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SID J. WHITE
MAY 13 1998
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant/Cross-Appellee,

vs.

FRANK G. CIBULA, JR.,

Appellee/Cross-Appellant.
_____/

CASE NO.: 89,551

The Florida Bar No.:
96,51,025(15B)

AMENDED REPLY TO ANSWER BRIEF OF THE FLORIDA BAR ON CROSS-APPEAL OF THE APPELLEE/CROSS-APPELLANT

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REPLY TO ANSWER BRIEF OF THE FLORIDA BAR ON CROSS-APPEAL

The Florida Bar in its Answer Brief to the Cross-Appeal does not respond to any of the cases cited by the Cross-Appellant, Frank G. Cibula, Jr., on the cited law indicating that the referee's findings of fact are erroneous, unlawful, unjustified and not based upon competent evidence. In fact, The Florida Bar does not cite any portion of the Transcript or the Record to support the referee's findings. The Cross-Appellant in his Initial Reply Brief set forth portions of the Record which clearly show that the findings of fact of the referee are erroneous, unlawful, unjustified and not based upon competent evidence.

The Bar cites its witness, Mr. Whiddon, to the effect that actual checks written out of the draw account total $84,700.000 including $30,000.00 for estimated taxes. (T Vol. I page 77, Bar brief page 11) Mr. Whiddon never testified nor did The Bar provide any evidence that the computations were done in August or November of 1991 before anyone knew, including Mr. Whiddon, that the draw account would show that $54,700.00 was taken out in draws in 1991; $30,000.00 was taken out of draw account for taxes; and the

additional monies left in the account supported the ongoing practice. Even The Bar's own witness could not have speculated in either August or November, 1991, what the total draws would be for the year 1991.

The Florida Bar at page 12 of their brief indicates that James Rich, one of the former wife's attorney, testified it would cost between $10,000.00 and $20,000.00 for financial information in the 1991 modification proceeding. This is obviously an oversight as his testimony at Volume I, page 104 was substantially less. Even so, this does not relieve the lawyer of his obligation in representing his client to the extent of either taxing costs at the end of the case or securing an evidentiary hearing before the trial judge to make the decision as to what reasonable initial costs would be paid and which party would bear those costs. In truth and in fact, the former wife did not want any financial disclosure. (T-112, Respondent's Exhibit #2)

The Bar further makes reference that it was candid in referring to the Order of May 31, 1996, from the post dissolution on modification to simply indicate that they placed the entire Order in evidence. This ignores the fact

that The Bar failed to cite the language in the Order which justified and approved modification in 1991 as found by the trial judge. The Bar compounds that fact by not referencing this statement in its Initial Brief before this Court. Fairness would require it.

The Florida Bar indicates that the Cross-Appellant made several unfavorable comments concerning the former wife which contain no citation to the Record. They cite pages 2 and 3 of the Statement of the Case and the Facts. A review of pages 2 and 3 of the Statement of Facts in the Cross-Appeal, are referenced in The Bar's Statement of Facts and the Case. Furthermore, Volume II beginning at page 44, 45, 46, 71 and 79 would support other facts. There is no dispute that the Cross-Appellant was residential custodial parent, received no child support, but paid alimony. Nowhere in the Answer to the Cross-Appeal does The Florida Bar support any evidence of <u>intent</u>. There was no evidence whatsoever that the Cross-Appellant was ever asked to bring any documents, tax returns, bookkeeping statements, or checking account statements to either hearing. (T 40) In fact, questions were answered truthfully and substantially accurately without records. Certainly the testimony

concerning the draws from August 13, 1991, through November 24, 1991, support an average of $3,000.00 per month in draws.

There is an absence of supportable findings in the referee's Order which was prepared at his request by Bar counsel. (Volume II, T-73 & 78) Recently this Court in The Florida Bar v. Edward C. Vining, Jr., 23 FLW 582 (Feb. 12, 1998) approved the referee's findings of fact which were not merely adopted from another's findings of fact when each finding of fact in the referee's report was corroborated by a citation to testimony offered during the disciplinary hearing. The Bar has failed to do so and it is suggested that the Record would not support such a finding.

COSTS

The submission of an affidavit of costs by The Florida Bar on September 12, 1997, does not mean that it is to be accepted as true, correct, or more importantly, taxable. The next affidavit submitted by The Bar was on October 13, 1997, after the final hearing. Due process would require that the referee conduct an evidentiary hearing to determine what costs were or were not taxable.

There was no indication that the referee did anything but rubber stamp what The Bar requested.

In fact, the referee's only comment concerning costs is stated in Volume II, page 75 of the transcript as follows:

> "He has to pay the costs. I acknowledge he has to pay the costs of The Bar's prosecution".

This was even before the submission of the affidavit of The Bar's costs at the hearing on September 12, 1997, at Volume II, page 12.

CONCLUSION ON CROSS-APPEAL

For the reasons set forth in the Cross-Appellant's Initial Brief and in this Reply to the Answer Brief on Cross-Appeal of The Florida Bar, the Court must find that the referee's findings of fact are erroneous, unlawful, unjustified, and are not based upon competent substantial evidence. In addition, the findings of fact cannot be corroborated by citation to testimony offered during the disciplinary proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 11th day of May, 1998, to: Ronna Friedman Young, Esq., The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309.

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