

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID ADOLPHUS BARTHOLF,

Respondent.

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Case No. SC94897

TFB File No. 97-00050-04D

ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE AND  
ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief of Complainant is submitted in 12 point Courier New font, a font that is not proportionately spaced, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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PRELIMINARY STATEMENT

Appellant, **David Adolphus Bartholf**, will be referred to as Respondent, or as Mr. Bartholf throughout this brief. The Appellee, **The Florida Bar**, will be referred to as such, or as the Bar.

STATEMENT OF THE CASE AND FACTS

The Florida Bar would adopt the representations of the Respondent/Appellant in his Statement of the Case and Facts as being accurate.

### SUMMARY OF ARGUMENT

Upon agreement of the parties, no opposition was raised to the Motion for Summary Judgment filed by the Bar. The parties hereto agreed that the minimum discipline recommended by the Referee should be a public reprimand.

An evaluation of Respondent by FLA, Inc., indicated Respondent has an alcohol problem and intensive out-patient treatment under an FLA, Inc., contract should be ordered.

At the time of the hearing before the Referee, it was announced by the Bar that the parties had agreed to submit the FLA, Inc., evaluation, along with three other reports not recommending treatment, to the Referee for consideration.

Upon evaluating the reports, the Referee found Respondent does have an alcohol problem and recommended a term of probation for one (1) year with Respondent contracting with FLA, Inc., as a condition.

The recommendation of the Referee was grounded upon competent evidence and cannot be seen as an abuse of discretion. As the Court's finder of fact, the Referee was charged with resolving any conflicting evidence. The recommendation of the Referee resolved the conflicting reports against the Respondent and ordered a conditional probation.

Since the recommendation was based upon competent evidence and is not clearly erroneous, the Referee's findings and recommendation should be affirmed. Respondent should receive a public reprimand and be placed on probation for one year with the condition he contract with FLA, Inc.



## ARGUMENT

The Florida Bar moved for Summary Judgment in this case which was unopposed by Respondent. At the hearing before the Referee on the Bar's motion, the Bar announced an agreement that had been reached between the Bar and counsel for Respondent. As represented to the Referee, the agreement was that upon an entry of summary judgment and a finding of guilt, Respondent and the Bar would stipulate that the minimum appropriate discipline should be a public reprimand.

Based upon an FLA., Inc., evaluation of Respondent, the Bar argued Respondent should be placed on probation with the condition he enter into a contact with FLA, Inc., that incorporated the recommendations of its evaluation. Respondent opposed such probation.

The parties agreed to submit a total of four reports or evaluations addressing whether or not Respondent had an alcohol problem to the Referee and allow the Referee to make a finding on this question and any appropriate recommendation.

After the Referee reviewed the evaluations, he found that Respondent does in fact have an alcohol problem and recommended Respondent be required to contract with FLA, Inc., for treatment

and be placed on probation for one (1) year and ordered to comply with the conditions of the recommended contract.

Respondent disagrees with this finding and recommendation of the Referee and has appealed. Respondent is asking the Court to review the evaluations, reweigh this evidence, and reverse the recommendation of the Referee.

It is well established that a Referee's finding of fact will be upheld unless it is clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So.2d 765, 766 (Fla. 1990). On review of a Referee's findings of fact, this Court presumes such findings to be correct. The Court neither reweighs the evidence or substitutes its judgment for that of the Referee so long as there is competent substantial evidence in the record to support the Referee's findings.

Respondent argues that since the Referee in this case reviewed a record consisting of written reports or evaluations, the presumption afforded the Referee's findings is only slight and this Court should not hold Respondent to a burden of proving the findings were clearly erroneous or lacking in evidentiary support. West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958).

In West Shore Restaurant Corp., the evidence before the trial judge was not disputed. The Court held that in such a case the presumption of correctness of the rulings of the chancellor are not as strong as where the evidence is conflicting. West Shore Restaurant Corp. at 126.

In The Florida Bar v. Hoffer, 383 So.2d 639 (1980), this Court ruled that any conflicts in the evidence are properly resolved by the Referee sitting as this Court's finder of fact.

In the instant matter, the findings of the reports or evaluations concerning whether Respondent has a drinking problem conflict as to their findings. It is the duty of the Referee to resolve the conflicts sitting as this Court's trier of fact.

Respondent argues that the record evidence does not support the recommendation. The evaluations were submitted to the Referee by joint stipulation so there can be no argument as to their competency. A review of these documents demonstrates the existence of substantial evidence to support the finding by the Referee that Respondent does have an alcohol problem.

In examining the Referee's recommendation, Respondent's full history should be taken into account. While Respondent argues that his conduct was unconnected to the practice of law and as a

citizen he was sanctioned criminally, he is at all times a lawyer and his actions reflect directly on the legal profession.

The first report dated January 26, 1996 (1997) was an evaluation done by Gateway Community Services as a condition of Respondent's criminal probation. The evaluation was a one hour contact resulting in a statement that client (Respondent) found not to be in need of services at this time (App Exhibit C).

On January 21, 1997, Respondent was evaluated by Dr. Kenneth Thompson, M.D., who specializes in Addiction Medicine (App Exhibit F). This evaluation resulted in a three-page document. Within Dr. Thompson's report, the following findings were presented: Respondent had been drinking prior to the golf course altercation leading to his arrest; another arrest occurred four or five years prior when he was "really drunk" and caught his estranged wife walking with another man; Respondent likes the effect of alcohol . . . "it relaxes him" and admits it would take "some will power to quit."; Respondent attempted to quit drinking after a friend described them both as "functional alcoholics"; Respondent has a brother who had alcohol problems and a son with a DUI.

Dr. Thompson directly addressed a key issue, that being Respondent's limited insight into the fact that alcohol was

associated with the two incidents leading to his arrest on criminal charges. Dr. Thompson also noted that Respondent appears to be drinking to cover up feelings and admits that there has been some impaired difficulty with discontinuing the alcohol. Based on these factors, Dr. Thompson found Respondent does have a problem with alcohol and recommended treatment.

Respondent was again evaluated on April 16, 1998, by Dr. William Carriere, M.D. (App Exhibit D). Dr. Carriere noted that Respondent does not meet the criteria of alcohol dependence. He also points out that Respondent has had episodes of behavior which have been aggravated by alcohol. Dr. Carriere goes on to say that Respondent is willing to cease all alcohol consumption as well as take antabuse. The report notes Respondent objects to a requirement to attend 90 Alcoholic Anonymous meetings in 90 days. No where in the report does it specifically state that Respondent does not have a problem with alcohol or that Respondent should not received treatment. Dr. Carriere only notes Respondent would gain little from forced meetings.

The last evaluation was performed on June 11, 1999, by Dr. David A. Orea, M.D. (App Exhibit E). While Dr. Orea's evaluation found Respondent does not meet the criteria for an alcohol disorder, it did bring out a discrepancy in Respondent's

representation. Dr. Orea notes Respondent says he only drinks on Fridays when playing golf, and has grapefruit juice and vodka. Respondent's representation to Dr. Thompson was that he had consumed three beers prior to the golf course incident in 1996.

The results of the reports are conflicting and the Referee resolved the conflict in giving creditability to Dr. Thompson's report. The evidence contained in Dr. Thompson's report is clearly sufficient to support the Referee's recommendation.

This Court has long held that there are three primary purposes in disciplining attorneys. The discipline should be: (1) fair to the public both by "protecting the public from unethical conduct and . . . not denying the public the services of a qualified lawyer"; (2) fair to the attorney by "being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation"; and (3) "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, 132 (Fla. 1970).

The public reprimand with a conditional probation meets all three criteria of Pahules. Respondent has exposed himself to criminal sanctions on two occasions involving alcohol and in each situation he involved a member of the public.

The Referee's recommendation is both an attempt to discipline Respondent and to reform his behavior so as to allow him the opportunity to be a productive member of the Bar.

In this matter, the Referee made a finding that Respondent has an alcohol problem and the finding was based upon competent evidence. In making this finding, the Referee was presented conflicting evidence which he resolved under his charged duty as this Court's finder of facts. Since the Referee's recommendation was not clearly erroneous or an abuse of discretion, it should be affirmed.

### CONCLUSION

The Referee's recommendation that Respondent be placed on probation with a condition that he contract with FLA, Inc., was based upon competent, substantial evidence. The Referee resolved conflicting evidence in his recommended order which cannot be argued as erroneous or an abuse of discretion. The Report of Referee should be affirmed.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. SC94897, TFB File No. 97-00050-04D, has been mailed by certified mail #7099 3400 0000 5632 0213, return receipt requested, to David Adolphus Bartholf, Respondent, c/o Robert Stuart Willis, Counsel For Respondent, at his record Bar address of Willis & Ferebee, 503 East Monroe Street, Jacksonville, Florida 32202-2838, on this 19th day of June, 2000.

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