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TN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross-Petitioner,

Supreme Court Case Nos.
91,148 & 91,281

v.

The Florida Bar Case Nos.
96-51,561(17C) &
97-50,410(17C)

DAVID SMITH NUNES,

Respondent/Petitioner.

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REPLY BRIEF OF THE FLORIDA BAR ON CROSS-PETITION

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ARGUMENT

NUNES SHOULD BE DISBARRED,

Nunes has argued that disbarment would not accomplish any of the three (3) purposes of disciplinary proceedings. Nunes brief, p. 12. The Florida Bar disagrees.

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer. *The Florida Bar v. Pahules,* 233 So.2d 130, 132 (Fla. 1970). The bar would like to focus on the impact on society of Nunes' misconduct. As discussed in the bar's initial brief, Nunes has been found to have violated 12 different Rules Regulating The Florida Bar since 1995, many more than once, and additionally has been reprimanded for violating an order of this Court. Nunes' problems have arisen not only when he represents himself in litigation but he has been found to have been incompetent in the representation of two different clients, the Burton and the Whynes matters' and unethical in the representation of another.[2] Given his disciplinary history, the bar respectfully suggests protecting the public should be a key consideration for the Court in this case.

In the instant case, Nunes lied about his representation of the Burtons and used

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'*The Florida Bar* v. Nunes, 679 So.2d 744 (Fla. 1996).

[2]*The Florida Bar* v. Nunes, 661 So.2d 1202 (Fla. 1995).

those lies in an attempt to maintain a frivolous suit against them. The suit was filed after this Court in prior disciplinary proceedings had found that Nunes had incompetently represented the Burtons and ordered him to pay restitution. Although the Burtons received an order requiring Nunes to pay certain attorneys fees and costs incurred by the Burtons in defense of Nunes' suit, Mrs. Burton testified that Nunes had not paid. In his brief, Nunes implied that he had paid and referred to a non-record writ of garnishment that he supplied to the Court in an appendix. Nunes brief, page 13. The bar has separately moved to strike the writ.

Even if Nunes had paid funds pursuant to the garnishment prior to the final hearing in this case,[3] that should not end the Court's examination of this issue. Not only is there obvious harm to Nunes' former clients, who were forced to defend the baseless suit, but there is an obvious cost to society, which is not simply the clogging of already overcrowded court dockets. This cost is in the apparent chilling effect on the willingness of former clients to make and pursue disciplinary complaints against their former lawyers if those clients are allowed to become the victims of baseless suits. Nunes, however, did not stop with a suit against those clients but he also sued

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[3]The bar stands by the record testimony of Mrs. Burton and has asked the Court to allow the bar to file non-record material in opposition if the Court does not strike the writ and Nunes' argument thereon.

The Florida Bar and the witnesses who testified against him in the prior disciplinary proceedings. Again, the bar submits that there is an apparent chilling effect created on the willingness of witnesses to cooperate in disciplinary proceedings if they may become the victims of frivolous litigation. As pointed out by Nunes, there are conditions precedent to obtaining the testimony of federal employees. See, Nunes' Emergency Motion for an Order on Appellant's Motion for Reconsideration for Injunctive Relief, pages 8-9, which Motion is an attachment to Nunes' Motion to Set Aside Referee's Report. Bruce Mar-mar, an Adjudications Officer with the Immigration and Naturalization Service, previously testified at the request of The Florida Bar and with permission from his agency (Bar exhibit 2, Order dated December 8, 1997, p. 2), and Mr. Marmar was subsequently sued by Nunes. It is obvious that such agencies may not be willing to grant their permission in the future if their employee faces the risk of suit.

Further, there is an impact on society and our litigation system by the remarks made by Nunes in the Schwartz matter. Lawsuits should not be a forum for a litigant to disparage and denigrate his opponent and the judges handling the case.

The second consideration in disciplinary proceedings is that the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. *The Florida Bar v. Pahules, 233*

So.2d 130 at 132. The current proceedings arose while Nunes was still on probation for his conduct in case numbers 84,097 and 85,54 1. As discussed in the bar's initial brief, p. 25, Nunes has repeatedly engaged in a pattern of misconduct and the prior discipline failed to prevent him from engaging in the conduct that is now before this Court. Nunes has previously been given ample opportunity to change his conduct and the prior suspensions and reprimands have apparently had little or no effect. The bar has previously argued that there is precedent to support disbarment because of the cumulative misconduct and dishonesty in this case and the bar will not repeat those arguments here.

Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. *The Florida Bar v. Pahules, 233* So.2d 130 at 132. Again, the bar submits that disbarment is appropriate. In filing suit against the Burtons and the witnesses who previously testified against him, Nunes not only made false representations but blatantly disregarded the order of this Court that had found him incompetent. Nunes admitted that he sued the Burtons for $432,000 calculated as ninety days (the period of suspension ordered in the prior case) times twenty-four hours a day times two hundred dollars per hour. T 95. In the bar's view, this type of conduct demands the harshest penalty in order to have the appropriate deterrent effect and to insure proper respect for the orders of this Court in the future.

The case cited by Nunes do not stand for the proposition that Nunes should receive less than disbarment. *The Florida Bar* v. *Siegel,* 5 11 So.2d 995 (Fla. 1987) and *The Florida Bar* v. *Adler,* 505 So.2d 1334 (Fla. 1987) involved no prior disciplinary history. In *The Florida Bar* v. *Vernell, 502* So.2d 1228 (Fla. 1987), the respondent did have prior discipline but as noted by the opinion of Justice Boyd, concurring in part and dissenting in part, there was no pattern of escalating misconduct and the last disciplinary judgment against Verne11 had been rendered seven years earlier.

In contrast to the above cases cited by Nunes, the bar would like the Court to note the case of *The Florida Bar v. Della-Donna,* 583 So.2d 307 (Fla. 1989). Frivolous litigation was among multiple misconduct which led to Della-Donna's disbarment. The evidence in *Della-Donna,* as described by the referee, established "a pattern of conduct and attitude" by Della-Donna "to misuse the judicial system for his personal advancement and to disregard ethical considerations." *Della-Donna* at 308. This Court further quoted the referee in *Della-Donna* who stated that "the evidence concerning Respondent's conduct taken as a whole, when viewed in a total perspective, is clearly indicative of fostering protracted unnecessary litigation for the self-interests and desires of Respondent alone," *Della-Donna* at 303. The same may be said of Nunes.

Contrary to the assertions of Nunes, it is not necessary to commit a crime in order to have disbarment imposed. For example, Della-Donna was disbarred although the referee specifically found that Della-Donna did not commit extortion. *Della-Donna* at 309. As discussed in the bar's initial brief (p. 18), this Court has recognized that the cumulative effect of multiple violations may show unfitness to practice law. E.g., *The Florida Bar v. Mavrides,* 442 So.2d 220 (Fla. 1983). This Court has not stated an additional requirement that any of the violations need to be of a criminal nature.

Although Nunes contends that his conduct is "more akin to over aggressiveness and overzealousness associated with lawyering" (Nunes' Answer Brief, p. 14), his conduct, as found by the referee, involved much more. The bar submits that these findings show an individual with a basic lack of understanding and appreciation of how an attorney should conduct himself in litigation. Moreover, as found by the referee, Nunes acted with a dishonest or selfish motive. RR 14.

In the past few years, Nunes has had numerous opportunities to learn from his various disciplinary proceedings. The bar submits that for the protection of the public, Nunes should not be given any further opportunities.

CONCLUSION

The referee's recommendation of a one year suspension should be increased to disbarment.

Respectfully submitted,

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CERTIFICATION OF TYPE FACE AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14 point type and that a true and correct copy of the foregoing Reply Brief was served by regular U.S. mail to Richard L. Rosenbaum, Attorney for David Smith Nunes, One East Broward Boulevard, Suite 1500, Barnett Bank Building, Fort Lauderdale, FL 33301 and a copy to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399 this 12th day of November, 1998.

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