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IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR,

Complainant,

vs.

CASE NO.: SC94897
TFB FILE NO.: 97-00050-04D

DAVID ADOLPHUS BARTHOLF,

Respondent.

Review of the Report of Referee

INITIAL BRIEF OF THE RESPONDENT IN SUPPORT OF HIS PETITION SEEKING REVIEW OF A PORTION OF THE RECOMMENDED DISCIPLINE.

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CERTIFICATE OF INTERESTED PERSONS

Norman J. Abood, Esquire	Respondent's Prior Counsel
Carlos Benavides	Original Complainant
The Honorable C. McFerrin Smith, III	Referee
James N. Watson, Jr., Esquire,	Assistant Staff Counsel The Florida Bar

CERTIFICATION OF TYPE SIZE AND STYLE

Counsel for Respondent, David Adolphus Bartholf, hereby certifies that the instant brief has been prepared with Courier 12 point 10 pitch, a font that is proportionately spaced.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Respondent, David Adolphus Bartholf, will be referred to herein as "Mr. Bartholf" or as "Respondent". The Complainant, The Florida Bar, will be referred herein as "The Bar".

Referenced to the Appendix will be indicated by "App" with further reference to the letter of the exhibit.

STATEMENT OF THE CASE AND FACTS

This case began on June 24, 1996, at a Jacksonville golf course. Respondent, who was 66 years of age at the time, became involved in an altercation with a golfer in the foursome immediately preceding his on the course. As a result of the altercation, the Respondent ultimately pled guilty to a charge of simple battery, a misdemeanor under Florida law, whereupon he was adjudged guilty and sentenced to probation for a period of one (1) year. That probation included a requirement that he attend a Court sanctioned class on anger management and also undergo an evaluation by Gateway Community Service (App. Exhibit C) to evaluate his need, if any, for alcohol treatment especially in light of the golf course incident. That evaluation resulted in the finding that there was no alcohol problem which required treatment.

In February of 1999, The Bar filed its Complaint (App. Exhibit A) based on that incident and the resulting misdemeanor conviction alleging violations of Rule 3-4.3 (misconduct and minor misconduct) and Rule 4-8.4(b), of the Rules of Professional Conduct of The Florida Bar (commission of a criminal act reflecting on the honesty, trustworthiness, or fitness).

On February 28, 2000, the Referee held final hearing. He was advised that counsel for the Respondent did not oppose The Bar's MOTION FOR SUMMARY JUDGMENT and, further, the parties agreed that an appropriate discipline should be a public reprimand. However, the parties disagreed on whether Respondent should additionally be

placed on probation for one (1) year and required to undergo alcohol treatment under the supervision of FLA, Inc.

Since there was no oral testimony taken, it was agreed that the Referee would make that determination based upon the written record before him. Specifically, this record included the above referenced evaluation by Gateway Community Services (App. Exhibit C), two (2) subsequent, independent evaluations (App. Exhibits D and E) which reached the same result, and one (1) contrary evaluation (App. Exhibit F) that had been arranged by FLA, Inc. These evaluations formed the basis for the recommended discipline and are provided herewith as part of the Appendix.

The Referee published his report on March 21, 2000, (App. Exhibit B) which recommended "a public reprimand" and a requirement that Respondent contract with FLA, Inc., for alcohol treatment and be placed on probation for one (1) year in order to ensure compliance with the terms and conditions of the recommended contract. There was also a requirement of payment of the costs of The Florida Bar in these proceedings.

Respondent has since filed his PETITION FOR REVIEW which addresses only that portion of the discipline which requires the alcohol treatment and related probation. There are no other issues as to guilt or other features of the recommended discipline.

SUMMARY OF THE ARGUMENT

Respondent is a 70 year old sole practitioner. The basis for this Bar action arose on June 24, 1996, on a Jacksonville golf course where he became involved in an altercation with another golfer. Ultimately he pled guilty to a charge of simple battery, a misdemeanor under Florida law, whereupon he was adjudged guilty and sentenced to probation for a period of one (1) year. Obviously, this episode had nothing whatsoever to do with his practice of law. He was sentenced to one (1) year probation which he has successfully completed. This probation included requirements that he complete an anger management course and that he undergo an evaluation (App. Exhibit C) to determine what, if any, alcohol treatment might be appropriate. That evaluation yielded a result that alcohol was not his problem and, accordingly, needed no treatment therefor.

Florida Lawyers Assistance, Inc., subsequently arranged a second evaluation (App. Exhibit F) that concluded that he did have an alcohol problem that merited treatment. Since that FLA, Inc., evaluation, he has had two (2) additional evaluations (App. Exhibits D and E) by qualified professionals, each of which have concluded that there is not an alcohol problem which warrants treatment.

The case before the Referee was resolved by consent to a Summary Judgment on the issue of guilt and agreement between the parties that a reprimand (now, necessarily public) was the

appropriate discipline. The parties disagreed on whether there should be a condition of alcohol treatment. Ultimately, the Referee has recommended (App. Exhibit B) to this Court that Respondent be required to undergo alcohol treatment under the supervision of FLA, Inc., with further requirement that he be placed on probation for a period of one (1) year to ensure compliance.

It is this condition regarding alcohol treatment that is the only subject of this appeal. This Court clearly has ultimate responsibility for fixing sanction. With three (3) of four (4) evaluations yielding a result that concluded that no such treatment was necessary, especially in the absence of any evidence that alcohol has ever impacted his performance as a lawyer, this portion of the discipline is not supported by the record. Respondent's strenuously objects to being publicly labeled as having an "alcohol problem" when the evidence is otherwise and similarly objects to being required to undergo an intense program of treatment for an alleged alcohol problem, when the weight of the record does not support it.

ARGUMENT

As substantially reflected by the Report of the Referee (App. Exhibit B) the issues in this case were almost wholly uncontested. Respondent consented to the entry of Summary Judgment on the issue of guilt and each of the parties agreed that the appropriate primary discipline should be a reprimand. The Bar has filed no cross-appeal and thus the only issue before this Court is that portion of the recommended discipline which would require Respondent to contract with FLA, Inc., for treatment of an alleged "alcohol problem" and be placed on probation for one (1) year in order to ensure compliance with the terms and conditions of the recommended contract. For the reasons that follow, Respondent seeks this Court's disapproval and deletion of that portion of the recommended discipline which is found at Paragraph IV, Subpart (B):

> I find that the evaluations provided by the parties do sufficiently establish Respondent has an alcohol problem and Respondent should be required to contract with FLA, Inc., for treatment. (If referred to FLA, Inc., Respondent should be placed on probation for one (1) year and ordered to comply with terms and conditions of the recommended contract.)

As seen, the Referee "finds" that the evaluations sufficiently establish that Respondent has an alcohol problem and that "finding" supports the recommended discipline. Such "finding", however, does not carry the presumption of correctness that would be overcome only by a showing that the finding was "clearly erroneous". See e.g., Florida Bar v. Barcus, 697 So.2d 71, 74 (Fla. 1997). If employed here, that deferential standard would essentially preclude

this Court from re-weighing the evidence and substituting its judgment on discipline for that of the Referee. There are at least two (2) reasons why this Court's authority cannot be so constrained.

First, the standard does not apply to a factual "finding" made solely on the basis of documentary evidence which is equally available to this Court. In West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958), this Court explained:

> The presumption of correctness due the ruling of a Chancellor based on a written record, where his effort has been directed to determining the probative force and legal effect of the written record, is slight for the reason that we have everything before us that he had before him and we have the same opportunity to weigh it as did the Chancellor. [emphasis supplied]

101 So.2d at 126. See also L & S Enterprises Inc. v. Miami Tile and Terrazzo Inc. 148 So.2d 299 (Fla. 3rd DCA 1963) (testimony presented by deposition); Dalton v. Dalton, 304 So.2d 511 (Fla. 4th DCA 1974) (intent of parties determined from contract rather than testimony).

Second and more fundamentally, this Court has repeatedly held that its scope of review on disciplinary recommendations is broader than that afforded to findings of fact because it bears the ultimate responsibility to determine the appropriate discipline. See Florida Bar v. Rubin, 709 So.2d 1361, 1364 (Fla. 1998); see also Florida Bar v. Carricarte, 733 So.2d 975, 978 (Fla. 1999).

Here, the Referee has recommended that Respondent undergo a one (1) year period of alcohol treatment based upon a "finding" of

an "alcohol problem". The question for this Court is whether the record evidence supports that recommendation. See Florida Bar v. Centurion, 25 Fla. L. Weekly, S344, S345 (Fla. May 4, 2000); see also Florida Bar v Carricarte, 733 So.2d at 975. The answer is, it does not.

Respondent, now a 70 year old sole practitioner, was 66 years of age when this case began. On June 24, 1996, at a local Jacksonville golf course, Respondent became involved in an altercation with a golfer in the foursome immediately preceding his on the course. Although it could well be debated who instigated the incident, that was not part of the proceedings below and will not be argued here. Rather, the admitted fact is that Respondent ultimately pled guilty to a charge of simple battery, a misdemeanor under Florida law, whereupon he was adjudged guilty and sentenced to probation for a period of one (1) year. Importantly, there was nothing about the episode that related in any way to the practice of law.

Respondent has since successfully completed the one (1) year term of probation that was imposed including attendance at a Court ordered class on anger management. As part of that same probation, he was screened by Gateway Community Services (App. Exhibit C) specifically to evaluate his need, if any, for alcohol treatment especially in light of the golf course incident. As the Report of Referee (App. Exhibit B) correctly describes, that evaluation resulted in a finding "that treatment for 'alcohol problem' was unnecessary".

Shortly after that evaluation by Gateway Community Services (App. Exhibit C), Respondent was evaluated again, this time by an FLA, Inc., evaluator, Dr. Kenneth W. Thompson (App. Exhibit F). That second evaluation was conducted in January of 1997 and concluded that Respondent was a proper candidate for the type of alcohol treatment recommended by the Referee. Thompson's evaluation was the only one that has ever reached that conclusion. And, that report is now nearly three and one-half (3 1/2) years old.

The intervening time has produced no conduct, complaints, or other evidence of an "alcohol problem". Indeed, the evidence accumulated since that time includes evaluations by two (2) separate physicians, Dr. William Carriere on December 23, 1997 (App. Exhibit D), and Dr. David A. Orea in June of 1999 (App. Exhibit E), who have found no need for alcohol treatment.

He met with Dr. William Carriere on December 23, 1997, and supplemented that initial meeting with several additional telephone conversations. Dr. Carriere also obtained relevant medical history through discussions with Respondent's regular family doctor. Based on his evaluation, Dr. Carriere concluded that Respondent would "gain little or nothing from forced meetings with AA".

A similar result was found by Dr. David A. Orea who conducted a psychological evaluation of Respondent in June of 1999. In relevant part, Dr. Orea concluded "In my opinion, Mr. Bartholf does not meet the criteria for an alcohol dependence disorder and nothing would be gained by forcing him to attend any type of

alcohol program."

In summary, the Respondent has been evaluated on four (4) separate occasions (App. Exhibits C, D, E and F). Of those four (4), only the one (1) arranged by FLA, Inc., (App. Exhibit F) three and one-half (3 1/2) years ago found that he had a "alcohol problem" that would support the treatment that has been recommended. The other three (3) evaluations (App. Exhibits C, D, and E) and the absence of any alcohol related complaint regarding his performance as a lawyer persuasively argue and weigh <u>against</u> the recommended discipline.

As noted earlier, this Court has reserved unto itself ultimate responsibility to determine appropriate discipline. There is agreement between the parties here that a reprimand is a proportionate discipline. What is at issue, a one (1) year course of alcohol treatment, might be considered as a relatively trivial matter when compared to the weighty --- often life and death --- nature of this Court's usual responsibilities. But, to this 70 year old practitioner, it is a very important matter.

He is very willing to admit, as he has, that he committed the misdemeanor offense of battery. The commission of that misdemeanor, though unrelated to his law practice, is the proper subject of Bar discipline in the form of a reprimand.

However, he is unwilling to be publicly labeled as having "an alcohol problem" and subjected to an intense (90 AA meetings in 90 days) period of rehabilitation when that recommendation is unsupported by the record evidence.

To be approved by this Court, any sanction must serve three (3) purposes: The judgment must be fair to society, be fair to the attorney, and sufficiently deter others from similar misconduct. Florida Bar v. Clement, 662 So.2d 690, 699 (Fla. 1995).

The issue before this Court seemingly has little to do with deterrence. Similarly, being "fair to society" is not implicated since the basis for the violation is wholly unconnected to Respondent's performance as a lawyer. As a citizen, he has previously been sanctioned by the misdemeanor trial court. In this Bar action, he is being additionally sanctioned by public reprimand. But, in the complete absence of any indication that his professional service to his clients or the Courts is now, or ever has been, impaired by an alcohol problem "fairness to society" seemingly has no connection to the contested discipline.

What is at the heart of this issue is the final consideration, fairness to the attorney. Regardless of what may be enlightened modern notions of alcoholism as a disease, it would be fundamentally unfair to this practitioner that he be publicly labeled as having "an alcohol problem" and requiring, as part of a Bar discipline, to involuntarily submit to a lengthy and intensive period of "rehabilitation", when that discipline is unsupported by the record evidence. The results of three (3) out of four (4) evaluations confirm that the contested discipline is not warranted. There is no evidence that Respondent's discharge of his professional responsibility has ever been affected by "an alcohol problem". Under all these circumstances, the

recommended discipline is unsupported by the record and should be deleted.

CONCLUSION

For the reasons expressed, Respondent respectfully prays this Court disapprove that portion of the Report of the Referee which would require him to contract with FLA, Inc., for alcohol treatment and be placed on probation for a period of one (1) year in order to ensure compliance with that contract. He takes no issue with any other portion of Report of the Referee.

RESPECTFULLY SUBMITTED this 26 day of May, 2000.

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CERTIFICATE OF SERVICE

I **CERTIFY** that a copy of the foregoing has been furnished to James N. Watson, Jr., Esquire, Assistant Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 by mail delivery this 26 day of May, 2000.

ROBERT STUART WILLIS

INDEX TO APPENDIX