ORIGINAL

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DAVID ADOLPHUS BARTHOLF,

Respondent.

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

Review of the Report of Referee

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

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CERTIFICATE 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. A 3" diskette is not included as computer tower compatible with only 5 1/4" diskette .

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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".

ARGUMENT IN RESPONSE AND REBUTTAL TO THE ANSWER BRIEF

The statement of the case and facts in Bartholf's initial brief was accepted as accurate by The Bar. That statement and the related arguments made clear that the only record evidence bearing on the issue before this Court were the four written reports or evaluations regarding the need for alcohol treatment. There was no live testimony or other presentation made to the Referee.

Nonetheless, The Bar argues that this Court should employ a "clearly erroneous" standard to review what it describes as the Referee's "finding of fact". Of course, application of that deferential standard of review to the recommended discipline at issue here would be directly contrary to this Court's previous authority. This Court has consistently 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 e.g. Florida Bar v. Rubin, 709 So.2d 1361, 1364 (Fla. 1998); see also Florida Bar v. Carricarte, 733 So.2d 975, 978 (Fla. 1999).

However, because the Referee couched his recommendation in terms of a "finding", The Bar attempts to characterize that as a "finding of fact" subject to the deferential standard. That characterization is misapplied.

Rather, the Referee's action is more accurately characterized as determining the probative force and legal effect of the record before it; i.e., whether the record evidence justifies and

adequately supports the recommended discipline. That recommended discipline (alcohol treatment and a related period of one year probation) is essentially subject to de novo review by this Court.

That is especially so where the only evidence presented to the Referee is exactly the same written evidence presented in the Appendix to Bartholf's Initial Brief. The Referee had no advantage over this Court in assessing the credibility or weight of the evidence as it might when the testimony is live and the Referee, unlike this Court, could see and hear the witnesses.

Accordingly, there is only slight deference owed to the Referee's recommended discipline.

That logically self-apparent proposition was articulated in West Shore Restaurant Corp. v. Turk, 101 So.2d 123 (Fla. 1958) as cited in Bartholf's Initial Brief. In its answer, The Bar has attempted to distinguish West Shore by arguing "The evidence before the trial judge [in that case] 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." [Answer Brief at Page 5]

The Bar's answer substantially misreads the holding in West Shore. Like here, there was only a written record in that case. There, the written record was in the form of pleadings, affidavits, and depositions which were the same record before the Florida Supreme Court. This Court acknowledged that "much of the evidence" was not disputed.

Here, the same could be said. The same individual presented

with the same history to each of the four different qualified experts. The only difference was the conclusion or recommendation reached by one of those experts.

Thus, exactly as this Court found in West Shore, the task of the chancellor was that of interpreting the probative force and legal effect of what was before him. Simply put, does the conclusion of one expert, that of The Bar's preferred evaluator, override the considered judgements of three other experts on this same issue.

Under these circumstances, this Court in West Shore concluded as follows:

> The presumption of correctness due to 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 we have everything before us that he had before him and we have the same opportunity to weigh it as did the chancellor.

West Shore at 126.

There is nothing in the record before this Court (or the Referee) that supports the conclusion that the opinion of The Bar's expert should outweigh the contrary opinion derived from three other independent evaluations. Significantly, too, that lone evaluation was a result of a single interview session three and one-half years removed from this Court's current decision.

Certainly the greater weight of the record evidence before this Court and the Referee is contrary to the recommended discipline. In the absence of any articulated countervailing

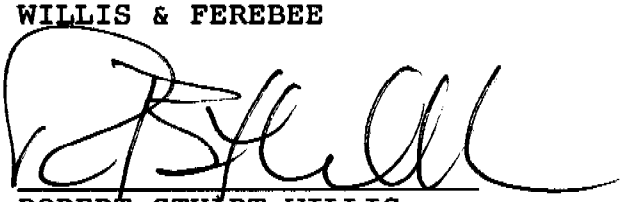
considerations, the weight of the evidence should control and the recommended course of treatment and related probation be deleted from this Court's final Order.

CONCLUSION

Based upon the review of the record evidence before this Court, the greater weight of the evidence supports Respondent's position that he should not be required to undergo an intensive course of alcohol treatment and subject to the corresponding term of probation. This 70 year old sole-practitioner has had neither complaint nor other indication of an "alcohol problem" that has or even might potentially impact on his professional service to his clients and the Courts. Under these circumstances, the recommended discipline is not supported by the record and should be deleted.

RESPECTFULLY SUBMITTED this 13 day of July, 2000.

WILLIS & FEREBEE



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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 13 day of July, 2000.

ROBERT STUART WILLIS