IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,315
(TFB Case Nos. 98-32,033(18B) and
98-32,145(18B)

THE FLORIDA BAR,

Complainant,

vs.

HENRY JOHN MARTOCCI,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF

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POINT I ON APPEAL

The Florida Bar in its Answer Brief misses the point with regard to Respondent's argument as to Point I on Appeal.

The Florida Bar contends that a Referee's findings of fact are presumed to be correct and will be upheld absent a clear showing that the findings are without any support in the record.

The actual contention of Respondent is to the effect that the Florida Bar is required to show in order to sustain the Referee's Report, evidence of a clear and convincing nature in support of its allegations. The Florida Bar vs. McLawhorn, 505 So 2d 1338 (Fla 1987).

As pointed out by Respondent in his Main Brief, the definition of clear and convincing evidence requires that the evidence must be credible with the witness being required to distinctly remember the facts and with the testimony being required to be precise and explicit, with the witnesses lacking in confusion as to the facts in issue. Slomowitz vs. Walker, 429 So 2d 797 (Fla 4th DCA 1983).

Respondent has indicated in his Main Brief the manner in which the testimony given before the Referee in the case at bar did not meet the test of clear and convincing evidence.

With regard to the testimony of Doris Rago, one wonders how the Florida Bar can term her testimony as being clear with Mrs. Rago being unconfused as to what had transpired when in fact, Mrs. Rago testified that she thinks that Respondent had called Florence Berger a "nut case" but that it had been so long ago that she did not remember exactly and that she did not remember what had been said by Respondent to Florence Berger (T 90-94).(Emphasis supplied)

With regard to the testimony of Dr. Jacqueline Jennette, there is presently pending before this Court Respondent's Motion to Correct and Supplement the Record so as to include therein the transcribed deposition of Dr. Jennette during the course of which deposition Dr. Jennette contended in her testimony that Respondent had made various derogatory remarks concerning Florence Berger but the transcript showing that no untoward comments whatsoever had made by anyone at that deposition. In fact, the transcribed deposition was in the actual possession of counsel for the Florida Bar during the course of Dr. Jennette's testimony before the Referee, counsel for the Bar therefore having had actual knowledge at the time of Dr. Jennette's testimony that said testimony was untrue at the very least as to Respondent's alleged conduct during the course of the deposition itself.

It is respectfully submitted that this casts great doubt upon the entire the

proceedings before the Referee and accordingly, Respondent also has pending before this Court a Motion for Relief from Referee's Report based upon misconduct of opposing counsel.

Furthermore, the Florida Bar contends that although there is contradictory evidence in the record, the Referee may choose to believe some witnesses over Respondent and that that is not a sufficient basis to indicate that her findings lacked support in the record.

In fact, the Referee apparently disregarded the testimony not only of nine (9) attorneys practicing in Brevard County, four (4) of which were female attorneys to the effect that Diana Figueroa who was Respondent's opposing counsel in the Berger case, had a reputation for dishonesty, untruthfulness and unethical practices, but furthermore apparently disregarded the testimony of two (2) Circuit Judges each of whom testified that they had had difficulties with Ms. Figueroa's lack of candor and in fact, Judge Lober having entered an Order indicating that she had "lied to him in an official proceeding." Conversely, each of these nine (9) lawyers as well as each of the Circuit Judges testified that Respondent while being extremely aggressive and zealous, was also extremely honest, direct and forthright.

The Referee's findings of fact are therefore clearly erroneous and lacking in evidentiary support utilizing the proper test of clear and convincing evidence.

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POINT II ON APPEAL

Respondent has fully set forth in his Main Brief his argument as to Point II on Appeal to the effect that there exists no record basis for the Referee's determination

to the effect that any of the alleged conduct on the part of Respondent was prejudicial to the administration of justice.

Respondent would simply take issue with the Florida Bar's continuing attempts to have Respondent punished for conduct in a prior case in which Respondent had actually been found by the same Referee to have been not guilty of the alleged allegations which had been brought against him.

Furthermore, while Respondent agrees that his conduct might at times be considered not totally professional it would appear that this is fortunately or unfortunately, a reflection not only of the Florida Bar as well as every other bar association but also society in general, it being clear that verbal discourse today often times takes on a spirit of argumentativeness as well as disagreeable conduct.

The question is as to whether or not conduct engaged in by an attorney is unethical in that it interferes with the administration of justice or is it simply disagreeable behavior brought on largely by the increasing contentiousness of litigants and in particular, litigants in domestic relation matters.

Furthermore, it is clear that the Referee should not have considered the matter of The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997) inasmuch as Respondent had been determined to have been not guilty of the charges which had then been brought against him and that accordingly as set forth in the Referee's Report, Respondent has no prior disciplinary record after having practiced law for

some thirty five (35) years with twenty five (25) years of those being in Florida and an additional ten (10) of those years in the State of New York, Respondent continuing to be a member of the New York Bar as well as the Florida Bar.

ARGUMENT

POINT III ON APPEAL

With regard to Point III on Appeal to the effect that the Referee had improperly placed upon Respondent the burden of proving his innocence, the Florida Bar attempts in its Answer Brief to indicate that it was Respondent who initially brought up the prior case involving Respondent.

Such is clearly not demonstrated by the record, it being clear that during the course of closing argument, it was the Referee who asked Respondent if he had recalled her factual findings in the Lanford matter, referring to that matter which resulted in this Court's opinion in favor of Respondent in the case of The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997).

Accordingly, it is clear that the Referee utilized the prior conduct of Respondent which had not resulted in a finding of guilt, in connection with her determination in the case at bar to the effect that the Respondent was guilty of the same type conduct.

This clearly evidences a pre-determination by the Referee in her mind to the effect that Respondent was going to be required to disprove his guilt in the case at bar.

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POINT IV ON APPEAL

The Florida Bar attempts to indicate that in various other cases, attorneys were suspended from the practice of law or given public reprimands for conduct similar to that alleged to have been committed by Respondent.

In The Florida Bar vs. Wasserman, 675 So 2d 103 (Fla 1996), Respondent was found guilty of having on several occasions lost his temper after a ruling by a

Judge and having stood and shouted, waived his arms, challenged the Judge to hold him in contempt, displayed his arms as to be handcuffed and banged on the table to the extent that the bailiff had to call a backup bailiff.

Immediately thereafter, Mr. Wasserman stated that he would advise his client to disobey the court's ruling and that on a separate date called another Judge's judicial assistant a little mother f - - - - - son of a b - - - - and referred to the judge as that mother f - - - - -.

The actions of Mr. Wasserman were clearly outrageous and in direct criminal contempt of a court at least with regard to the appearance before Judge Newton.

Furthermore, Mr. Wasserman was found guilty of conduct which is contrary to honesty and justice.

Finally, with regard to the Florida Bar's indication to the effect that Respondent had in 1982 been given a private reprimand in a case involving an alleged excessive fee such is simply stated not an indication of what occurred. Rather, the grievance committee voted "no probable cause" and determined that the fee while it might have been considered to be excessive by some, was not extortionate or exorbitant.

If any punishment be held proper by this Court, the same should be in the nature of an admonishment or private reprimand, there being no aggravating factors set forth by the Referee in her report and an admonishment or private reprimand

being in keeping with the purposes of lawyer discipline. The Florida Bar vs. Cibula, 725 So 2d 360 (Fla 1998); Standard 9.32(a)(b)(g) Lawyers Sanction Standards.

Furthermore, each of the parties should pay their own costs in connection with this matter.

Respectfully submitted

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STATEMENT ON PRINT SIZE

I hereby certify that size and style of the type used in this Brief was Times New Roman (14 point).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been furnished to the Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1927, and a true and correct copy of the foregoing has been furnished by US Mail to Frances R. Brown-Lewis, Esq., 1200 Edgewater Drive, Orlando, FL 32804-6314, this _____ day of April, 2000.

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