IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GREGORY GLEN SCHULTZ

Respondent.
_____/

CASE NO. 87,298

TFB NO. 95-11,133(6E)

CROSS REPLY BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Gregory Glen Schultz, will be referred to as "Respondent."

"TR-1" will refer to the Transcript of the final hearing in the disciplinary case styled THE FLORIDA BAR v. GREGORY GLEN SCHULTZ, Case No. 87,298, dated July 19, 1996.

"TR-4" will refer to the Transcript of the supplemental evidentiary hearing in Case No. 87,298, dated August 26, 1996.

STATEMENT OF THE CASE AND OF THE FACTS

This case has progressed through the review process with some procedural uncertainty as to the proper characterization of the various briefs. The Florida Bar considers this to be its Cross-Reply Brief. As such, no further briefs will be filed by the Bar unless requested by the Court.

SUMMARY OF THE ARGUMENT

Respondent objects to the Bar's reconstruction of his daily checking account balance, as contained in the Bar's Initial Brief. Respondent argues that the Court should not permit the Bar to comment on the evidence via the reconstruction, because the reconstruction itself is not part of the record. Such argument is specious and without merit. The Bar's reconstruction derives solely from Respondent's own documents. It constitutes argument in this case, which is why it appears in the brief. The evidence from which the Bar reconstructed Respondent's daily checking account balance was properly appended to its brief. If the Court wishes to confirm the Bar's argument as to that evidence, it may readily do so. The Bar's Initial Brief contains no improper argument or improper submission of record evidence.

The evidence which caused the referee to reverse his finding that Respondent had fabricated evidence is neither substantial nor competent. The only evidence upon which the referee reversed himself is a document created by Respondent, supposedly from records obtained his bank, which he alone perused. Respondent reconfigured his records, and offered that reconstruction to show that he had, over the previous years, written out-of-sequence checks on occasion. In this respect Respondent's reconfiguration

of evidence is similar to the Bar's argument. However, unlike the Bar's reconstruction, the documents from which Respondent supposedly tabulated his evidence are not part of the record; his reconstruction must be taken on faith alone. The referee should not have deemed such an exhibit to be competent or substantial.

Throughout this appeal, Respondent refers to Sydney Mawby and Bxidgett Kenny as "disinterested" witnesses. Respondent hired and paid Mr. Mawby as a consultant in a substantial commercial venture, and Mr. Mawby voluntarily appeared at the final hearing at Respondent's request, without a subpoena. Clearly, Mr. Mawby is not disinterested. The testimony of his other voluntary witness, Bridgett Kenny, has been discredited. This Court cannot reasonably rely on either witness.

Finally, Respondent's argument on review is illogical. First he contends that the referee clearly erred in finding him guilty of any wrongful intent ox wrongful conduct; in other words, the referee was completely off base regarding the merits. In his next breath, Respondent seeks to uphold the referee's reversal of his finding on the fabrication of evidence issue. The Bar contends the referee was originally correct in all respects, including his finding that Respondent knowingly submitted manufactured evidence to the Court.

ARGUMENT

I. THE BAR'S INITIAL BRIEF CONTAINS NO IMPROPER ARGUMENT OR IMPROPER SUBMISSIONS OF NON-RECORD EVIDENCE.

Respondent objects to the Bar's reconstruction of his daily checking account balance; see The Bar's Initial Brief at 30-31. Respondent argues that the Bar should not be permitted to comment on the record evidence via that reconstruction, **because** the reconstruction itself is not part of the record. Respondent's argument on this issue is without merit. The reconstruction constitutes argument. It derives solely from documents which Respondent entered into evidence at the supplemental evidentiary hearing. The Bar appended to its,Initial Brief every record document it used in reconstructing Respondent's daily checking account balance, so that no miscommunication could possibly result. Because the reconstruction constitutes argument, the Bar properly included within its brief, and the exhibits from which the reconstruction derives were properly appended to its brief, pursuant to Rule 9.220, Rules of Appellate Procedure.

If the Court desires to confirm, or to challenge, the substance of the Bar's reconfiguration of the record documents, it may readily do so by referring to the exhibits which the Bar appended to its Initial Brief. Respondent may do so as well.

Tellingly, however, Respondent does not challenge the substance of the reconstructed daily balances. Rather, he argues what amounts to a motion to strike the reconstruction from the Bar's Initial Brief, by stating that it does not constitute evidence in this case. The Bar agrees that its reconstruction is not evidence. It is argument about the evidence; what the evidence really means, and how it relates substantively to the issues in this case.

In support of his implied motion to strike, Respondent relies on Altchiler v. Fla. Dep't f Prof. Regulation, 442 So. 2d 349 (Fla. 1st DCA 1983), and Thornber v. City of Ft. Walton Reach, 534 so. 2d 754 (Fla. 1st DCA 1988). Both cases are factually distinguishable from the instant matter to such a degree as to be wholly inapposite, and therefore unavailing.

In Altchiler, the appellant appended to his initial brief materials that were not part of the record below, and his brief contained argument about those improper attachments. Here, the Bar appended to its brief only documents that had been accepted into evidence by the referee. The Bar's brief contained proper argument about those documents, which argument included the Bar's reconfiguration of the same into a more meaningful and convenient format. Similarly, in Thornber, supra, the appellant attempted to

supplement the existing record of the case by submitting documents on appeal which were never part of the record below. That scenario likewise did not occur in the instant case. Thus, neither Altchiler nor Thornber can support Respondent's contentions. Respondent's protestations regarding the reconstruction of his own documents are without merit. He does not challenge the content of the reconstructed daily balances because he cannot credibly do so. They are what they are.

II. THE EVIDENCE UPON WHICH THE REFEREE RELIED IN REVERSING HIS FINDING REGARDING FABRICATION OF EVIDENCE IS NEITHER COMPETENT NOR SUBSTANTIAL; THUS HIS REVERSAL WAS CLEARLY ERRONEOUS.

At the supplemental evidentiaxy hearing, the referee sought evidence from Respondent that would show that Respondent's checks 1779 and 1782 were not the only checks that Respondent wrote out of sequence. Respondent submitted only one document that clearly demonstrated this fact. That document is appended to the Bar's Initial Brief, and is also appended herein, and labeled "Exhibit "1" for the Court's convenience. See Appendix, post.

Exhibit "1" is not a bank record, but Respondent's tabulation of his banking records. For the sake of consistency, the Bar shall herein refer to Exhibit "1" as Respondent's 'reconstruction" of his banking activity as it related solely to the proper sequencing vel

non of the checks that went through his account over a four year period. Respondent's reconstruction of his bank records is thus similar to the Bar's reconstruction, except for one major distinction: the records upon which Respondent supposedly based his reconstruction are not part of the record of this case.

Through this exhibit Respondent hoped to convince the trier of fact that Respondent had, at various times in the past, written out-of-sequence checks. However, in and by itself, Exhibit "1" does not prove that fact. The veracity of Exhibit "1" can only be ascertained by analyzing and comparing the actual records from which it was supposedly drawn. Without such cross-referencing, the "facts" stated by Exhibit "1" amount to naked hearsay without any indicia of reliability, since, as Respondent testified, the exhibit was created by him (and his family) not in the course of business, but just prior to the supplemental evidentiary hearing.[1] See TR-4 at 285.

Without the actual bank records, no one can tell what Respondent even means by his assertion that some of the checks

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[1] The document labeled herein as Appendix Exhibit "1" was identified as "Exhibit "A" at the supplemental hearing of August 26, 1996, and was characterized by Respondent as "a summary of all the microfiche records that we ordered from the bank" for the years 1993, 1994, 1995 and 1996.

listed on Exhibit "1" were 'out-of-sequence." No one can know if Respondent actually issued them out of sequence (as he would have the court believe), or whether they were merely negotiated out of sequence. Without the actual bank records, no one can tell whether any of the checks which Exhibit "1" identifies as out-of-sequence were merely post-dated by Respondent, or back-dated, or merely misdated. (In this case alone, Respondent has admitted to post-dating one check and back-dating another. See TR-1 at 137; TR-1 at 158.) As this case proves, such dating practices do not necessarily mean that the checks were issued out of sequence; any post-dated or back-dated check would merely appear out of sequence, to anyone researching the documents at a later date.

For all these reasons, this Court cannot accept Exhibit "1" as competent or substantial evidence of any fact -- certainly not of the fact that Respondent occasionally issued out-of-sequence checks (i.e., besides the putative checks, nos. 1779 and 1782). Because Exhibit "1" is the only document that purports to document and demonstrate such "fact", and because Respondent did not tender the documents from which he created Exhibit "1", the referee clearly erred in finding that Respondent "occasionally wrote out-of-sequence checks", and, he therefore clearly erred in reversing his previous finding that Respondent had manufactured evidence. The

only thing that Exhibit "1" really proves is that Respondent made a list of his checks from evidence that was not admitted, and drew his own conclusions regarding the issuance and sequencing of those checks. That is evidence of nothing.

Moreover, even if the documents from which Exhibit "1" was crafted were introduced and admitted (i.e., even if Exhibit "1" did prove clearly that Respondent did, on occasion, issue out-of-sequence checks), that fact remains largely irrelevant to the issue of whether Respondent manufactured the evidence relating to putative checks 1779 and 1782. The fact that Respondent knew that he did not have sufficient funds to cover either or both checks at the time he says he drafted and delivered them is much more relevant and material to the question of whether he lied about issuing them, or whether he fabricated the evidence of the same. At the time the referee reversed his finding as to the fabrication issue, neither the referee nor the Bar had any prior opportunity to analyze the various banking records which Respondent did enter into evidence. Therefore, the referee and no knowledge of the aforesaid more pertinent, more relevant fact regarding Respondent's knowledge of his insufficient funds. Thus, the referee was deceived into reversing his own finding,

For all the foregoing reasons, the referee's reversal of his

finding regarding fabrication of evidence is clearly erroneous. The original finding should be reinstated.

III. NEITHER SIDNEY MAWBY NOR BRIDGETT KENNY WERE "DISINTERESTED" WITNESSES.

Throughout this appeal, Respondent has referred to Sydney Mawby and Bridgett Kenny as 'disinterested" witnesses. However, both appeared voluntarily, upon Respondent's request, and neither were issued a subpoena. TR-1 at 103; 119. As for Mr. Mawby, Respondent engaged and compensated him as a consultant in a substantial commercial venture. TR-1 at 105-06. These two business associates have known each other for a number of years, and they pursued a mutual interest in the successful start-up of a concrete plant in Costa Rica. Id. Clearly, Mr. Mawby is not as 'disinterested" as Respondent would have this Court believe.

The testimony of Respondent's other voluntary witness, Bridgett Kenny, has been discredited. see generally The Bar's Answer Brief. Accordingly, this Court cannot reasonably rely on the statements of either Mr. Mawby or Ms. Kenny.

Lastly, Respondent's entire argument on appeal is disingenuous, illogical, and inconsistent. In his cross initial brief, Respondent argued that the referee clearly erred in finding him guilty of any wrongful intent or wrongful conduct; in other

words, Respondent contends that the referee was completely off base regarding the merits of this case. In his Answer Brief, however, Respondent seeks to uphold as correct the referee's decision to reverse his finding on the fabrication of evidence issue. Respondent considers that to be the only finding which the referee got right. He got everything else wrong.

The Bar contends the referee was originally correct in every respect, including his finding that Respondent knowingly submitted manufactured evidence to the Court. The Bar argues that the only reason why the referee reversed his finding was because both he and the Bar were blind-sided by Respondent's submission of documents at the supplemental hearing, and neither had any real opportunity to review or analyze the same. Now that the Bar has had such an opportunity, Respondent seeks to strike its argument dealing with, and detailing, that analysis, without attacking the substance of that analysis. The Court is left to wonder why.

CONCLUSION

For the reasons shown above, this Court should disbar Respondent for his underlying fraudulent conduct and for testifying falsely under oath. Further, the referee's original finding that Respondent fabricated evidence should be reinstated, since there is clear evidence of the fabrication. In addition to the disbarment, Respondent should be required to make restitution to Ms. Van Nortwick, as prescribed by the referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Cross Reply Brief have been furnished by Regular U.S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies have been furnished by Regular U.S. Mail to Jay A. Hebert, Esq., Counsel for Respondent, at The Hebert Law Group, P.A., Suite 1, 13560 - 49th Street North, Clearwater, Florida 34622; and to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 19th day of December, 1996.

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