IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

In re.

DAVID S. NUNES.

Case No. 84,097

_____/

PETITIONER'S REPLY BRIEF

on

PETITION TO REVIEW
FINDINGS OF THE REFEREE

Fla. Bar No. 94-50,185 (17C)

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STATEMENT OF THE CASE & FACTS

Petitioner is mindful of the constraints of Fla.R.App.P. 9.210(c) and (d), but the Answer Brief of the Florida Bar is misleading, omissive and inaccurate in a number of key respects. (No record or index was furnished and/or received by petitioner. Record citations herein track record-cites as used by the bar.)

The bar's statement of the case said petitioner's motion for a change of venue was denied: However, venue was initially Palm Beach County and changed to Broward County. The bar denies "conceding" the rehearing ground of error in taxing costs for both Counts, where only one was sustained. However, at p. 17 of its brief, the bar writes; "The bar also stated [in reply to rehearing] that if the referee determined to prorate costs, the bar had no objection to leaving such proration to the discretion of the referee.", which sounds of concession.

The bar omits that Amanda Illes was intentionally left out of Mr. Garcia's foreclosure suit, though an indispensable party as an estate beneficiary, and that her interest was not foreclosed. The petitioner's "appearance" before the trial judge was to have her *outstanding* rights excluded from execution. Although the bar is technically correct in stating that petitioner was not successful, the court's ruling was not on the merits, but on an erroneous finding that he lacked jurisdiction, which then founded the mandamus petition. As to that petition, the bar omits that the main remedy was prohibition; on which the DCA issued a show cause order. The bar thus skirts the crux of the entire matter - Mr. Garcia's June 16, 1993 letter expressly said the DCA's [stay] order would not be honored.

The bar's note 2, p. 4, states that "In fact, Mr. Nunes was not successful in front of the Fourth District Court of Appeal in the proceedings in question herein.

(T1 99; See also, Exhibit 14 admitted in evidence.)". While again technically correct, the statement is nevertheless misleading: The 4th DCA dismissed the petition as moot - because Mr. Garcia assured it that execution had been *completed* on June 11, 1993, before the show cause order issued on June 14, 1993. Mr. Garcia's June 16 letter (Exh. 4, per the bar) acknowledges [at the very least] that personal property remained at the premises. Also see T2 132, 133.

The bar states at p.5 that "Mr. Garcia did not, however, provide a telephone number or fax number or address for Gina Sherman..": Mr. Garcia's June 16 letter plainly indicates the (same) "800" number for Mr. Nerdin and Ms. Sherman. The bar cites Mr. Garcia's *opinions* that petitioner knew Ms. Sherman worked for First Nationwide Bank: But see T1 65 & 127, where, after Mr. Garcia was unable to produce one paper showing Ms. Sherman's name prior to the June 16 letter (which he could not produce to the bar committee either), he was *specifically* asked about petitioner's [prior] knowledge of Gina Sherman at T1 128:

> Q. I will withdraw that and ask do you have any independent recollection of any kind of notice you gave me to make me know or acknowledge that Gina Sherman was your client?
>
> A. I don't think so; not that I recall.

At p. 13, the bar selects isolated words to prop the notion that petitioner gave "inconsistant" explanations for contacting Ms. Sherman. In fact, petitioner simply did not remember: T2 25 *et seq.* (all following emphasis added);

> By the bar:
>
> Q. -- is that piece of correspondence that we have made Exhibit One the correspondence you were referring to that he [Mr. Garcia] told you that your clients needed to contact Little and Company?
>
> Mr. Nunes:
>
> A. No, he [Mr. Garcia] told me that by phone.
>
> Q. And he also sent you a letter?
>
> A. And he sent this letter but he told me to contact Little and Company --
>
> Q. All right.
>
> A. -- because it was out of his hands.

Q. Did he tell you to contact Gina Sherman?

A. When I called Little and Company, Little and Company said I must contact this woman. I don't know who the woman was. And they gave me the fax number, that's all they gave me, and told me to fax the letter that I had faxed to Little and Company.

Q. Okay.

A. So I was --

Q. Are you saying that you followed up on the telephone number that he gave you here and that you called Mr. Nerdin and then he --

A. Yeah, I called Little and Company.

Q. And do you recall who you spoke to?

A. I *think* it's Nerdin.

[lines 5-10 omitted]

A. But he gave me a number and told me that I must fax a letter to this woman and I didn't know who this woman was.

Q. Who's "he?" Are you sure it's Mr. Nerdin or was it someone else over there at --

A. I *think* it was Mr. Nerdin.

Q. All right?

A. Or it was a woman. *I don't really recall* which one of them really, to tell you the truth.

Q. You believe it was someone at Little and Company?

A. It was Little and Company that I called.

Q. You don't remember if it was Mr. Nerdin?

A. I don't remember if it was a male or female that I spoke with.

The bar says the testimony of Ralph Little (owner of Little & Co.) belies petitioner's claim that he got Ms. Sherman's fax number there, arguing; "Gina Sherman's name and fax number was not information they would have at Little & Company. (T2 121)": But at p.13, the bar quotes Mr. Garcia answering petitioner's question of how he knew Gina Sherman worked for the bank:

"...you obtained that information from Mr. Nerdin who **would have told you** or given you the information to call somebody at First Nationwide..."

(emphasis added)

ARGUMENT

I. - THE BAR'S ARGUMENT REGARDING THE "SUBJECT MATTER OF REPRESENTATION" STRETCHES THE LAW, AND IGNORES THE LEGAL REASON FOR THE SUBJECT COMMUNICATION

Petitioner argued that the subject letter related to the prohibition/mandamus petition directed to the trial judge, where the "subject of representation" was legally limited to the trial judge exceeding jurisdiction in the former instance, and refusal to exercise jurisdiction in the later. True, the judge's questioned acts arose in Mr. Garcia's foreclosure - but the purely jurisdictional question in prohibition is not the same "subject of representation" as in the foreclosure suit. This is further underscored by these writs being directed to the lower court - not a party - and are, in the main, *ex parte*, Fla.R.App.P. 9.100. The writ's limited scope has existed since its inception to resolve ancient English church/state conflicts, see e.g. *English v. McCrary,* 348 So.2d 293 (Fla. 1977), and has always been regarded as an original proceeding, not an appeal or certiorari substitute, e.g., *State ex rel. Rheinauer v. Malone,* 23 So. 575 (Fla. 1898), and thus cannot be a "continuation" of the underlying case; i.e., the "subject of representation" is necessarily different.

Mr. Garcia did not claim he was retained or authorized by First Nationwide Bank to file anything in its behalf in the prohibition/mandamus case, and testifies at T2 130 that his firm is only hired by the bank for one particular purpose:

> By Mr. Nunes:
>
> Q. Okay. You are the bank's representative here in Florida; is that correct again, and are you an attorney?
>
> Mr. Garcia:
>
> A. I am not the bank's representative in Florida. I am not the bank's representative in Florida. **We are hired by First Nationwide Bank to prosecute foreclosures** in Florida and in particular in Broward County. (emphasis added)

The bar's argument overlooks the very core of the issue: The DCA issued a show cause order which stayed all proceedings, Fla.R.App. 9.100(f). It is a legal "no brainer" that if a stay is entered - you stop in your tracks! *Arguendo,* even if Amanda Illes *had* been ousted of possession on June 11th - which she was not - it was undisputed that all of her possessions - including her pets - remained in the premises: *Nothing* was removed and only one lock was symbolically changed. The June 14th DCA order (should have) prohibited removal of possessions. **Yet, Mr. Garcia's June 16 letter specifically said the stay would be disobeyed.**

Here, there was a stay, and expressed intent to disobey it. Rule 4-4.2 of the Rules Regulating the Florida Bar contains an exception to the prohibition:

> Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice.... directly to an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

Notice to the bank was necessitated by Mr. Garcia's own conduct, and the exception founded petitioner's statement in his June 25 letter that he was duty bound to advise the bank that the DCA's stay would be violated if Mr. Garcia's advice was taken. The letter could have been more terse, but the communication [had it been knowingly made] was in good faith deemed appropriate.

In any event, the *intent* to copy the bank as expressed in the letter, is *not* the equivalent of actually copying the bank (again, the letter did not indicate a "cc" to the bank); much less "evidence" of knowing that Gina Sherman worked for the bank: That's apples and oranges.

However, even *had* petitioner copied the bank, the letter's plain purpose was to prevent the execution, and would certainly have gone to someone in a position of sufficient authority to effect it - not simply Mr. Garcia's "client representative",

whatever that is, even if petitioner *had* known that "fact" at the time. In this context, it is important to note that days later, on June 30, 1993, petitioner instead served Amanda Illes' quiet title, etc., suit on the bank's president, which achieved the desired effect of blocking the execution; at least on the day Mr. Garcia said. Moreover, when the execution *was* perpetrated on July 9, 1993, in violation of the stay, Little & Co. did not participate.

II. - THE BAR DOES NOT DEFEAT THE "MANAGERIAL RESPONSIBILITY" ELEMENT OF A VIOLATION OF RULE 4-4.2

The bar concedes that the comment to Rule 4-4.2 explains that in the case of an organization, as here, there is no violation unless the person communicated with has managerial [or other specified] responsibilities. It is undisputed that there was simply no evidence at all of what Gina Sherman's position/responsibility with the bank was. The bar can only offer Mr. Garcia's claims that she was [one of] his "client contact[s]" or "client representative[s]" with the bank[1].

But exactly what is a "client contact" or "client representative"? Petitioner is unable to find a single legal definition, much less a definition which includes the responsibility elements required by the rule. Nor does the bar provide one.

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[1] It is interesting that Mr. Garcia never specifically claimed, nor was there any other evidence, that Ms. Gina Sherman was actually an employee of First Nationwide Bank. Nor is an employment relationship necessarily inherent in whatever the definition of a "client contact" or "client representative" might be.

Mr. Garcia's testimony - *stated disjunctively*; "..you got [Ms. Sherman's fax number] from Mr. Nerdin who would have told you **or** given you the information to call somebody at First Nationwide..", raises further question about whether Gina Sherman was, in fact, employed by First Nationwide Bank.

III. - BALD SUSPICION IS NOT "OVERWHELMING EVIDENCE" THAT PETITIONER KNEW THAT GINA SHERMAN WORKED FOR A REPRESENTED PARTY

It is undisputed that at the time of the subject communication, petitioner knew that Mr. Garcia had represented First Nationwide Bank in a foreclosure suit against realty, in which petitioner's minor client had an outstanding interest. It is undisputed that on June 25, 1993, petitioner *intended* to copy First Nationwide Bank with the subject letter to give notice of the stay order, and caution of a contempt if Mr. Garcia were allowed to violate the stay - **which he said would be done**. It is undisputed that on June 25, 1993, petitioner faxed copies of the subject letter to Mr. Ray Nerdin and to Ms. Gina Sherman.

But there was no evidence that Gina Sherman's name ever appeared prior to Mr. Garcia's June 16, 1993 letter, and when Mr. Garcia was asked if he'd ever mentioned her name before, he replied "I don't think so; not that I recall." How, then, *could* petitioner have known she worked for Mr. Garcia's client?

The only such "evidence" was Mr. Garcia's bare *speculation*. At p.6, the bar poses as evidence Mr. Garcia saying there was "No question in [his] mind" that petitioner knew, because of Mr. Garcia's theories cited at p.12: Because Mr. Garcia did not provide Ms. Sherman's fax number; which is both immaterial, as well as mooted, by his third "theory", that Ray Nerdin, ".. would have given it to you..". His other theory, that petitioner knew it through Amanda's father, flies against Mr. Garcia's inability to produce one single piece of paper showing Gina Sherman's name, despite years of litigation; and two opportunities in two forums, to produce such a paper: Nor did Mr. Garcia even claim to have ever mentioned Gina Sherman to Mr. Illes.

Any perceived inconsistency involved where petitioner got Ms. Sherman's "fax" number, which he at all times said he got from Little & Co. The bar says "not so", because Mr. Little, Little & Co.'s owner, basically said he'd never heard of her. However, Mr. Garcia's own testimony was that "..you [petitioner] got that information from Mr. Nerdin who would have told you or given you the information to call somebody at First Nationwide..".

But where or how petitioner got Ms. Sherman's fax number is neither relevant to nor probative of the *relevant* issue; whether petitioner knew he was communicating with First Nationwide Bank by faxing Gina Sherman. There was no discrepancy on *that* point. Nor any evidence.

The utter absence of substance to this charge is best framed by the charge the referree did *not* sustain: Mr. Garcia complained, and the bar sustained, that because the postmark date of a copy of a motion, *attached to a* **later** *letter to the court*, did not match the service date certified on the motion, it formed a "pattern" of deceptive conduct.

The referee was simply caught-up in the bar's "where there's smoke, there's fire" frenzy, and mistook overzealous pettyfoggery for evidence.

IV. - THE BAR'S ARGUMENT REGARDING REHEARING AND COSTS IS ERRONEOUS

The bar baldly claims petitioner was not entitled to hearing on his rehearing motion, as well as that simply because the referee has discretion to award costs, an erroneous award is not reversible.

In support of its (re)hearing point, the bar cites *The Florida Bar v. Winn,*

593 So.2d 1047, 1047 (Fla. 1992), where this Court taught there is no fundamental right to *oral argument* in disciplinary proceedings, *in this Court*. The issue here, however, is whether a *referee* may summarily deny hearing on a legally sufficient motion for rehearing, and even before a response is filed. Parenthetically, there is no "right" to oral argument before *any* appellate tribunal.

Contrary to the bar's assertion (at p.17) that the motion was a "rehash", the motion raised important issues of both fact and law which the referee overlooked and/or misapplied. The bar's argument that "..under the Rules of Discipline, a respondent has no automatic entitlement to further hearing." has it backwards. Full and fair hearing is an *axiomatic* due process element; and rehearing is specifically provided for in each set of procedural rules in Florida jurisprudence. If courts in each and every case fully and accurately considered and interpreted all relevant facts and law, there would be no need either for rehearing, or courts of appeal.

Petitioner would respectfully submit that, instead of how the bar would have it, the Rules of Discipline would have to specifically permit summary disposition of motions; rather than permit what is already axiomatic. Why are local rules necessary for trial courts to summarily decide rehearings? Moreover, the referee in this case acted before the bar even filed its response, evidencing prejudgment: And when the bar's response was filed, it did not claim the motion was frivolous; it squarely addressed its merits.

The bar finds significance in the referee supplementing her cost-award with the court reporter's charges for the final hearing - which is not appealed. What *is* appealed is that the bar's costs on the Count the referee correctly rejected were taxed. On that point, the bar's rehearing response was merely that it felt the award in its favor was correct, but if not, OK..... Yet, the bar denies concession.

CONCLUSION

Petitioner accordingly respectfully requests that this Court reverse the referree's finding that he knowingly communicating with Mr. Garcia's client about the subject of representation, on the ground of no competent evidence in support, and other relief previously stated.

CERTIFICATE OF SERVICE: I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of the Petitioner has been furnished to Rona Friedman Young, Bar Counsel, 5900 N. Andrews Ave., Ste. 835, Ft. Lauderdale, FL 33309; Mr. John T. Berry, Staff Counsel, The Fla. Bar, 650 Apalachee Pkwy., Tallahassee, FL 32399-2300; and Mr. John F. Harkness, Jr., Exec. Dir., The Fla. Bar, 650 Apalachee Pkwy., Tallahassee, FL 32399-2300, by placing the same into the United States Mail this 17 day of May, 1995.

Respectfully submitted by
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