the Prosecutor would provide the witnesses with the same direction as that contained in the subpoenas that Catalano wished to have served (and these subpoenas

³ The Bar's citation to *Florida Bar v. Lund*, 410 So.2d 922 (Fla. 1982) is not instructive. Although the opinion tells us that Lund lied during proceedings before a grievance committee, no further facts are provided. It is therefore impossible to tell if *Lund* is factually applicable to the instant case.

Similarly, the Bar's citation to *Hayes v. Johnson*, 566 So.2d 260 (Fla. 5th DCA 1990) offers little to the instant analysis other than the broad and accepted (by Catalano) proposition that attorneys must be truthful and fair in their submission to a court. If anything, the distinction in *Hayes* is that the offending attorney there failed to disclose matters to the court in his pleading about which the court did not have direct knowledge. In the instant case, the "false" statement in Count I recounts events *that occurred at a hearing* presided over by Judge Lebow and cites to a transcript which resided in the court file. These two cases are not alike.

contained the direction of the court to contact counsel) clear and convincing evidence of a knowing and intentional misstatement is absent. The findings of the referee should not be accepted.⁴

III

LACHES

Catalano has asserted that the Bar informed him in 1990 that the investigation regarding the *Stidham* was closed. In response to the Catalano's laches argument the Bar states that laches is not predicated on a mere lapse of time, but requires a finding of unexplained or unexcused delay for an unreasonable length of time. *Block v. Ferguson*, 47 So. 2d 694 (Fla. 1950). As was discussed in the Respondent's initial brief there was over two and one half years between the time the Respondent was informed by Bar Counsel Stamm that the file was being closed and the Respondent was not being investigated by the Bar and the instant complaint being filed on May 24, 1993. To date the Bar has never given any valid reason why this matter was reopened.

What may be drawn from the testimony of Bar Counsel Warren Stamm is that all materials necessary for the instant complaint were in the hand of the Bar early in 1990. Only

⁴ The Respondent agrees with the Complainant's statement that a Referee's finding of fact is entitled to a presumption of correctness. *Florida Bar v. Winderman*, 614 So. 2d 484 (Fla. 1993); *Florida Bar v. Stalnaker*, 485 So. 2d 815 (Fla. 1986). However, this presumption will not be upheld on appeal if clearly erroneous and lacking in evidentiary support. *Florida Bar v. Winderman*, 614 So. 2d 484, 486 (Fla. 1993). Catalano's statements are a reasonable interpretation of what occurred on October 13, 1989. Significantly, the Referee made no specific finding that the Respondent intended to utter a false statement. The record does not support a finding of intent and therefore, the Referee's findings must be vacated.

through the persistent urgings of Alberto Milian was the complaint processed. ST-B Pp.28-31.⁵ Catalano was prejudiced by having to face charges which he believed were closed in 1990 and has properly shown sufficient facts for relief.

IV.

MITIGATING FACTORS

Catalano has never had full opportunity to present mitigation to the Referee, despite having been promised the opportunity to present his witnesses on this matter. The Referee, during the closing argument portion of the proceeding did not inform Catalano that he intended to reach the punishment portion of the proceedings without hearing live testimony. Where a lawyer's reputation and career are impacted by the decision of the referee and this Court, it seems fundamental that he be entitled to present fully evidence of the years of service that he has given to the community and the Bar.

V.

THE BAR'S COSTS

Catalano does not dispute that the state of the law is as presented in *Florida Bar v. Miele*, 605 So. 2d 866 (Fla. 1992)("[a]ssessment of costs in attorney disciplinary proceeding is within the referee's discretion and will not be reversed absent abuse of discretion.") However, the failure to exercise discretion is an abuse of discretion. No hearing has been held by the Referee

⁵ The Bar's complaint on P.18 of their Brief that the "testimony by Stamm was not supported by any documentary evidence" is disingenuous. Although the Bar file was subpoenaed for these hearings, Bar Counsel "forgot" to bring them to the first hearing, ST-A p.128, and when finally present with the file showed Stamm only portions of the file. Stamm sought additional materials from the file to verify his assertion that he had closed the file. ST-B Pp.31-4. Stamm's notes were never produced by the Bar.

to determine if the costs asserted by the Bar were in fact expended or were reasonable. The instant Referee erred and/or abused his discretion when he failed to conduct a hearing upon disputed costs. See *Florida Bar v. Carr*, 574 So. 2d 59 (Fla. 1990), *Florida Bar v. Miele*, 605 So. 2d 866 (Fla. 1992) and *Florida Bar v. Righmeyer*, 616 So. 2d 953 (Fla. 1993).

CONCLUSION

The Respondent hereby moves this Honorable Court to set aside the Referee's final finding as to both counts as there was no factual or legal basis for the finding. Further, on the facts presented, no discipline is justified. If this Honorable Court does not set aside the finding of guilt by the Referee, then the Respondent moves this Honorable Court to reverse and remand for proceeding consistent with the positions taken herein in regard to mitigation evidence and costs.

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Respectfully Submitted:

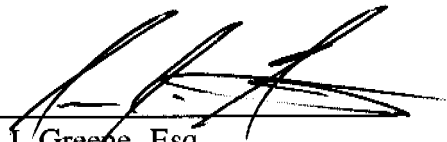
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant brief has been furnished to the Pamela Pride-Chavies, Assistant Bar Counsel 444 Brickell Ave, Suite M-100, Miami, FL 33131 this 1 day of June, 1994.

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