

087

IN THE SUPREME COURT OF FLORIDA

WILLIAM T. CHARNOCK,
Appellant,

v.

THE FLORIDA BAR,
Appellee.

FILED

SIX MONTHS

FEB 15 1995

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

REPLY BRIEF OF APPELLANT
WILLIAM T. CHARNOCK

ON APPEAL FROM THE REPORT OF THE REFEREE
CASE NO: 81,857
TFB CASE NO. 93-30,100 (05B)

LAW OFFICES OF JAMES MARTIN BROWN
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III. SUMMARY OF REPLY

The Florida Bar argues that the finding of fact made by the referee should be upheld unless clearly erroneous or without support in the record. In addition, the Bar argues that the appellant has to show that there is no evidence in the record to support the referee's findings or that the record evidence clearly contradicts the conclusions, citing The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994) which in turn refers to The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992). The problem is that the opinion in Miele does not support the heavier burden put forth by the Bar.

As the Bar admits in their answer, the facts and circumstances of this case are unique. There was no guidance for the Appellant in the ethics opinions. The Appellant simply used an existing law to try to prevent injustice and protect his client's rights through zealous representation.

In addressing the Appellant's candor toward the tribunal it is important that one applies the proper burden of proof as addressed above. When applying the proper burden of proof it is clear that the Appellant did not try to shift the blame from himself when fully allowed to explain what happened.

IV. REPLY

The widely accepted burden when trying to overturn a referee's findings is that the findings would be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). The court's use of the word "or" implies that the finding may be clearly erroneous if it has support in the record. If the finding was without support in the record, there would be no need to show that the finding was clearly erroneous, and conversely if there was support in the record, it is the Appellant's burden to show that the finding was clearly erroneous through what little evidence is present and any contradictions.

However, the Bar states that the Appellant carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions citing The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994). On close examination of Rue this burden is cited as having been set out in The Florida Bar v. Miele, 605 So.2d 866 (Fla. 1992).

The Miele decision never sets out this burden of proof, nor does any case except Rue citing to Miele. Therefore, this higher burden on the Appellant cannot be used as the standard. The proper standard remains clearly erroneous taking into consideration all

evidence in the record. As in Rue the Bar points out evidence to support its version of the facts, ignoring contradictory evidence in the record as presented in Appellant's Initial Brief.

In representing one's clients it is one's duty to use all legal and ethical means at one's disposal to further the client's cause. If counsel falls short of this level of effort and competence, he is subject to discipline for lack of diligence and competence, yet the boundaries within which the attorney works are not always clear.

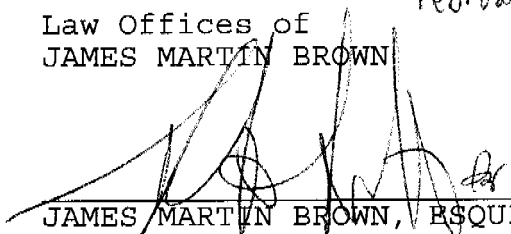
Attorneys cannot violate the law, attorneys cannot lie, and attorneys cannot violate the Rules Regulating the Florida Bar. There is a difficult balancing test that every zealous advocate must go through in his representation of a client. When the zealous advocate finds himself wondering whether some action is legal and ethical he seeks the opinions of this Court, the Rules Regulating the Bar, and the opinions of his brothers and sisters in the Bar.

As the Bar admits this is a unique situation. There is no dispute that the Appellant consulted other attorneys to see what legal remedies were available, and there were no ethics opinions to aid the Appellant. Now the Bar seeks to punish, and punish severely, for taking action that if found to be unethical was unethical because it was overzealous.

RESPECTFULLY SUBMITTED on behalf of the Respondent, William T. Charnock, III, Esquire, on this the 13 day of ~~January~~, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Carlos E. Torres, Esquire, Assistant Staff Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801-1084, by U.S. Mail delivery, on this 13 day of ~~January~~, 1995.



JAMES MARTIN BROWN, ESQUIRE

February