IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HENRY J. MARTOCCI,

Respondent.
_____/

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

THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS *AND* REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on November 7, 1996, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated December 5, 1996, will be referred to as "RR", followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex. ___, followed by the exhibit number.

In this brief, the profanities "Fuck you/me" and "Asshole" and any derivations thereof shall be referred to as "F--- you/me" and A--hole", respectively.

The respondent's Answer Brief dated March 20, 1997 shall be referred to as "RB", followed by the referenced page number(s).

SUMMARY OF THE ARGUMENT

The referee's conclusion that respondent engaged in the conduct. as charged hut should be found not guilty is not supported in the record. From a review of the entire proceeding, it is clear respondent has missed the point of. this case and does not understand his obligations as a member of the bar. Respondent's brief ,is replete with excuses for his admitted conduct. He chooses to place the blame on various factors and on opposing counsel, Mr. Lanford, rather than accept his individual responsibility. While respondent takes great pains to point to Mr. Lanford's conduct, he does not, even attempt: to address his conduct toward the court reporter, Ms. McGraw, apparently finding her to be unimportant. That is exactly the point. Respondent cares little about how his unprofessional conduct affects others. In his brief respondent even suggests that his remarks to Mr. Lanford were not disparaging or humiliating because Mr. Lanford did not "feel" disparaged or humiliated. Respondent misinterprets Mr. Lanford's testimony, but even if respondent did not intend his statements to Mr. Lanford to be disparaging, then what purpose did he have for saying "F--- you" and "A--hole" to him? Further, he fails to address the question of whether his conduct was prejudicial to the administration of justice. Respondent also continues with his idea that because attorneys are sometimes uncivil toward each other, and because society as a

whole has realized diminished civility, that respondent's conduct in this case is somehow excused. Will this Court accept respondent's justifications and find that he has acted with the highest standards that are required of an officer of the court arid a member of the bar? The Florida Bar submits that respondent's conduct cannot be excused away. Only by entering a finding of guilt and imposing a public reprimand as discipline can this Court send a message that unprofessional, disparaging and childish behavior towards other attorneys or court personnel is unethical and will not be tolerated.

ARGUMENT

A FINDING OF GUILT AND THE IMPOSITION OF A PUBLIC REPRIMAND ARE WARRANTED AS THE REFEREE'S CONCLUSIONS FROM THE FINDINGS OF FACT ARE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE IN THE RECORD.

R. Regulating Fla. Bar 4-8.4(d), as was charged against respondent in this case, states that a lawyer shall not:

> engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic. [Emphasis added].

Respondent suggests that because Mr. Lanford testified that he did riot say he had been disparaged, humiliated or embarrassed for himself as a result of respondent's use of profanities and other statements, that respondent's remarks were, therefore, not disparaging [RB, p. 2]. However, respondent misconstrued the substance of Mr. Lanford's testimony as he has taken it out of context. Respondent ignores Mr. Lanford's testimony that upon hearing the profanities, he was "absolutely stunned" and that he "felt assaulted" [T, p. 53]. Respondent also stated he did not intend such remarks to be disparaging or humiliating [RB, pp. 7-

8]. What purpose could respondent have had in making the statements he did to Mr. Lanford? As the bar cited in its initial brief, in The Florida Rar v. Uhrig, 666 So. 2d 887 (Fla. 1996), the attorney was disciplined for sending a letter in which he compared a litigant's opinions to body odor. Frankly, that seems rather tame compared to respondent saying "F--- you" and "A--hole" to Mr. Lanford in the middle of a doctors' office. Although respondent *states* he did not intend such remarks to be disparaging or humiliating, he does not indicate what he intended to convey with those profanities. Respondent does not even address in his brief the fact: he called Mr. Lanford a "looney" in the parking lot after Dr. Slade's deposition. Such was heard by the court reporter and could have been heard by anyone else who happened to be in the vicinity [T, pp. 32, 86, 123-124]. What purpose could respondent have had to call an opposing counsel a "looney" in a public area if not to disparage or humiliate him?

Throughout his Answer Brief, respondent points the finger at opposing counsel's conduct and states that the referee "clearly corisidercd" the underlying circumstances wherein Mr. Lanford called respondent a "liar" [RB, p. 81. That is merely respondent's supposition and has no basis in the record as the referee does not specify in her report what "conduct of opposing counsel" she considered [RR, p. 4]. The referee's report only states that, "[r]espondent also testified that Mr. Lanford

accused him of being a liar and conspiring with his client to deny return of the children to Mr. Newman" [RR, p. 41 (emphasis added). In fact, Mr. Lanford testified at the final hearing that he did not call respondent a liar during the custody case, rather, he called respondent a liar when he attempted to deny saying "F--- you" and "A--hole" to Mr. Lanford after the fact [T, pp. 44-45, 62-63]. Even assuming Mr. Lanford called respondent a liar regarding the custody issue "one (1) week prior to the deposition of Dr. Slade" [RB, p. 91, does that warrant respondent's actions? Does it rise to the same level as respondent confronting Mr. Lanford face to face and saying "F--- you" arid "A--hole" several times in a public place'? Even if Mr. Lanford acted less professionally than he maybe should have in his dealings with respondent, that would tend to mitigate respondent's offense. It does not change the fact that respondent said what he said and that it was inappropriate and unethical.

At no point in respondent's Answer Brief does he address his conduct toward the court reporter, Stephanie McGraw. It is clear from the record that prior to the start of the deposition of Dr. Whitacre, the evening of April 24, 1995, respondent pointed his finger at Ms. McGraw and stated, in front of others, "I'm going to yet that woman if it's the last thing I do" [T, pp. 70-711. During the Whitacre deposition, respondent stated his contention

that Mr. Lanford and Ms. McGraw had completely fabricated portions of the Slade transcript [Bar Ex. 2]. Respondent also called Ms. McGraw's impartiality into question on the record during the Whitacre deposition [Bar Ex. 2]. Further, respondent published in a court document filed in the Newman case his opinion that Mr. Lanford and Ms. McGraw had acted in concert to fabricate the transcript from Dr. Slade's deposition [Bar Ex. 31. Ms. McGraw testified at the final hearing in this case that respondent's accusation that she fabricated a transcript could affect her court reporting business [T, p. 73]. Further, Ms. McGraw testified that she felt threatened when respondent said he was going to "get" her and that she was concerned and very upset by that statement [T, pp. 85-86, 89]. Certainly, respondent's remarks about Ms. McGraw were intended to disparage or humiliate her, which is a result respondent clearly achieved. There can be no doubt respondent's conduct toward Ms. McGraw was prejudicial to the administration of justice in that it violated Rule 4-8.4(d). In addition, respondent's statements that Mr. Lanford and Ms. McGraw had conspired to fabricate a transcript had no basis in fact as respondent had not listened to the audio tape reflecting his use of profanities nor had he attempted to verify his accusations prior to publishing them in the Newman case [T, pp. 104, 108-1091. Because the evidence later showed that Ms. McGraw's recording of respondent's use of obscene language toward Mr. Lanford after the deposition was correct, respondent's

publication that portions of the Slade transcript were complete fabrications was a misrepresentation in violation of R. Regulating Fla. Bar 4-8.4(c). From respondent's brief, he apparently misunderstands the bar's citation to ~~The Florida~~ Bar v. Adams, 641 So. 2d 399 (Fla. 1994). In that case, the attorney was disciplined for issuing a letter making unfounded threats and allegations against two attorneys who were involved in a client's lawsuit. Like Adams, respondent in this case made accusations against others that were false and never had any basis in fact.

By referring to his past disciplinary record, respondent apparently misunderstood the bar's statement in its initial brief that "respondent has engaged in a pattern of offensive and disparaging behavior as reflected by the referee's findings of facts" [At p. 22]. It is the bar's position that respondent displayed a pattern of misconduct because his actions did not stop at swearing at Mr. Lanford. Respondent's disparaging conduct continued when he called Mr. Lanford a "looney" in the parking lot after the deposition had concluded; when he told Ms. McGraw later that evening prior to the Whitacre deposition that he was going to "get" her; when he accused Mr. Lanford and Ms. McGraw of conspiring to fabricate a transcript; and when he published such unfounded accusations in the ~~Newman~~ case. The referee's findings of fact reflect this continuing pattern of offensive and disparaging conduct and callous indifference to the

impact of his conduct upon others.

Respondent eventually admitted saying "F--- you" and "A--hole" to Mr. Lanford, although he attempted to deny it before the grievance committee and others in violation of Rule 4-8.4(c). The referee found that respondent said "F--- you" and "A--hole" to Mr. Lanford. Respondent admitted calling Mr. Lanford a "looney" and that he would "get" Ms. McGraw and the referee so found. Respondent's other disparaging conduct toward Mr. Lanford and Ms. McGraw are found in his answer, the response to the Request for Admissions as well as in the record and the referee's findings of fact. Simply put, respondent did engage in the conduct that the bar has alleged all along. There was no basis or support for the referee's conclusion that although respondent engaged in the conduct as alleged that there should be no finding of guilt and no discipline imposed.

Respondent states in his brief that none *of* the cases cited by the bar are on point with the facts of the instant matter. All of the cases cited by the bar stand for the proposition that an attorney who engages in inappropriate personal behavior toward litigants, court. personnel, or other attorneys will be subject to discipline. *[See* The Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996); The Florida Bar v. Uhrig, 666 So. 2d 887 (Fla. 1996); The Florida Bar v. Adams, 641 So. 2d 399 (Fla.

1994); and The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991). specifically, the Wasserman case involved, in part, an attorney's inappropriate language to a judge's assistant during a telephone conversation. That conduct, like in the case at hand, did not occur during the course of any court proceeding. The attorney said to the judicial assistant, "You little motherf----; you and that judge, that motherf---- son of a b----." The Court did not ignore this conduct. simply because it occurred outside of a court proceeding. Any rational person would find Wasserman's statement to the judicial assistant to be disparaging. Why should respondent saying "F--- you" and "A--hole" to another attorney be considered anything but disparaging and prejudicial to the administration of justice?

During the final hearing and in his Answer Brief respondent has promulgated the idea that the term "A--hole" is no longer considered offensive as it has slipped into everyday language and individuals use that word in everyday confrontations. What is more troublesome, however, is that respondent suggests that attorneys routinely use such words during heated exchanges and even use far worse language. Even if true, does that make it right? Just because some attorneys behave in a certain manner, should that excuse all attorneys? According to respondent, the bar is naive in speaking of a loss of civility by attorneys because it is society itself which has realized diminished

civility over the past several years. "Society" is not an officer of the court, respondent is. Attorneys are and should be held to a much higher standard than non-attorney members of society.

> Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in members of the legal profession. When a lawyer commits any act or conducts himself in such fashion as to cause criticism of the Bar, he thereby impairs the confidence and respect which the Bar generally should enjoy in the eyes of the public. Striving for such an honorable and respected public image is not for the personal aggrandizement of the individual members of the profession; it is to enable them properly and effectively to perform the services and discharge the responsibilities which are entrusted to us. Without the respect and confidence of the public, it is impossible for the profession to discharge its duties effectively and efficiently . . . The Florida Bar v. Wagner, 212 So. 2d 770, 772 (Fla. 1968).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's conclusions and finding of not guilty and instead, based on the findings of fact and evidence presented, find respondent guilty of violating rules 4-8.4(c) and 4-8.4(d) and as discipline impose at least a public reprimand, payment of the bar's costs, and respondent's referral to a stress/anger management program.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief have been sent by regular U.S. Mail to 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* James Dressler, Counsel for Respondent, 110 Dixie Lane, Cocoa Beach, Florida, 32931-3542; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 31st day of March, 1997.

Respectfully submitted,

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Bar Counsel