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FILED
SID J. WHITE
AUG 4 1995
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MILTON KELNER,

Respondent.
_____/

Case No. 84,435

RESPONDENT'S BRIEF ON PETITION FOR REVIEW

FACTS

Dr. John Tatum has admitted, by Answers to Interrogatories, Answers to Request for Admissions, Depositions, Defendant's Pre Trial Compliance and at Trial that as the former wife's treating psychiatrist, he was negligent in the handling of the psychiatric transference - countertransference phenomenon resulting in sex with Plaintiff's then wife and that this was a deviation from the standard of care.

The mishandling of the transference - countertransference phenomenon started in 1984 although the wife was Defendant's patient since 1982. The sex acts occurred in November or December 1989 through January 15, 1990. The wife moved out of the marital home in January 1990, leaving Plaintiff to care for the wife's 3 children, and thereafter told Plaintiff of the sex with Defendant and that she wanted a divorce because she and Defendant loved each other. In April, 1990, the wife moved back into the marital home and Plaintiff moved out.

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In December 1990, Plaintiff filed for divorce which was granted in April, 1991.

Dr. John Tatum violated the following statutes:

Florida Statutes 491.011; 766.102; 458.331; 794.011(5) and (6); 491.009(1) (k); 458.329

See *Lieberman v. Dept. of Pro. Regulation,* 573 So.2d 349 (Fla 5DCA 1990), (Patient is presumed incapable of consenting to sexual activity with patient's physician, Florida Statute, Section 458.331(k) and *Solloway v. Department of Professional Regulation,* 421 So.2d 573 (Fla 3rd DCA 1982).

STANDARDS FOR LAWYER SANCTIONS

Respondent's conduct at trial, did no injury or harm to the client, the public or the judicial system.

There was no proof of any intent or knowledge or conscious objective to violate a court order.

AWARENESS

Respondent was not negligent in his conduct at trial.

The only injury, if it may be so classified, is the resulting mistrial. Every mistrial does not warrant a lawyer's sanctions and Respondent did not intentionally cause a mistrial. Respondent was not held in contempt of court for violating the trial court's orders.

The Board of Governors of The Florida Bar adopted an amended version of the ABA Standards for Imposing Lawyer Sanctions

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and thereby provided a format for Bar Counsel, referees and the Supreme Court of Florida to consider each of these questions before recommending or imposing appropriate discipline:

(1) duties violated;

(2) the lawyer's mental state;

(3) the potential or actual injury caused by the lawyer's misconduct;

(4) the existence of aggravating or mitigating circumstances. (underscoring added)

FACTORS TO BE CONSIDERED
IN IMPOSING SANCTIONS

"Standard 3.0 Generally

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors."

Respondent violated no duty, had normal mental health, caused no potential or actual injury. Mitigating factors will be argued hereafter.

....

"Standard 5.0 Violations of Duties Owed to the Public

5.13 Public Reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty,

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fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonishment is appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law."

Respondent has not knowingly engaged in dishonesty, fraud, deceit, or misrepresentation or committed any act which reflects upon his fitness to practice law.

...

"Standard 6.2 Abuse of the Legal Process

6.23 Public Reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.24 Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding."

Respondent has not negligently failed to comply with a court order which caused injury to the client or caused interference with a legal proceeding.

"Standard 9.0 Aggravation and Mitigation.

9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

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9.32 Factors Which May Be Considered in Mitigation.

Mitigating factors include:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(c) personal or emotional problems;

(d) timely good faith effort to make restitution or to rectify consequences of misconduct;

(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

(f) inexperience in the practice of law;

(g) character or reputation;

(h) physical or mental disability or impairment;

(i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;

(j) interim rehabilitation;

(k) imposition of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses;

(n) prompt compliance with a fee arbitration award." (underscoring added).

In Mitigation there is (a) an absence of prior disciplinary record; (b) an absence of dishonesty or selfish motive; (c) the character and reputation of the Respondent is exemplary. He received the Florida Bar Pro Bono Service Award in 1984 and is still appointed continuously as Guardian ad Litem, Pro Bono, for children.

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Respondent became a Board Certified Civil Trial Lawyer in 1983.; (d) He has made a good faith effort to rectify any consequences of misconduct, by advising counsel for the Defendant (Tatum), that prior to retrial, he will submit every question dealing with loss of consortium for the Trial Court's ruling, so that There will be no second mistrial. A public reprimand will depreciate Respondent's acting as Guardian Ad Litem, pro bono, for children.

Case Law

1. Burden of Proof In Disciplinary Proceedings

In The Florida Bar vs. Rayman, 238 So.2d 594, (Fla.1970) the Florida Supreme Court held that the Florida Bar in a disciplinary proceeding, the burden on the Florida Bar for the quantum of proof was something more than a mere simple preponderance of the evidence.

In The Florida Bar vs. Niles, 644 So.2d 504, (Fla. 1994) the Supreme Court held that The Bar "has the burden of proving the accusations by clear and convincing evidence at Pg 506." The Florida Bar has not carried its burden of proof by clear and convincing evidence.

2. Private or Public Reprimand or Admonishment or No Sanction

Respondent's violation, if any, of the Trial Court's order resulted from a misunderstanding and an attempt by Respondent to prove his client's loss of consortium damage. This was an isolated instance and no benefit can be served by a public

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reprimand. Respondent had a duty to present his client's full claim for damages.

In The Florida Bar vs. Doe, 550 So.2d 1111, (Fla. 1989) the Supreme Court held: "We accept the referee's premise that Doe did not intend to violate any rules. We look upon this not to negate but to mitigate, the effect of his onerous contract. Because of this we reduce the punishment from public reprimand to private", "at pg. 1113."

In The Florida Bar vs. Price, 569 So.2d 1261, (Fla. 1990) the Supreme Court, quoting from The Florida Bar vs. Kirkpatrick, 567 So.2d 1377, (Fla. 1990) stated:

"[P]rivate reprimand is the appropriate disciplinary sanction when the misconduct can be categorized as a minor misconduct. In other words, a private reprimand is the appropriate sanction only for the most insignificant of offenses. Kirkpatrick, 567 So.2d at 1379 (citations omitted), at pg 1263".

In The Florida Bar vs. Catalano, Vol 19, No 43, FLW., S 539, (Fla. 1994) the Supreme Court held:

"(PER CURIAM.) Michael A. Catalano, a member of The Florida Bar, petitions for review of a referee's report recommending that he be publicly reprimanded. We have jurisdiction pursuant to article V, section 15 of The Florida Constitution.

We disapprove the referee's report because we do not find competent and substantial evidence to support the finding that Catalano *knowingly* committed certain acts and thus violated Rules

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Regulating the Florida Bar 4-3.3(a)(1) and 4-4.1(a). We therefore find Catalano not guilty of the charged misconduct.

Given our disapproval of the referee's report, we decline to impose the Bar's costs on Catalano."

As in *Catalano,* there has been no competent and substantial evidence to support a finding that Respondent knowingly committed wrongful acts in violation of the Court's orders. Further, the Referee has made no such finding. Respondent advised the Court that he would not intentionally violate the Court's order (Transcript, October 15, 1993, pg. 10).

LOSS OF CONSORTIUM CLAIM

Florida Standard Jury Instruction 6.2e provides that the spouses loss of consortium and services include:

> *"Any loss by reason of [his wife's] [her husband's] injury, of [his] [her] services, comfort, society and attentions in the past [and in the future]."* (underscoring added)

There is no Florida case or authority to warrant the termination of a spouse's loss of consortium by a divorce. In *Taylor v. Orlando Clinic,* 55 So.2d 876, 878 (Fla 5th DCA 1989) the Court held:

> "The wife's cause of action for loss of consortium, while derived from the personal injury to the husband, survives the death of her husband-patient, whose own personal injury action did not survive his death. *Busby v. Winn & Lovett Miami, Inc.* 80 So.2d 675 (Fla. 1955); *Orange County v. Piper,* 523 So. 2d 196 (Fla. 5th DCA 1988), rev. denied 531 So.2d 1354 (Fla 1988). See also, *Ryter v. Brennan,* 291 So.2d 55 (Fla

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1st DCA 1974), cert. denied, 297 So.2d 836 (Fla. 1974); *Resmondo v. International Builders of Florida, Inc.*, 265 So.2d 72 (Fla. 1st DCA 1972). It was error to dismiss the wife's cause of action for loss of consortium."

Similarly, *Lithgow v. Hamilton,* 69 So.2d 776,778, (Fla 1954) held that the consortium claim of the husband for the wrongful death of his wife included the value of his wife's future services including cost of caring for the children in the future and the costs of her future replacement as a housekeeper, etc., and the husband's right to his wife's society, services, companionship and sex and the psychological damage to their child. Their joint life expectancy was used to measure such future damages.

In *Platt v. Schwindt,* 493 So.2d 520, 522, 523, (Fla 2nd DCA 1986) the Court held:

> "At trial, Mr. Platt requested an instruction for future loss of consortium. Florida Standard Jury Instruction 6.2(e) provides that damages are to be awarded to the husband for "[a]ny loss by reason of his wife's injury, of her services, comfort, society and attentions in the past *and in the future.*" (emphasis supplied). Mr. Platt offered substantial proof of loss of consortium and it is not unreasonable to conclude the loss will continue into the future. According to *Gates v. Foley*, 247 So.2d 40 (Fla. 1971), consortium is:
>
> [T]he companionship and fellowship of husband and wife and the right of each to the company, cooperation and aid of the other in every conjugal relation. Consortium means much more than mere sexual relation and consists, also, of that affection, solace, comfort, companionship, conjugal life, fellowship, society and assistance so necessary to a successful marriage."

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TRIAL COURT ACTIVITIES

A reading of the trial court transcript reveals the proverbial line was drawn in the sand by the trial court concerning what would be admissible evidence to prove the Plaintiff's damages and what would not. There was considerable discussion concerning interpretation of that ruling with statements by the respondent herein, in advance, that there would be every attempt to comply with the trial court's rulings while still representing his client to the best of his ability.

While the referee's conclusions are not unsupportable, another reasonable conclusion is also supported - that this was an interpretation problem of a fine point of law in the unusual circumstances presented by this case. It is rare that a Plaintiff husband would sue a defendant doctor for sexual misconduct with his wife where the wife was not a party and had been represented by separate counsel and had already settled her part of the claim.

MITIGATING FACTORS

If the above noted facts are insufficient to persuade this Court to overturn the referee's findings, the facts combined with the respondent's past service to the Bar should be more than sufficient to alter the penalty recommended by the referee or the method of administration.

The respondent is 78 years of age. He has been a member of the Florida bar since 1948 with more than a spotless record. The

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respondent received the 11th Judicial Circuit Pro Bono award in 1989 for service to the probate division in the representation of children in the Dade County - a service which continues through today.

At this age and stage in life, with such a record of service to the public, a public reprimand appears to be extremely inappropriate. The conduct noted in the referee's report, even if totally supported is not the type of conduct for which a public reprimand is appropriate. Alternatives exist including diversion into the public enhancement program for whatever benefit it may be to the respondent.

If the court finds all of the above to be inappropriate, the respondent moves this court to excuse his obligation to appearance before the board for receipt of his reprimand and asks that this court find another suitable means to administer the sanction which it deems fit and proper.

CONCLUSION

1. The case does not warrant a public reprimand.

2. If any sanction is to be imposed, it should be a private admonishment.

3. No sanction should be imposed.

4. The court should use its discretion to avoid the harsh penalty recommended by the referee in this case in favor of alternative actions (private reprimands or diversion to the professional enhancement program) based on the circumstances of this case and the circumstances of the respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was sent by U.S. Mail on this 2nd day of August, 1995 to: Jan Wichrowski, Bar Counsel, The Florida Bar, 800 North Orange Avenue, Suite 200, Orlando, Florida 32801 and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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BY: _____
John D. Kelner, Esquire

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