

077

IN THE SUPREME COURT OF FLORIDA
(Before a referee)

FILED
SID J. WHITE
✓ SEP 21 1998

THE FLORIDA BAR,

Complainant

vs

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

WALTER BENTON DUNAGAN

Respondent

REPLY BRIEF

Submitted by:

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TABLE OF CONTENTS

	PAGE
STATEMENT OF CASES AND FACTS	1
RESPONSE TO FLORIDA BARS ARGUMENT POINT I	2
RESPONSE TO FLORIDA BARS ARGUMENT POINT II	4
CERTIFICATE OF SERVICE	6

TABLE OF CITATIONS

CASES CITED	PAGE
The Florida Bar v Wilson 23 Fla. L Weekly 5227 (Fla. April 16, 1998)	5
RULES OF APPELLATE PROCEDURE	
Fla. R. App P. 9.210(c)(d)	1
RULES REGULATING THE FLORIDA BAR	
Rule 4-4.2	3
OTHER AUTHORITIES AND TREATISES	
Professional Ethics of the Florida Bar 3rd Ed.	4
Opinion 73-3 April 30, 1973	4
THE LAW OF LAWYERING	
2d Ed Hazard v Hodges sec. 1.9:105	4

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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Now comes Respondent, WALTER B. DUNAGAN, and for his Reply Brief shows:

1. STATEMENT OF CASE AND FACTS.

In accordance with Fla. R. App P. 9.210(c) and (d) it is provided that any Answer Brief should generally omit a statement of the Case and the Facts, unless necessary for adequate review. Reply briefs are wholly for the rebuttal of argument. It is respectfully submitted that the "Statement of Facts" in the Answer of the Florida Bar is false in material part, argumentative, and requires rebuttal.

A. On page 4 of the Answer Brief the Bar alleges in their first sentence that attorney Walter B. Dunagan represented both husband and wife in the formation of a restaurant business. (It is noted that the citations of the transcript here and elsewhere do not support the matters asserted.) The testimony of both parties is that all of the leases, occupational licenses, restaurant licenses, supplier agreements, tax filings, etc., were all completed and the restaurant was up and running before WILLIAM LEUCHT came to his attorney and asked that a Bill of Sale be executed to transfer 'Biscuits 'N' Gravy 'N' More' to himself and his wife. (V 1 p 115 L 5-4; V 1 p 34 L 16-21).

B. Next the Bar lists as part of its Statement of Facts that Respondent mailed two letters: one to the City Attorney and one to the Police, warning of a possible breach of the peace. In the statement of facts it is alleged that confidential information about

PAULA LEUCHT was disclosed and the Bar says nothing about what this confidential information was, or how it caused PAULA LEUCHT to be arrested for disorderly conduct. (Page 5 of the Answer Brief).

2. RESPONSE TO FLORIDA BARS ARGUMENT POINT I

In the Initial Brief Respondent lists every possible point of conflict with PAULA LEUCHT, as alleged by the Florida Bar, and as to each, she responds that no confidential information was gained and the matter was wholly unrelated to her dissolution of marriage. (Respondent's Initial Brief p 7, D, first paragraph). These answers by the alleged victim that past representation by the Respondent as her attorney were not material to her divorce case makes the Florida Bars argument that Respondent's representing the husband is a "fundamental violation", (page 11 of the Answer Brief), to be erroneous.. As does the Florida Bars argument on Page 11 of their Answer Brief that the Respondent was contesting the "legality" of the Bill of Sale, when it was at most submitted that the parties had failed to implement the document and had repudiated it. (V2 p 113, 114 and 115 - never implemented; V 2 p 120 L 6-13 Bill of Sale - irrelevant not used; V2 p 148 L 7-25, p 149 L 1-19. PAULA

LEUCHT, never based any claim in her divorce on the Bill of Sale.

The Florida Bar on page 12, of their Answer Brief asserts that the ownership of the restaurant was a central issue in the divorce. The citation for this proposition is the opinion of PAULA LEUCHT. The counter petition filed by the Wife in her divorce was introduced in Court and examined with PAULA LEUCHT (V1 p 74 L 1-5). The counter petition claimed for equitable distribution only, without any reference to Bills of Sale, and ownership, (V 1 p 76 L 10-23). Basically the property was settled by an equal division, at the inception of the litigation, by stipulation. (V2 p 126 L 16-26; V 2 p 131 L 24-25, p 122 L 1-10).

What rings even more hollow is the Florida Bars argument that Respondent should contact PAULA LEUCHT when he is aware his former client has counsel which would result in direct contact of a person represented by another in violation of Rule 4-4.2.

The Florida Bar on page 13 of their Answer Brief refers to PAULA LEUCHT'S claimed lack of consent. The Bar fails to address any of the matters set forth in Respondents Initial Brief concerning PAULA LEUCHT having retained Mr. Beck as her attorney and the necessity of the Respondent to deal directly with him and not his former client PAULA LEUCHT. The Initial Brief is replete with citations from the

testimony of PAULA LEUCHT that the dissolution had no relation to any prior matters. (Respondent's Initial Brief p 7, D, first paragraph.) Where there is no relationship between the present and the prior matter, no conflict exists. Professional Ethics of the Florida Bar (3d Ed). Opinion 73-3, April 30, 1973; and, The Law of Lawyering 2d Ed Hazard v Hodes sec. 1.9:105.

The Florida Bar on page 15 of their Answer Brief assert that the intent of the letters to the City Attorney and City Police (Bars Exhibit 4&5) was stated for the first time at the hearing before the referee to be an intent to prevent crime. The letters speak for themselves. It is expressly set forth therein that breach of the peace or disorderly conduct were feared. The fears were justified in that PAULA LEUCHT was arrested for disorderly conduct, and the police feared that physical violence was imminent.

3. RESPONSE TO FLORIDA BARS ARGUMENT (Point II)

The Florida Bar argues 91 days suspension is reasonable punishment and cites on Page 22 of their Answer Brief the factual finding of the Referee that "Ms. Paula Leucht suffered no prejudice from the Respondents actions"! Thus, the Respondent is guilty of a technical violation which resulted in no harm to his former client.

PAULA LEUCHT finally objected to Respondent representing her husband 8

months after the divorce was filed. Upon objection, the Respondent immediately withdrew. Thus, the Florida Bar's citation of *The Florida Bar v Wilson*, 23 Fla. L. Weekly 5227 (Fla. April 16, 1998) is not applicable, where in *Wilson* the attorney kept on filing motions and representing his client.

The Florida Bar in its reliance on PAULA LEUCHT to be a victim pays no attention to PAULA LEUCHT'S consultation with her attorney Mr. Beck and their decision to let the Respondent be the attorney for her husband, as testified to by PAULA LEUCHT:

“We talked about him representing Bill and he had previously represented me, or us. And Mr .Beck said, “I don't have a problem with Walter Dunagan. There are better lawyers out there to be up against than him. We might come out better if he represents Bill than if we had Bill go and get somebody else.”

See Vol. 1 page 92.

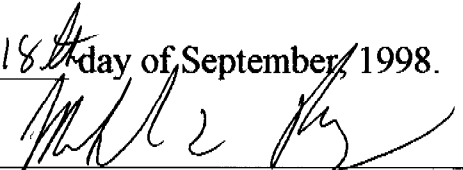
It appears from the record PAULA LEUCHT consented to Mr. Dunagan representing her husband when it was in her interest, but when no longer in her interest she complains to the Florida Bar who chose to believe she is a victim and that her own attorney Mr. Beck is to be ignored; to- wit his affidavit, Respondent's Exhibit 3,

where he claims he conferred with both PAULA LEUCHT and Respondent on any alleged potential conflicts.

Lastly, the Respondent, aware of his past record, was and is desirous of having no conflicts with his clients. In the present case the ex-client PAULA LEUCHT has manipulated the judicial system in such a manner as to allow Respondent to represent her husband while reserving the right to complain to the Florida Bar alleging conflict and mistreatment. The Florida Bar has aided and abetted this situation by ignoring Mr. Becks position as to conferring with his client PAULA LEUCHT and allowing Respondent to represent her husband. Under the hereinabove circumstances of this case a suspension of 91 days is overly harsh and not justified.

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 F. Harkness, Jr. Executive Director, The Florida Bar and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 18th day of September 1998.


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