IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant/Cross-Appellee,

v.

FRANK G. CIBULA, JR.

Appellee/Cross-Appellant.

_____/

Supreme Court Case No. 89,551

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

# THE FLORIDA BAR'S REPLY BRIEF AND ANSWER BRIEF ON CROSS-APPEAL

RONNA FRIEDMAN YOUNG #563129
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN ANTHONY BOGGS #253847
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

JOHN F. HARKNESS, JR. #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**



**FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS**



**RULES REGULATING THE FLORIDA BAR**

## ARGUMENT

(Bar Appeal)

**THIS COURT SHOULD INCREASE THE SUSPENSION FROM SIXTY (60) DAYS TO NINETY-ONE (91) DAYS TO REQUIRE PROOF OF REHABILITATION AND FURTHER ORDER THAT CIBULA'S CERTIFICATION IN THE AREA OF CIVIL TRIAL LAW BE WITHDRAWN.**

The thrust of Cibula's argument on the appeal and cross-appeal is that Cibula had no intent to deceive the court. The referee found that he did, specifically holding that Cibula knowingly made false representations and that Cibula deliberately testified falsely. RR 5. The referee further listed five specific areas of evidence that supported his finding. RR 5-8.

With respect to the bar's appeal for an increase in the suspension from sixty to ninety-one days, Cibula has argued that he is not guilty and has further argued that if the referee's recommendation of guilt is upheld, the misconduct does not warrant imposition of a suspension. The bar submits that a brief review of the evidence shows not only that a suspension is warranted but further reveals that one requiring rehabilitation is due.

In 1991, Cibula testified under oath that he was receiving approximately $3,000 per month in income from his law practice or approximately $36,000 per year. RR 5. In his Statement of the Facts (p. 6), Cibula argued that the draw schedule supported his

testimony. It did not. The first time Cibula testified was August 9, 1991. RR 2. In July of 1991, the month immediately prior to this first testimony, Cibula did not take only $3,000 in draws. Cibula Exhibit 2. He took $5,000. Cibula Exhibit 2. In fact, he took more than $3,000 in every month except one for January through July. Cibula Exhibit 2. February was the one month in which he took less than $3,000, and in January, he took $5,000 and in March, he took $9,500. Cibula Exhibit 2. The second time Cibula testified was November 25, 1991. RR 3. On this date when Cibula testified that his income was only about $3,000 a month or $36,000 per year, Cibula, by his own admission, had already taken draws amounting to $44,200 and the next day, he took an additional $1,000 as well as $9,500 during the month of December. RR 6. Given that Cibula had taken more in his own pocket than what he testified to in court, the bar submits that the referee had ample evidence to find that Cibula deliberately testified falsely.

Not only does the draw schedule not support the testimony of $3,000 per month in draws but it also does not support the testimony of $36,000 per year in income. Cibula in his Statement of Facts (p. 6) noted that draws were explained as to what Cibula took home, not money paid to the IRS for estimated taxes or money left in the account to run the office. The bar agrees that the

terms draws and income are not equivalent and notes that draws are generally less than income. The bar's evidence included a letter written by Donald Pagan, Cibula's certified public accountant, to Cibula on December 14, 1987 which letter stated in pertinent part:

> Please remember that you are taxed on the partners earnings of the law practice and not on your draw (which is usually about $5,000 to $7,500 less). Your draws are less than taxable income as you must always leave some working capital in the bank accounts for January operations.

Bar exhibit 12.

Although Cibula could not say "yes or no" as to whether he received this letter from Pagan (T (vol. 1) 36), it is clear that Pagan specifically advised Cibula that draws were always less than income. Pagan also testified that he reminded Cibula many times that a draw is not income. T (vol 1) 157. To some extent, Cibula's testimony in 1991 equated the concept of draws with income. However, Cibula's testimony in 1991 as it related to both draws and income was false in that he had taken significantly more in draws (Cibula Exhibit 2) as well as earned more in income than what his testimony revealed.

Aside from what Cibula took home in his own pocket as a basis for the referee's finding, the referee, as listed in his report (RR 5-8), had ample evidence of intent including the estimated tax

payments and carryovers for 1991 in the amount of $132,390. As noted by the referee, the total estimated tax payments were over three times the amount of $36,000 that Cibula had testified to was his income. RR 7.

Although Cibula admitted to taking $54,700 in draws, the bar's expert certified public accountant, James Whiddon, testified that Cibula had available $84,700 to take as a draw based on Cibula's figures or assuming that Cibula was able to draw out of total income, he had available about $118,000. T (vo. 1) 58. The figure of $84,700 was the amount of draws actually taken plus the $30,000 that was sent to the IRS for estimated tax payments. T (vol. 1) 56. Due to his overpayment of estimated tax payments, Cibula was entitled to a refund of $104,385.00. RR 4. Each year on his tax return, Cibula would have had to sign off on any carryover of estimated tax payments and would have been able to see the growth of the carryover. T (vol. 1) 91. In Whiddon's opinion, there was no legitimate reason for overpaying estimated taxes by over $100,000 and that such overpayment was a method of hiding income from creditors or an ex-spouse. RR 7-8.

Not only did Cibula misrepresent his draws and income to the court, but James Rich, counsel for the ex-Mrs. Cibula testified that Mr. Cibula "continually told me that he was making $3,000 a

month that was his income." T (vol. 1) 93. Rich confirmed these representations to Mr. Cibula in letters dated November 6, 1991 and November 26, 1991. RR 7. Rich tried to get records from Mr. Cibula to determine the extent and validity of the $36,000 representations. T (vol. 1) 96. Mr. Cibula advised him that it would cost between $10,000 to $15,000 to get his accountant to answer Rich's interrogatories. T (vol. 1) 99. In response to a question from the referee, Rich indicated that the most he could recall for an accountant to answer interrogatories would be in the range of ten hours of the accountants' time, not $5,000, not $10,000, not $15,000. T (vol. 1 100-101). Rich was never able to obtain records from Cibula and relied upon Cibula's representations under oath. T (vol. 1) 101. As to whether Rich believed Cibula because Cibula was an attorney, Rich stated: "I felt that was a factor in it, yes. When you have an attorney swearing under oath a couple of times in a contempt hearing, yes, I felt it was a factor." T (vol. 1) 101. It was also a factor that Cibula swore to this under oath on more than one occasion. T (vol. 1) 101.

Examination of the surrounding circumstances also lends support to the referee's finding that Cibula knew his representations were false and deliberately testified falsely. Documentation produced by Cibula showed income levels for other

years never less than six figures and no year where Cibula made only $36,000. RR 7. For 1991, Cibula's own accountant anticipated a six figure income for Cibula somewhere between a $100,000 and a $125,000. T (vol. 1) 145-146. Cibula had four orders of contempt entered against from 1988 to 1991 as well as order of commitment entered in 1990 for failing to make payments to and for the benefit of his former wife and the referee found that Cibula's testimony was consistent with the pattern of attempting to evade his responsibilities to the former wife. RR 8.

Given that the caselaw has already been extensively discussed by the bar and by Cibula, the bar will not reexamine the cases in detail here. However, the bar submits that this case is more analogous to those cases where respondents have been given rehabilitative suspensions than to cases where lesser discipline has been imposed. For example, in *The Florida Bar v. Colclough*, 561 So.2d 1147 (Fla. 1990), the respondent was given a six month suspension for making misrepresentations to the court and to opposing counsel although the respondent had no prior disciplinary history and the record contained letters and affidavits as to his good character. Similarly, in *The Florida Bar v. Schramm*, 668 So.2d 585 (Fla. 1996), a respondent's misconduct including making misrepresentations to judges and failing to represent a client was

held to have warranted a ninety-one day suspension.

Cibula has argued that the referee did not seem to consider the factors listed in the Florida Standards for Imposing Lawyer Sanctions before making his recommendation of discipline. Cibula Answer Brief 17. Shortly before the referee announced his recommendation of discipline, the bar, in fact, advised the referee of the factors listed in the Standards. T (vol. 2) 59-60. Although Cibula has argued that Fla.Stds.Imposing Law.Sancs. 6.14 or 6.13 would apply to these proceedings (Cibula Answer Brief 17), those standards apply to negligent conduct. The bar submits that the referee correctly applied Fla.Stds.Imposing Law.Sancs. 6.12 in recommending a suspension which Standard reads as follows:

> 6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

The bar, however, contends that the degree of Cibula's misconduct warrants a ninety-one day suspension as well an order that Cibula's certification in the area of civil trial law be withdrawn. Cibula has argued that Cibula's prior public reprimand might not have resulted in discipline under *The Florida Bar v. Taylor*, 648 So.2d. 709 (Fla. 1995). *Taylor* held that no disciplinary action was warranted for failure to pay child support

where the failure constituted civil not criminal contempt and the conduct was not found to be fraudulent or dishonest. Cibula was previously disciplined for having been held in contempt on four separate occasions for failing to make payments to and for the benefit of the former wife and an additionally, an order of commitment was entered against him. RR 8 and 11. One of the findings of fact from the prior proceeding was:

> Notwithstanding the fact that some of his federal income tax returns for the period 1985-1989 showed overpayments of federal income taxes, respondent never included overpayment of such taxes in any financial affidavit during the dissolution or post-dissolution of marriage proceedings.

Paragraph Z of Report of Referee attached to the bar's Affidavit, admitted into evidence as bar exhibit 1 at September 12, 1997 final hearing on discipline.

Given this prior finding, Cibula's conduct might well have been found to be fraudulent had the case been litigated post-*Taylor*. Regardless of what might have happened, the record remains of prior discipline and the bar submits that it should be rightfully considered in aggravation as prior disciplinary history.

Cibula has also argued that an admonishment or public reprimand would be warranted since Cibula's conduct was not as egregious as the conduct in those cases where greater discipline

was ordered. Cibula Answer Brief 18. The bar disagrees. What is particularly striking about Cibula's misrepresentations is that they not only occurred under oath but that they occurred in two separate hearings months apart. Cibula, also, repeated the misrepresentations to James Rich, counsel for the former wife, outside of court. RR 7. This repetition shows that Cibula's testimony was not made thoughtlessly or off the cuff but was made deliberately. RR 7. Moreover, the fact that Cibula made the misrepresentations more than once means that Cibula had the opportunity to correct his previous misconduct. Instead he chose to continue in the same vein.

This conduct, in the bar's view, warrants the imposition of a ninety-one day suspension and an order withdrawing Cibula's certification in the area of civil trial law.

## CONCLUSION
(Bar Appeal)

For the reasons stated herein and in the bar's initial brief, the bar submits that this Court should increase the suspension from sixty days to ninety-one days and further order that Cibula's certification in the area of civil trial law be withdrawn.

## SUMMARY OF ARGUMENT ON CROSS-APPEAL

Cibula has petitioned for review of the findings of guilt and has argued that the referee's findings of fact are erroneous, unlawful and unjustified and not based on competent, substantial evidence. The bar submits otherwise.

Cibula's main argument is that Cibula did not know what his income was and his testimony was only a substantially accurate estimate. Cibula's argument ignores the fact that Cibula had taken more in his own pocket than what he testified to in court. His argument also ignores the fact that Cibula would have had to sign off on the overpayment of estimated taxes.

The referee in his report listed five specific areas that supported his finding that Cibula deliberately testified falsely and the bar contends that there is no reasons to disturb his factual findings. The bar further contends that there was no abuse of discretion in the award of costs to the bar and that the award of costs should be approved by this Court.

## ARGUMENT
(Cibula's Cross-Appeal)

### THE REFEREE'S FINDINGS OF FACT ARE NOT ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED BUT ARE BASED UPON COMPETENT, SUBSTANTIAL EVIDENCE.

Cibula has argued that the findings of fact by the referee are

erroneous, unlawful and unjustified and not based upon competent, substantial evidence in the record. The referee's findings are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. *The Florida Bar v. Winderman*, 614 So.2d 484, 486 (Fla. 1993). *See also, The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). The bar submits that there is no reason to disturb the referee's factual findings in this case.

Cibula has argued that "only someone with a crystal ball could determine what the total business income would be" and that he did not know what his total business income would be in August of 1991 or November of 1991. Cibula's Initial Brief 20. This argument ignores the fact that Cibula had taken more in his own pocket than what he testified to in court. This argument also ignores the fact that Cibula would have had to sign off on the estimated tax payments.

Cibula further argued that the bar's accountant guessed at what amounts may have been available to take out in draws. Whiddon testified that actual checks written out of the draw account totaled $84,700 including the $30,000 for estimated taxes. T (vol. 1 77). Whiddon further testified that there was no reason to overpay the estimated tax obligation by over $100,000 and that such overpayment was a method of hiding income from a creditor or ex-

spouse. T (vol. 1) 62-63.

Cibula has also contended that if James Rich, the attorney for the ex-wife, wanted any discovery with respect to income, "he certainly should know the rules of procedure to secure the information pursuant to a court order." Cibula's initial brief 27. Rich testified not only that Cibula wanted between $10,000 and $20,000 for this information but that he thought he could rely on Cibula's under oath testimony. *See*, T(vol. 1)99-101. Rich also testified that "it was like trying to pull teeth to get anything from Mr. Cibula, whether it was financial documents or information. And it would have been contested to the nth degree." T (vol. 1) 118.

The bar in its initial brief and reply brief has discussed the evidence including the five specific areas of evidence that the referee found to support his conclusion that Cibula testified falsely. The bar will not repeat this discussion here but will simply submit that there was no error by the referee with respect to the factual findings.

Cibula also argued that the bar was not candid in referring to the order of May 31, 1996 from the post-dissolution proceedings which order found: "The former Husband misrepresented his income in 1991 in order to induce the Former Wife to agree to modify the

alimony." In fact, Cibula admitted that the order contained this language. RR 5. The bar placed the entire order in evidence. Bar exhibit 5. Cibula testified that the order continued on to say that the facts would have justified modification in 1991. T (vol. 1) 47-48. The bar submits that the fact that Cibula may have been entitled to modification does not excuse the fact that he misrepresented his income nor the fact that he apparently did so for his own personal and financial gain.

The bar also notes that Cibula makes several unfavorable references to the ex-wife, many of which contain no citation to the record. *See, for example,* pages 2 and 3 of Cibula's statement of the case and of the facts. The bar believes it appropriate to point out that it was not the ex-wife or her attorney who referred the instant matter to the bar but it was Judge Jack Cook, formerly the Chief Judge of Palm Beach County. T (vol. 2) 36-37.

Cibula's final argument was that the referee erred in awarding costs to the bar and that Cibula should be granted a hearing on costs. The bar's affidavit of costs was admitted without objection at the hearing on September 12, 1997. Bar exhibit 2 at T (vol. 2) 12. At this hearing, the referee announced that he was awarding costs to the bar. T (vol. 2) 78. On October 13, 1997, the bar served a Supplemental Affidavit of Costs to include charges for the

court reporter from September 12, 1997. The referee signed the report of referee on October 10, 1997. Respondent served a motion for rehearing on October 20, 1997 on various grounds including that the costs of the bar's accountant were not necessary or reasonable. The referee denied the motion for rehearing by order dated October 21, 1997.

Given that the referee has apparently exercised his discretion to award costs, the bar submits there is no reason to disturb this finding. Under Rule 3-7.6(o)(2):

> The referee shall have discretion to award costs and absent an abuse of discretion the referee's award shall not be reversed.

Respondent cannot demonstrate an abuse of discretion and accordingly, the bar submits that the award of costs should not be disturbed.

## CONCLUSION

(On Cibula's cross-appeal)

The referees's findings of fact are not erroneous, unlawful or unjustified but are based on competent, substantial evidence. Although the bar disagrees with the duration of the suspension recommended by the referee, the bar contends there is no reason to disturb the finding of guilt.

Respectfully submitted,

RONNA FRIEDMAN YOUNG #563129
Bar Counsel
The Florida Bar
5900 N. Andrews Ave, #835
Fort Lauderdale, FL 33309
(954) 772-2245

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Robert H. Springer, Attorney for Respondent, Springer & Springer, 3003 S. Congress Avenue, Suite 1A, Palm Springs, FL 33461 by regular U.S. mail, two day priority, on this 14th day of April, 1998.

RONNA FRIEDMAN YOUNG

G:\USERS\CANKER\PLEADING\CIBULA\REPLYBR.IEF