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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No: 88,180
[TFB Case No. 96-30,098 (18C

v.

HENRY J. MARTOCCI,

Respondent.

/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The parties wi.I.l. be referred Lo as "The Florida Bar" or "The Bar" and "Martocci".

References Lo the transcript of the final hearing held on November II, 1996 shall be referred to by the designation (T) .

References to the Referee's report dated December 5, 1996 will he referred to as (RR).

STATEMENT OF THE CASE

Respondent accepts the statement of the case as set forth in "The Florida Bar's" Brief.

STATEMENT OF THE FACTS

Respondent would accept the statement of the facts as set forth by "The Florida Bar" in its initial brief except that Respondent would deny having directed disparaging remarks to opposing counsel and contends that the statements that he made to Mr. Lanford following the conclusion of the deposition in question and outside the deposition room were neither intended by him nor accepted by Mr. Lanford as being disparaging or humiliating.

In fact, during his direct examination by counsel for "The Florida Bar", Mr. Lanford **testified at** the hearing of November 7, 1996 to the effect that he had asked "Martocci" to say the word "A.H." on three (3) separate occasions (T 30-31). Immediately thereafter when asked by counsel for "The Florida Bar" how he felt after "Martocci" had used that language towards him, Mr. Lanford stated that he was startled but he was not embarrassed for himself; rather, he was embarrassed for "Martocci" (T 32).

Mr. Lanford later testified on cross-examination that he had never said **that** he was disparaged or humiliated himself but rather was embarrassed for "Martocci" (T 54).

When asked why he had had "Martocci" repeat the word on so many occasions, Mr. Lanford indicated "I made a good record, didn't I?" (T 53). Mr. Lanford also admitted at the time of the

hearing on November 7, 1996 that he had during the course of these proceedings called "Martocci" a liar in the presence of a Circuit Judge (T 41-42) .

With regard to the medical condition of Respondent at the time of and immediately prior to the incident in question, it would appear that Respondent's wife to whom he was engaged at the time had been required to return to the State of Maryland in October of 1994 in order to attend to her mother who had been diagnosed with Alzheimer's disease (T 120) . Within a couple of weeks thereafter, Respondent was taken to Wuesthoff Memorial Hospital, he having suffered a mild stroke with a blood sugar level of 1100 (T 120).

Later and on the very weekend prior to the deposition of Dr. Slade, Respondent's fiancee had made arrangements to come down to Florida for the weekend and she was picked up by Respondent at the airport on Friday night at 10:30 P.M. Respondent left the office and did not go in on Saturday and therefore knew nothing about the deposition of Dr. Whitacre until the time of Dr. Slade's deposition on the following Monday Morning. Since Respondent s then fiancee had to leave on the following Tuesday morning, plans had been made for the time that she was going to be able to spend in Florida and the deposition of Dr. Whitacre caused severe difficulty with regard thereto

('I' 1.21) . IL. i s to be noted at this poi nt that Lhe notice of depos i tion was fi rst forwarded to "Martocci" by Mr. Lanford on Saturday, April 22, 1995 by facsimile.

Reviewing the report of the Referee dated December 5, 1996 counsel for "The Florida Bar" understates Lhe findings of Judge Angelos as Referee with regard to the conduct of Mr. Lanford. Judge Angelos sets forth the various circumstarices including the health of the Responden L and other matters and in the very words of the Referee "Most importantly, the conduct of opposing counsel in this case. . . "

SUMMARY OF ARGUMENT

The Referee's findings of fact and conclusions in these disciplinary proceedings are supported by competent substantial evidence and carry with them a presumption of correctness and should be upheld. The Florida Bar v. Poe, 662 So.2d 700 (Fla. 1995).

In as much as the Referee's findings are supported by competent substantial evidence, the reviewing Court is precluded from re-weighing the evidence and substituting its judgment for that of the Referee. The Florida Bar v. Poe, supra.; The Florida Bar v. Rue. 643 So.2d **1080** (Fla. 1994).

Furthermore, assuming a finding of guilt, the maximum penalty which should have been mposed upon Kespondent would consist of a private reprimand .

During the course of twenty (20) years of practice in the State of Florida and another twelve (12) years of practice prior thereto in the State of New York, Respondent has been the subject. of a finding of guilt in a disciplinary proceeding only on one (1) occasion., which occurred some fourteen (14) years ago and which involved a disputed fee.

Accordingly, there is clearly no pattern of conduct by this Respondent as contended by **"The** Florida Bar" in its initial brief.

This case is clearly unlike that in the case of The

Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996) wherein the attorney was disciplined in two (2) separate cases for his personal behavior during the very course of a court proceeding and had been publicly reprimanded previously for charging an excessive Tee, failing **Lo** commonly handle a legal matter, failing to act with reasonable diligence and most importantly failing to promptly deliver funds and render a full accounting of funds to his clients ,

Furthermore, in Wasserman the attorney in question had been publicly reprimanded and **placed** on probation for one (1) year for violating the Bar rules regulating trust accounts and had also been admonished prior thereto for failing to communicate diligently with opposing counsel, failing to protect his client's interest and engaging in conduct prejudicial to the administration of justice.

A private reprimand in **this cause,** should any sanctions at all be proper, would clearly be more than sufficient to protect the public, punish the accused attorney and deter other **like** minded attorneys. The Florida Bar v. Dubbeld, 594 so.2d 735 (Fla. 1992) .

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS TN THTS DISCIPLINARY PROCEEDING ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD AND CARRY WTTTT THEM A PRESUMPTION OF CORRECTNESS AND SHOULD BE UPHELD.

The task of "The Bar" in challenqinq the Referee's findings or conclusions in this disciplinary proceeding is to show that the record lacks any evidence to support the findings of Judge Angelos or her conclusions. The Florida Bar v. Poe, 662 So.2d 700 (Fla. 1995); The Florida Bar v. Rue, 643 So.2d **1080** (Fla. **1994).**

If the Referee's findings in disciplinary proceedings are supported by competent substantial evidence, the reviewing Court is precluded from reweighing the evidence and substituting its judgment for- that of the Referee. The Florida Bar v. Poe, supra.

"The Florida Bar" goes to great lengths in its initial brief in connection with its contention to the effect that the language used by Respondent following the deposition in question was intended to disparage, embarrass and humiliate Mr. Lanford, opposing counsel.

The difficulty is that Mr. Lanford himself clear-ly testified both on direct and cross-examination at the time of the

hearing held before Judge Angelos as Referee on November- 7, 1996 he had never said that he had been disparaged or humiliated or embarrassed for himself ('I' 54)but rather, that he was embarrassed for "Martocci".

Further-more, when asked on cross-examination why if he had been embarrassed or humiliated he had had "Martocci" repeal. the word "a---" on three separate occasions, his somewhat flippant response was "I made a good recor-d, didn't I".

Furthermore, it is apparent from an examination **of** the Referee's report (RR 3) that the Referee accepted the hearing testimony of Respondent **Lo** the **effect** that when he had indicated that he had notused the words later attributed to him, he had intended **to convey the** fact that he had not utilized those words during the course of the deposition itself but rather at a time after the deposition had been concluded (T 101).

Additionally, the Referee clearly considered the circumstances which had occurred during the course of the proceedings underlying this grievance procedure wherein opposing counsel called "Martocci" a liar both before Judge Burk and at a time prior thereto (T 105-106).

Apparently Respondent's client refused to return the children to their father in the State of South Carolina following an agreed upon visitation by the children with her in the State

of Florida. "Martocci" asked her to return the children and explained to her what the consequences of her conduct might or might not be but had no knowledge that the children were not going to be returned until late Sunday evening; immediately thereafter on Monday morning, "Martocci" telephoned opposing counsel and informed him that the children were not going to be returned; at this point opposing counsel accused "Martocci" of conspiring in effect with his client to not return the children to their father in the State of South Carolina and called him a liar (T 105-106),

Could not the Referee have concluded that: it. was partially this set of circumstances which had taken place within one (1) week prior to the deposition of Dr. Slade that had led to the bad feelings on the part of each counsel.?

Finally, "The Bar" contends that the conduct of Respondent involved a pattern of offensive and disparaging behavior.

The difficulty with this argument lies in the fact that. "The Bar" itself has admitted that the only prior disciplinary proceeding of record against this Respondent leading to a finding of guilt on his part was some four-teen (14) years ago. Furthermore, that matter some fourteen years ago involved a dispute concerning a fee arrangement. ('I' 134).

Finally, no one of the cases cited by "The Bar" in it:: initial brief is on point with regard to the facts in the case at bar.

In The Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996), the attorney was disciplined in two (2) separate cases for his personal behavior during the very course of a court proceeding at which time he shouted criticisms at the judge, waived his arms and banged on the table. E'urthermore, after receiving an unfavorable response over the telephone from a judge's judicial assistant, the attorney called the assistant a little mother f---- and referred to the judge as a mother f---- and a son of a b----.

Previously, that attorney had been publicly reprimanded for charging an excessive fee, failing to competently handle a 1 egal matter, failing to act with reasonable diligence and most importantly failing to promptly deliver funds and render a full accounting of funds to his client. Two years thereafter, said attorney was publicly reprimanded and placed on probation for one year for- viol at i rig the Bar rules regulating trust accounts. Within another year, said attorney was admonished for failing to communicate diligently with opposi ng counsel , fai 1 ing to protect his client's interests and engaging in conduct prejudi ci a I to the administration of justice .

In the case at bar-, Respondent did in fact refer Lo

opposing counsel as an "A----" but opposing counsel in fact denied feeling disparaged or humiliated by said conduct. Furthermore, Respondent in the case at bar has not been disciplined for some fourteen years, that fourteen year old disciplinary proceeding resulting in a private reprimand arid being the only finding of improper conduct on the part of Respondent during his twenty (20) years of practice in the State of Florida and twelve (12) years of practice prior- thereto in Lhe State of New York.

In the case of The Florida Bar v. Adams, 641 So.2d 399 (Fla. 1994), the attorney in question issued a letter accusing two (2) attorneys, a hospital and a doctor of suborning per-jury. In Adams, there was absolutely no factual. basis whatsoever upon which the Respondent-attorney could have reasonably suspected the type of conduct contained in his accusations against the other attorneys, the hospital and the physician.

In the case at bar, it is clear that the tape recorder operated by the court reporter did not pick up the words "F-- You". One would therefore reasonably question how the court reporter could have included those words in the transcript produced by her- without having been informed of the use by Respondent of those words by another person, obviously Mr. Lanford.

In The Florida Har v. Perlmutter, 582 So.2d 616 (Fla.

1991) the attorney in question apparently wrote letter-s to different persons threatening them with multiple lawsuits, verbally attacking them and impugning their motivation and standing in the community without just cause.

In The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992) the attorney who had been disciplined with a public reprimand had been convicted for driving under- the influence of alcohol, had had his driver's license suspended and had left obscene or at least patently obscene messages on the answuring machine of a woman whom he believed had Lold his wife that he was having an extramarital affair-. Furthermore, the incidents giving rise to the complaint occurred apparently over a three (3) month period of time whereas in the case at bar the incident lasted only minutes if that and was obviously the result of an ongoing dispute between two (2) attorneys who had butted heads in a highly contested and emotional custody proceeding, counsel for the opposing party having called Respondent a liar and having accused Respondent of conspiring with his client in order to deprive the father of custody of the children, prior Lo the incident in question.

The findings and conclusions of the Referee are clearly supported by competent substantial evidence in the record and thus are presumed Lo be correct and should be upheld.

POINT TT

ASSUMING A FINDING OF GUILT, THE MAXIMUM PENALTY WIIICII SHOULD BE IMPOSED UPON RESPONDENT WOULD BE A PRIVATE REPRIMAND.

Assuming a finding of guilt, the maximum penalty which should he imposed upon Respondent for his conduct in the case at bar would consist of a private reprimand.

It would appear that this would satisfy the three (3) purposes of lawyer discipline which are the protection of the public, punishment of the accused attorney and deterrence of other like minded lawyers. The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992).

In answering a question posed by counsel for "The Bar" with regard to the acceptability of the word "A--hole" Respondent would submit. that as he testified at the hearing of November 7, 1996 unfortunately that word as well as other words previously deemed to be offensive had slipped into the language.

It is not only "shockjocks" who use these words but rather persons in everyday confrontations with each other ncluding attorneys.

If these words had been used by Respondent during the very course of a judicial proceeding, including; without limitation, a hearing or a deposition or similar procedures, then the words would be far less acceptable.

However, it is not at all uncommon for attorneys

following the course of a heated exchange and at a time after the proceeding has terminated for them to engage in such conduct including the use of such language and in fact far worse.

Counsel for "The Bar" speaks to an alleged loss of a degree of civility on the part of attorneys. Rather, an open eyed view of the world would clearly indicate that society itself has diminished in civility over the last many years.

CONCLUSION

The findings and conclusions of the Referee are clearly supported by competent substantial evidence in the record and should be upheld.

Furthermore, assuming there had been a finding of guilt, the maximum penalty which should have been imposed upon Respondent for his conduct in the case at bar would consist of a private reprimand.

Respectfully submitted,

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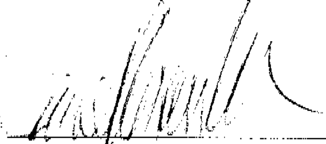
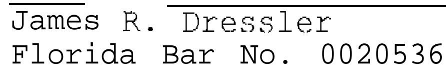


James R. Dressler
Florida Bar No. 0020536

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of Respondent's Answer- Brief have been sent by regular U.S. Mail Lo the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, 'Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to John F. Harkness, Jr. Executive Director of The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, and a copy to Frances R. Brown and Eric M. Turner, Bar Counsel, 'The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085, this ` day of March, 1997.

Respectfully submitted,



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