IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NOS.: 84,814
83,818

vs.

PHILLIP R. WASSERMAN,

Respondent.

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The following abbreviations and symbols are used in this brief:

Rep. of Ref.	=	Report of Referee
R.	=	Transcript of final hearing before Referee on April 20, 1995.

STATEMENT OF THE CASE AND OF THE FACTS

This disciplinary proceeding is before this Court upon Respondent's Petition For Review of the Report of Referee. Jurisdiction is conferred by Article V, Section 15, Florida Constitution. In his Petition For Review, Respondent contests both the Referee's recommended findings of guilt and his recommendations of discipline.

The proceedings before the Referee were the consolidation of three separate one count complaints filed by The Florida Bar against Respondent. Prior to final hearing the Referee entered an order partially granting a motion to dismiss and removed Rule 4-8.4(d) from Case Number 84,814. Final hearing on these complaints was conducted before the Referee on April 20, 1995 and May 1, 1995. Subsequent to the final hearing the Referee issued his Report of Referee dated June 26, 1995, and found Respondent guilty of violating Rule 3-4.3 and Rule 4-3.5(c) as to Case Number 83,818; found Respondent guilty of violating Rule 3-4.3 and Rule 4-8.4(a) as to Case Number 84,814; and found Respondent not guilty as to all violations alleged under Case Number 84,438.

The underlying facts adduced at final hearing before the Referee are substantially as follows. As to Case Number 83,818, Respondent appeared before The Honorable Bonnie S. Newton on August 23, 1993 for two custody hearings. [R. 109]. Respondent arrived several minutes late for the first custody hearing which the Judge commenced in his absence. [R. 50, 109, 111]. At the conclusion of this first hearing, the Judge granted custody of the minor children

to the grandparents of the children. [R. 62]. As the grandparents were neither parties to the action, nor was there any prayer for custody to be granted to them, Respondent objected to the Judge's ruling pointing out to the Court that the ruling was jurisdictionally improper. [R. 110, 112]. Nevertheless, the ruling stood.

The second hearing before the Judge was immediately commenced thereafter. After Respondent and opposing counsel made brief opening statements to the Judge, the Judge granted custody to the mother who was represented by opposing counsel. [R. 78, 115]. When Respondent objected to this unusual and unorthodox ruling, the Judge agreed to take testimony on the issue. [R. 78, 116]. The testimony adduced before the Judge was that the mother had a long standing drinking problem and had a history of driving her automobile in an impaired condition with the children aboard. [R. 117]. Nevertheless, at the conclusion of the hearing the Judge once again granted temporary custody to the mother. [R. 78, 118]. At this time, Respondent vehemently objected to the ruling of the Court pointing out that the children were in danger. Respondent's voice was loud and he criticized the ruling of the Court. [R. 53, 79, 120]. When advised by the Judge that his conduct may be contemptuous, Respondent responded that the children were being placed in danger and if arguing this point would cause him to be in contempt, then the Court would have to hold him in contempt. Respondent also advised the Court that he found the ruling contemptuous. [R. 79, 120, 121].

Thereafter, outside the courtroom Respondent advised opposing counsel that he was going to instruct his client to disregard the Court's order. [R. 80]. However, Respondent did not advise his client to disregard the order and in fact, the client obeyed the Court's order and relinquished custody of the children to the mother. [R. 153].

As to Case Number 84,814, the facts adduced at trial were substantially as follows. A subpoena was issued for Respondent to appear and produce his file in a domestic case on April 14, 1994 before The Honorable John C. Lenderman. [R. 254]. The subpoena was left at Respondent's office though not personally served. [R. 255]. In fact, Respondent did not discover the subpoena until after the hearing had been conducted. [R. 255].

When Respondent discovered the subpoena, he called Judge Lenderman's office to speak to the Judge. [R. 256]. Respondent was advised by the judicial assistant that the Judge had instructed her to prepare a show cause order for Respondent's failure to appear pursuant to the improperly served subpoena. [R. 257]. Thereupon, Respondent requested to speak to the Judge. [R. 257]. After conferring with the Judge, the judicial assistant advised Respondent that the Judge would not speak to him as it would be an ex parte communication. [R. 169, 257]. At that point, the judicial assistant indicated that Respondent stated "you little mother fucker; you and that judge, that mother fucking son of a bitch". [R. 170]. Respondent testified that he was speaking to the judicial assistant on his speaker phone and felt that the

statements allegedly made, if spoken, were made after he believed the call had been terminated. [R. 257, 266]. In fact, Respondent submitted to a polygraph examination by Allan Stein, the results of which were introduced into evidence with the Referee. Mr. Stein concluded that Respondent was truthful when answering "No" to the questions concerning derogatory statements about the judicial assistant and the judge.

As to Case Number 83,818, the Referee recommended a sixty day suspension and as to Case Number 84,814, the Referee recommended a six month suspension.

SUMMARY OF ARGUMENTS

The Referee's recommendation of discipline in Case Number 83,818 of a sixty day suspension is grossly excessive based on the underlying facts of the case and this Court's prior treatment of attorneys who have been disciplined for engaging in conduct which is disrespectful or derogatory to a tribunal or impugns the integrity of a judge. In fact, in cases involving cumulative misconduct and cases where judges were improperly accused of criminal activity, the most severe discipline imposed by this Court has been a public reprimand. Because Respondent's comments were made during an emotionally charged custody hearing, and done in the heat of battle, a finding of minor misconduct is the appropriate discipline.

Furthermore, the Referee's recommendation of guilt in Case Number 84,814 is not supported by the underlying facts of the case. Respondent's act of cursing at a judicial assistant is neither fraudulent or dishonest and therefore does not violate Rule 3-4.3 as found by the Referee. Furthermore, Rule 4-8.4(a) is not impacted as the Respondent is not charged with violating any other Rule of Professional Conduct in this case. Moreover, Respondent's comments are constitutionally protected speech. Accordingly, the finding of the Referee of guilty as to these two referenced rules is clearly erroneous and lacking in evidentiary support. Respondent should be found not guilty in Case Number 84,814.

THE REFEREE ERRED IN HIS RECOMMENDATION OF DISCIPLINE AS TO CASE NO. 83,818 IN THAT HE FAILED TO GIVE DUE CONSIDERATION TO THE MITIGATION SHOWN AND TO THE PRIOR SANCTIONS IMPOSED BY THIS COURT IN SIMILAR CASES OF ATTORNEY MISCONDUCT.

The Referee below recommended the imposition of a 60 day suspension upon his finding of guilt as to Case No. 83,818. In that case, the Referee found that after receiving a judge's ruling Respondent lost his temper, criticized the ruling, banged the table, and challenged the Court to hold him in contempt. [Rep. Ref. at 1]. However, in arriving at this recommendation the Referee failed to give proper consideration to the mitigation presented and the past decisions of this Court regarding sanctions in like disciplinary cases.

The context of Respondent's conduct in this instance was substantially as follows. Respondent had back-to-back domestic hearings (custody) scheduled before the same judge on August 23, 1993. [R. 109]. Due to Respondent being several minutes tardy, the judge commenced the first custody hearing prior to Respondent's arrival. [R. 50, 109]. At the conclusion of the first hearing, the judge awarded temporary custody to the parents of the litigants (grandparents), although they were not parties to the action, there was no prayer for such relief, and therefore, there appeared to be no jurisdiction for making such a ruling. [R. 82, 110, 112].

During the second hearing, the judge awarded custody to the mother prior to the taking of testimony. [R. 84, 114, 115]. After Respondent objected to the ruling in the absence of testimony, the Court allowed the presentation of testimony. [R. 84, 116]. The

testimony established that the mother had a long history of alcohol abuse, including a habit of drunk driving with the children in her car. [R. 117, 118]. The testimony further showed that at the time of the hearing the mother had been sober for only 90 days. [R. 117]. Nevertheless, the Court repeated her pre-testimony ruling and awarded temporary custody to the mother resulting in the Respondent's reaction which is the focus of this case. [R. 118].

Therefore, it was against this backdrop of unusual and potentially improper decisions by the Court that Respondent voiced his objections in an admittedly improper fashion.

In mitigation, Respondent explained to the Referee that he was concerned over the welfare of the children and their physical safety in the subject case. [R. 120]. Respondent was trying to communicate to the judge that the ruling was wrong because it placed the children in danger. [R. 137, 138, 156]. Moreover, Respondent's client was not advised to disregard the Court's order, and in fact, the order was obeyed. [R. 151 - 154]. Ironically, the Court later changed its temporary ruling and granted custody to Respondent's client. [R. 154].

Furthermore, at the hearing below Respondent acknowledged the wrongfulness of his conduct, [R. 121], and assured the Referee that he would handle things differently in the future if faced with a similar situation. [R. 132, 133]. Moreover, Respondent apologized to the judge at whom his improper behavior was directed. [R. 122].

Respondent respectfully offers these circumstances, not as justification or as an excuse for his behavior, but in explanation

and mitigation thereof. Respondent also suggests, with all due respect to the Referee below, that proper consideration was not given to the setting in which this conduct occurred. In fact, the Referee expressed disinterest in the underlying facts of the case which led to Respondent's conduct. [R. 44 - 46, 85].

Additional mitigation, as recognized by the Referee, is that "Respondent gives generously of his money and time to the Suncoast Child Protection Team, Inc., in support of needy children. Respondent has performed considerable pro bono legal services." [Rep. Ref. at 3]. Significantly, the fact that Respondent chooses to help children on a volunteer basis is consistent with his concern for the welfare of the children in the underlying litigation.

Given the totality of the circumstances coupled with this Court's handling of the following cases involving the disruption of a tribunal or criticism of the judiciary, the recommendation of a 60 day suspension is clearly excessive. The following cases establish that, at most, a public reprimand has been administered by this Court in like situations.

In The Florida Bar v. Pascoe, 526 So.2d 912 (Fla. 1988), the accused attorney received a public reprimand and probation for improper criticism of a federal court action coupled with possession of marijuana, placement of an advertisement found ethically improper, and failure to timely handle a criminal appeal.

In The Florida Bar In re Shimek, 284 So.2d 686 (1973), the offending attorney was found to have filed a pleading wherein he

alleged that a state court judge "avoided the performance of his sworn duty. To repeat a time worn phrase - you cannot get justice in a state court where the judge is a product of the prosecutorial system which aided dramatically in elevating him to the bench. A product of that system who works close with sheriffs and who must depend on political support and re-election to the bench is not going to do justice". Shimek's accusations were found to be false and he was ordered by this Court to apologize and admonished not to repeat the misconduct.

Also, a public reprimand was administered by this Court in The Florida Bar v. Flynn, 512 So.2d 180 (Fla. 1987). Flynn's misconduct involved the following scenario. When a client of Flynn was charged with a violation of probation, she advised the Court that Flynn had not informed her that she was on probation. The judge then recommended that the client file a grievance with The Florida Bar. In response to the Bar, Flynn accused the judge of improper conduct and stated his intention to file a judicial grievance and a civil rights action against the judge, unless the judge withdrew or retracted his findings.

Furthermore, in The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981), the accused attorney made public statements denigrating the courts and the administration of justice and was sanctioned with a public reprimand.

In The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988), the accused attorney engaged in unethical conduct toward the judiciary far more egregious than Respondent here. Clark wrongfully accused

one circuit judge of being involved in a conspiracy resulting in obstruction of justice. Clark further improperly accused the same judge and other judges of being corruptly influenced and engaging in a pattern of racketeering activity in violation of the RICO statute. Moreover, Clark also was found to have made repeated frivolous claims on appeal attempting to take a speeding conviction all the way to the United States Supreme Court. For these various transgressions, Clark was publicly reprimanded by this Court.

Finally, the Court dealt again with false accusations towards the judiciary in The Florida Bar v. Tindall, 550 So.2d 449 (Fla. 1989). In Tindall the subject attorney filed a complaint in the United States District Court, Middle District of Florida alleging racketeering activities on the part of some business partners against whom he had brought a declaratory action. In the federal suit, Tindall accused the circuit judge presiding over the declaratory action of unfair disposition of the case and of accepting bribes from the defendants. Remarkably, Tindall testified that he had no evidence establishing any improper activity on the part of the judge.

This Court publicly reprimanded Tindall for his actions saying "[H]ad the respondent merely verbalized his accusations in the heat of a bad day in court, perhaps a private reprimand would have been in order. However, the respondent went to the extreme of formalizing his admittedly unsubstantiated, serious charges against a member of the judiciary by including them in a complaint and later in an amended complaint filed in the United States District

Court." at 449. (emphasis added).

Based on the foregoing cases, it is clear that this Court has consistently ordered a public reprimand when sanctioning an errant lawyer for improper conduct towards a member of the judiciary. This has been true even when the conduct was coupled with other misconduct as in Clark and Pascoe above. Moreover, the conduct in Clark and Tindall did not simply involve the criticism of a judge, but involved the premeditated act of filing lawsuits falsely alleging criminal conduct by members of the judiciary. Moreover, as bad as they were, the Tindall court stated that the accusations of criminal conduct might have been deserving of a private reprimand if made in the "heat of a bad day in court".

Respondent's conduct pales in comparison to much of the conduct described above. Respondent spontaneously reacted to a ruling involving the custody and safety of children; obviously a subject of great interest to Respondent given his support to the Suncoast Child Protection Team, Inc. Furthermore, the ruling came on the heels of several other adverse rulings from the same judge, which were, at least, unorthodox.

Accordingly, the facts herein vividly describe "a bad day in court" as referenced by the Tindall court. As such, it would appear that a finding of minor misconduct is clearly the appropriate discipline to impose based upon the facts and circumstances of this case. Any greater discipline will have the effect of advising members of the Bar that it is better to call a judge a criminal than it is to vehemently object to a ruling.

Respondent respectfully suggests that such a finding would be illogical.

This Court has consistently held that its scope of review is broader when reviewing recommendations than its review power of findings of fact. The Florida Bar v. Inglis, 471 So.2d 38 (Fla. 1985). The Court should exercise this power and impose a finding of minor misconduct.

THE REFEREE ERRED IN FINDING THAT RESPONDENT'S COMMENTS TO A JUDICIAL ASSISTANT WERE VIOLATIVE OF RULE 3-4.3 OF THE RULES OF DISCIPLINE AND/OR RULE 4-8.4(a) OF THE RULES OF PROFESSIONAL CONDUCT.

The Referee below found that Respondent made abusive comments to the judicial assistant of a circuit judge during a telephone conversation directed at both the judicial assistant and the judge. The Referee further found that those telephonic statements constituted a violation of Rule 3-4.3 of the Rules of Discipline of the Rules Regulating The Florida Bar and Rule 4-8.4(a) of the Rules of Professional Conduct. These findings are clearly erroneous for several reasons.

First, the statements of Respondent found by the Referee do not offend the clear language of Rule 3-4.3. Rule 3-4.3 entitled "Misconduct and Minor Misconduct" reads as follows:

> The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. <u>The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline</u>. (emphasis added).

The Referee's finding that Respondent cursed at a judicial assistant cannot be said to be "unlawful or contrary to honesty and justice . . .". Nor, does Respondent's speech constitute a felony or misdemeanor as the rule purports to prohibit. Respondent concedes that the Referee's findings evince speech that arguably is

intemperate, offensive and certainly ill advised. However, Respondent respectfully suggests that those characteristics alone fall far short of unlawfulness, dishonesty or injustice and therefore the speech does not violate Rule 3-4.3.

Moreover, assuming arguendo that Respondent's statements offend the spirit or letter of Rule 3-4.3, there is absolutely no authority for the imposition of discipline by this Court. The preceding rule makes this fact abundantly clear. Rule 3-4.2 entitled "Rules of Professional Conduct" states that:

> Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.

Obviously, the Rules of Professional Conduct do not include Rule 3-4.3 but are found under Chapter 4 of the Rules Regulating The Florida Bar. Chapter 3, under which Rule 3-4.3 falls, is entitled Rules of Discipline and outlines the disciplinary system and procedures, not the guidelines for proper professional conduct. Therefore, Respondent cannot be disciplined for a perceived "violation" of Rule 3-4.3.

Logically, Respondent could not be found to have violated Rule 4-8.4(a) for a related reason. Rule 4-8.4(a) states that "A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another". Because Rule 3-4.3 is not a rule of professional conduct, Respondent is not even charged with violating a rule of professional conduct in this case. Respondent was previously charged with a violation of Rule 4-8.4(d), however, that

rule was dismissed prior to hearing by the Referee. Accordingly, Respondent cannot be guilty of violating Rule 4-8.4(d) in the absence of a finding that he violated another rule of professional conduct. The Referee's finding with respect to a violation of Rule 4-8.4(d) must be rejected.

Furthermore, this Court recently recognized its lack of authority to discipline an attorney for an alleged violation of Rules 3-4.3 and 4-8.4(a) in the absence of a finding of fraudulent or dishonest conduct. The Florida Bar v. Taylor, 648 So.2d 709 (Fla. 1995). In Taylor, The Florida Bar urged the discipline of an attorney under the rules involved herein, Rule 3-4.3, and Rule 4-8.4(a), based upon Taylor's willful failure to pay child support. In recommending no disciplinary action, this Court stated that while it did not condone the conduct, the disciplinary rules did not grant it the authority to discipline an attorney for the conduct involved absent a finding of fraudulent or dishonest conduct.

In the case below, this Court may not condone Respondent's statements. However, as in Taylor, the Respondent's statements did not involve fraudulent or dishonest conduct and therefore is not violative of Rules 3-4.3 and Rule 4-8.4(a).

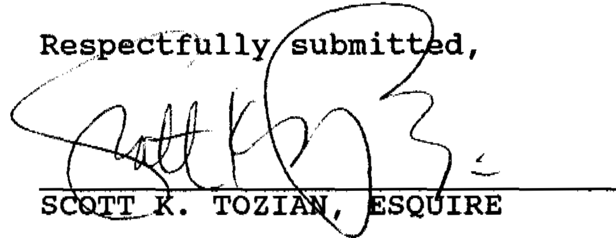
Finally, Respondent's comments represent speech constitutionally protected by the First Amendment of the United States Constitution, and Article I, Section 4 of the Constitution of the State of Florida. As Justice Barkett recognized in her dissenting opinion in The Florida Bar v. Pascoe, 526 So.2d 912

(Fla. 1988), "[p]unishment is for conduct, not for exercising a first amendment right to express an opinion which may differ from the Bar's or anyone else's views, including ours".

CONCLUSION

This Court should reject the Referee's recommendation of a sixty day suspension in Case Number 83,818 and enter a finding of minor misconduct based upon the prior decisions of this Court in similar cases. Moreover, the Court should reject the recommendations of guilt in Case Number 84,814 and find the Respondent not guilty.

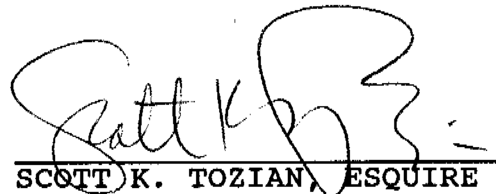
Respectfully submitted,



SCOTT K. TOZIAN, ESQUIRE

C E R T I F I C A T E   O F   S E R V I C E

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 9th day of October, 1995, to: Stephen C. Whalen, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607.



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