

077

IN THE SUPREME COURT OF FLORIDA
(Before a referee)

FILED 9-11
SID J. WHITE
AUG 18 1998

THE FLORIDA BAR,

Complainant

vs

APPEAL DOCKET:
CASE NO: 91,753
[TFB Case No. 97-30,790(07A)]

WALTER BENTON DUNAGAN

Respondent

INITIAL BRIEF

Submitted by:

MICHAEL L. RAMOS, Esq.
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Attorney for Appellant
Fla. Bar #220612

All references to the transcript shall be designated with the prefix "V"; specifically, "V1" and "V2" refer to Volumes 1 and 2 of the principal proceedings before the Hon. Lance M. Day, held on March 31, 1998; "V3" refers to the transcript of telephonic proceedings had on April 20, 1998; "V4" refers to the transcript of telephonic proceedings had on April 30, 1998; "V5" refers to the transcript of telephonic proceedings had on May 7, 1998; references to the Referee's Report will be prefixed by "RR".

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I and II STATEMENT OF THE
CASE AND OF THE FACTS

Respondent, WALTER B. DUNAGAN, represented WILLIAM LEUCHT, as his attorney for a number of years (V2 p 106 L 15-25, p 107 L 1-2) prior to WILLIAM LEUCHT'S marriage to PAULA LEUCHT. Respondent continued to represent WILLIAM LEUCHT and on occasion represented PAULA LEUCHT on legal matters of joint concern.

On February 27, 1996, a suit for dissolution of marriage was filed, with attorney WALTER B. DUNAGAN representing WILLIAM LEUCHT. (Bar's Exhibit 7), with the consent of PAULA LEUCHT as provided by her attorney Mr. DAVE BECK, ESQUIRE. On March 1, 1996, attorney DAVE BECK representing PAULA LEUCHT filed for an emergency hearing. The hearing was had on March 4, 1996, and the parties stipulated to all matters concerning property and custody.

Attorney WALTER B. DUNAGAN continued to represent WILLIAM LEUCHT, until the letter objecting to said representation of October 24, 1996 from Mr. MARCUS CORNELIUS, ESQUIRE; to-wit: PAULA LEUCHT'S new attorney (Bar's Exhibit 8). On October 31, 1996, attorney WALTER B. DUNAGAN

withdrew. (Bar's Exhibit 7). On November 2, 1996, PAULA LEUCHT filed her complaint with the Bar.

SUMMARY OF ARGUMENT

Husband and Wife had been represented at various times in the past by Respondent. Upon dissolution the Husband chose to retain Respondent as his attorney. The Wife chose to retain Dave Beck as her counsel. The issue of possible conflict was raised ab initio. No prior matter handled by Respondent related to the divorce. The Wife through her attorney Dave Beck consented to the representation of the Husband by Respondent. At an emergency hearing, virtually immediately after filing, substantially all issues were settled with equal division of property. Eight months after the suit was filed the wife engaged a criminal defense attorney to represent her as to a charge of disorderly conduct. On the suggestion of this attorney having nothing to do with the dissolution, Respondent withdrew.

There was no conflict; there was consent; 91 days suspension is inappropriate as discipline, if discipline is warranted.

III ARGUMENT

A. WHETHER THE REFEREE ERRED BY INTERPRETING RULES 4-1.7(b) AND 4.1.9(a) OF THE RULES OF PROFESSIONAL CONDUCT REQUIRING CONSULTATION, AS TO CONFLICT OF INTEREST TO REQUIRE RESPONDENT TO OBTAIN CONSENT FROM FORMER CLIENT AND NOT FROM FORMER CLIENT'S NEW ATTORNEY.

Rules 4-1.7 and 4-1.9 forbid representation of adverse interests, unless there is consultation and consent. Rule 4-1.7(a)(2); 4-1.7(b)(2); 4-1.9(a). The Referee interpreted these rules to mean that PAULA LEUCHT had to be consulted, directly by Respondent, after she had retained attorney DAVE BECK. (V3 p 15 L 6-17). This ruling violates Rule 4-4.2, which requires that an attorney speak only with an attorney where a person is represented by an attorney.

“(At) that point...” (V3 L 10), at a critical moment in time, the Referee found that attorney WALTER B. DUNAGAN was obliged to do what he was forbidden to do.

Prior to consent being a necessity there must be a bona fide conflict. Either conflict between existing clients as to the same subject matter; Florida Bar vs Ethier, 261 So 817 (Fla 1992) (Dissolution); or, a subsequent client as to the same or a similar subject matter where a former client was represented. Sears, Roebuck & Co. vs Stansbury,

374 So 2d 1051 (Fla 5th DCA 1979)(representing manufacturer then consumer on product liability as to the craftsman mower).

B. WHETHER THE REFEREE ERRED BY FAILING TO FIND THE FORMER CLIENT, THROUGH HER NEW ATTORNEY, CONSENTED TO RESPONDENT'S REPRESENTING THE FORMER CLIENT'S HUSBAND AND WAIVED ANY RIGHT TO COMPLAIN.

The affidavit of Attorney Dave Beck, (Respondent's Exhibit 3), stipulated into evidence, (V1 p L 4-25, and V1 p 7 L 1-18) sets forth the fact that he discussed the possibility of conflict, and that PAULA LEUCHT could consent or not consent to the representation of her husband WILLIAM LEUCHT by her former attorney WALTER B. DUNAGAN. PAULA LEUCHT pursuant to consultation and advice of her attorney DAVE BECK granted consent for attorney WALTER B. DUNAGAN to represent the husband which Dave Beck communicated directly to WALTER B. DUNAGAN on several occasions. (V2 p 116, 117 and 118). The progress docket (the Bar's Exhibit 7) shows attorney WALTER B. DUNAGAN remained in the case through change of counsel, and until attorney MARCUS CORNELIUS suggested a conflict, and attorney WALTER B. DUNAGAN withdrew.

The affidavits of Attorney Beck are stipulated into evidence (V1 p 6 L 6-25, p 7 L 1-5). When Attorney Beck undertook the representation of PAULA LEUCHT,

if he believed there was an ethical violation in the representation of WILLIAM LEUCHT by Respondent he was required to report it to the Bar. ABA Code DR1-103, ABA Model Rule 8.3, Fla. Rule 4-8.3(a), or at least object. It is clear from the affidavits of Attorney Beck and his conduct that he adequately discussed the matter with PAULA LEUCHT and assured her of her rights, including the right to consent to the representation by Respondent of WILLIAM LEUCHT, allowing Respondent to remain in the case.

Attorney Marcus Cornelius is clear that conflict of interest was discussed ab initio and the right to require Respondent to withdraw (V1 p 27 L 25, p 28 L 1-18). When the Bar asked PAULA LEUCHT about the matter PAULA LEUCHT testified that Attorney Beck told her such representation could be a conflict and PAULA LEUCHT had the right to require Respondent to withdraw. He did advise PAULA LEUCHT to consent to the continuing representation of WILLIAM LEUCHT by Respondent (V1 p 49 L 22-25, p 50 L 1-12). On cross-examination, PAULA LEUCHT said she made no 'conformed' consent, or, at least none in writing, although she did in fact consent that Respondent remain in the case, for reasons sufficient to her. (V1 p 82 L 14-25, p 83 L 1-9). The Court then said or asked PAULA LEUCHT something to the effect that 'there was then no discussion, was there'. She then agreed

although all testimony is contrary (V1 p 97 L 5-12).

Consent after consultation is clear. *Snyderburn vs Bantock*, 626 So 2d 7 (Fla 5th DCA 1993). There was otherwise a duty to object: to speak out against continued representation. *ibid*. The opposite was done in that Respondent testified he conferred with attorney Dave Beck while representing PAULA LEUCHT on at least three occasions concerning potential conflicts and consent. (V2 p 116 , 117 and 118).

C. WHETHER THE REFEREE ERRED BY INTERPRETING THE RULES OF PROFESSIONAL CONDUCT THAT, THE FORMER CLIENT AFTER CONSULTATION WITH HER NEW ATTORNEY, AND HER FAILURE TO TIMELY OBJECT TO ANY POTENTIAL CONFLICT, WAS NOT CONSENT.

PAULA LEUCHT'S testimony was that she had retained Mr. Beck as counsel prior to going to the restaurant where she was arrested for disorderly conduct on March 2, 1996. (V1 p 42 and 43; her pleadings for the emergency hearing are dated March 1, 1996). From March 1, 1996 until October 31, 1996 when attorney WALTER B. DUNAGAN moved for leave to withdraw there is no suggestion that there was a lack of consent or conflict. This is a period of approximately eight (8) months.

Although attorney Beck represents that express, informed consent was obtained ab initio, it would be unconscionable to remain silent and allow opposing counsel to believe that consent has been obtained, and then later deny this to be the case, and to

affirm that the opposite is true. See *Snyderburn v Bantock*, 625 So 2d 7 (Fla 5th DCA 1993).

In addition, a finding that Attorney David Beck had not obtained consent, proceeded without consent, or overrode the objections of his client rather than seeking the lawful objectives of his client would be a violation of Rules of Professional Responsibility. Rule 4-1.2.

D. WHETHER THE REFEREE ERRED BY INTERPRETING THE RULES OF PROFESSIONAL CONDUCT TO FIND A BONA FIDE CONFLICT, EVEN WHEN THE FORMER CLIENT TESTIFIED THE RESPONDENT'S PRIOR REPRESENTATION WAS NOT MATERIAL TO THE DIVORCE ACTION; FORMER CLIENT SUFFERED NO PROPERTY LOSS, AND ANY DISCLOSURE TO THE THIRD PERSONS WAS TO PREVENT COMMISSION OF CRIME OR PHYSICAL INJURY.

PAULA LEUCHT testified as to each claimed act of prior legal representation by Respondent that the same was not material to the divorce proceedings, and no confidential information was obtained that related to the divorce proceedings. (Bay-Walsh, V1 p 59 L 10-25, p 60 L 1-25, p 61 L 1-25; Dept. of Transportation, V1 p 62 L 2-25, p 63 L 1-25, p 64 L 1-25, p 65 L 1-4; Bill of Sale, V1 p 65 L 5-25, p 66 L 1-25, p 67 L 1-6, fictitious name, p 67 L 7-25, p 68 L 1-17).

The Referee found that PAULA LEUCHT lost no property and suffered no

prejudice out of any conflict, which might have existed. (Report of Referee p 6 second paragraph from bottom).

There was a letter from attorney WALTER B. DUNAGAN to the attorney for the City of Port Orange; and the identical letter was sent to the Port Orange Police. Bar Exhibit 4 and 5. The letters are dated February 23, 1996 and inform the recipient of the pending termination of two employees as of February 29, 1996, so that on March 1, 1996 they would no longer be welcome, and would be trespassing. The first sentence of the next to last paragraph of the letter says that “(y)ou are being notified in order to prevent a breach of peace from occurring.”

A violation of 4-1.6 for disclosing confidential information is not charged. (See paragraph 18 of Complaint. The Bar does refer to 4-1.6 in Paragraph 10 and 15). The disclosure made is permitted by 4-1.6(b)(1). The Referee found the (irrelevant) 4-1.6 was used by attorney WALTER B. DUNAGAN as a defense (RR #23 p 4). However, the Referee uses 4-1.6(b)(2) only as to death or substantial bodily harm, and omits reference to 4-1.6(b)(1) which refers to any crime - which disorderly conduct is. *ibid*. In fact, the Referee finds that attorney WALTER B. DUNAGAN was responsible for the arrest of PAULA LEUCHT (*ibid*), even though Ms. Leucht was charged with disorderly conduct and not trespass. The stress that the Bar placed on 4-1.6, and the

deviation from “(b)(1)” to “(b)(2)” was highly material to the findings of the Court, and materially prejudiced the Court and respondent.

E. WHETHER THE REFEREE ERRED BY INTERPRETING THE RULES OF PROFESSIONAL CONDUCT TO REQUIRE RESPONDENT TO SERVE A 91 DAY SUSPENSION ON A CONFLICT WHICH IN PART WAS CAUSED BY THE CONDUCT OF ACQUIESCENCE BY THE FORMER CLIENT, WHEN THE PRIOR REPRESENTATION WAS NOT MATERIAL TO ANY THEORETICAL CONFLICT, WHERE THE FORMER CLIENT SUFFERED NO PROPERTY LOSS, OR ANY APPARENT PREJUDICE IN HER DIVORCE CASE, AND THE RESPONDENT RECEIVED NO FINANCIAL BENEFIT.

Suspension for 91 days is not appropriate when there is a possibility of conflict and before an action is taken, everyone secures counsel to represent them, and all consent to representation by such counsel of their own choosing. At the initial stage, there was counsel and consent to what might otherwise appear to be conflict. (V1 p 42 and 43; Respondent’s Exhibit 3). There is no suggestion of any alleged conflict until eight months after the divorce proceeding had begun.

There is no evidence of any property loss by PAULA LEUCHT nor any financial gain by Respondent.

CONCLUSION

The Referee is attempting to establish new law that consent can only be obtained directly from the former client and suggests that such consent be in writing. Although

this may be attractive for a future amendment of the Rules of Professional Conduct, such is not the law today.

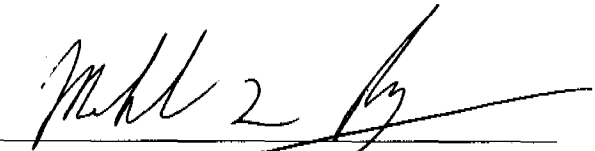
In reviewing the facts of this case in their entirety, the Respondent had represented PAULA LEUCHT on matters which did not pertain to the dissolution of marriage; Respondent had consent or believed he had consent from his former client; through her new attorney; PAULA LEUCHT was aware of her rights but consented to her husband being represented by Respondent for a period of no less than eight months; and lastly there was no evidence of any property or legal rights being lost by the former client nor the respondent receiving financial gain from any alleged conflict. With such a factual scenario the interpretation of the Rules of Professional Conduct by the Referee are unnervingly harsh, as is the punishment.

This Honorable Court should reverse the Referee on his interpretation of consent, find for the Respondent, or reduce the punishment to fairly address the facts of this case.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to Jan Wichrowski, Trial Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando,

Florida 32804, and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar,
650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 17th day of
Aug, 1998.

A handwritten signature in black ink, appearing to read "M L Ramos", written over a horizontal line.

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FILED

SID J. WHITE

AUG 18 1998

TRANSMITTAL MEMO

DATE: AUGUST 17, 1998

TO: THE SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
500 SOUTH DUVAL STREET
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FROM: MICHAEL L. RAMOS, ESQ.
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RE: THE FLORIDA BAR VS DUNAGAN
CASE NO: 91-753
[TFB CASE NO: 97-30,790 (07A)]

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

TRANSMITTED HERewith FOR FILING OR OTHER APPROPRIATE ACTION AS INDICATED,
PLEASE FIND THE FOLLOWING:

1. ORIGINAL AND SEVEN (7) COPIES
OF INITIAL BRIEF

VERY TRULY YOURS,

MICHAEL L. RAMOS

MLR:MZ
ENC.