ORIGINAL

IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC96767

THE FLORIDA BAR,

Complainant,

vs.

F. LEE BAILEY,

Respondent.

RESPONDENT'S REPLY BRIEF

On Review of a Report of a Referee
in a Florida Bar Disciplinary Proceeding

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ARGUMENT

I.

THE STANDARD OF REVIEW MUST CONSIDER THE CLEAR AND CONVINCING STANDARD OF PROOF IMPOSED ON THE BAR

The Bar writes that Bailey has the "heavy burden of establishing that the record is wholly lacking in evidentiary support for Judge Ellis' findings, including her specific finding that he held the Biochem stock in trust," and that his burden is to "demonstrate that there is no evidence" to support the Referee's findings. Answer Brief, pp. 8, 10.

The Bar's standard overstates Bailey's burden. The standard on review is that the findings "carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record." *Florida Bar v. Pearce*, 631 *So*. 2d 1092, 1093 (Fla. 1994).

"Without support in the record" or "clearly erroneous" must be judged on appeal in light of the clear and convincing evidence standard. Any other approach would eviscerate the important purposes served by the heightened evidentiary standard of proof that applies in Bar disciplinary proceedings.

We recognize that this Court's decisions do not comport with the standard we posit. In *Florida Bar v. Hooper*, 509 So. 2d 289 (Fla. 1987), the Court wrote, "this

Court's review of a referee's finding of fact is not in the nature of a trial *de novo* in which the Court must be satisfied that the evidence is clear and convincing." *Id.* at 290.

"*De novo*" is different from determining "clearly erroneous" or "without support in the record."[1] We agree the review is not *de novo*, but one cannot determine whether a finding of fact is "clearly erroneous" without considering the standard of proof necessary to establish the fact. It is not surprising that the meaning and application of these concepts is sometimes perplexing. *Compare, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986), which addressed the question of whether the *New York Times v. Sullivan* "clear and convincing evidence requirement must be considered by a court ruling on a motion for *summary* judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." *Id.*, at 244. *Anderson v. Liberty Lobby* held:

> [W]e are convinced that the inquiry involved in a ruling on a motion for *summary* judgment . . . necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits.
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> * * *

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[1] *See* PHILIP J. PADOVANO, FLORIDA APPELLATE PRACTICE § 9.6, pp. 155-160, and § 9.4, pp. 147-149 (2d ed. 1997).

> Thus, in ruling on a motion for *sumrnary* judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden. . . . It *makes* no sense to say that a jury could reasonably find for either party without some benchmark as to what standards govern its deliberations and within what boundaries its ultimate decision must fall, and these standards and boundaries are in fact provided by the applicable evidentiary standards.

Id., **477 U.S.** at 252, 254-255.

The same reasoning must apply here. It makes no sense to say that this Court can determine whether a referee's findings of fact are clearly erroneous or without sufficient support in the record without applying the applicable evidentiary standard – clear and convincing evidence – to the inquiry.

We turn to the evidence.

II.

THE EVIDENCE OF A TRUST WAS NOT CLEAR AND CONVINCING

We agree with the Bar that an attorney's ethical obligation to hold and safeguard a client's property "does not hinge on the use of a specific word, nor on the existence of a writing evidencing a formal trust agreement." Answer Brief, p. 7.

But the question in this case is a different one: Was there clear and convincing evidence that Bailey knew that an increase in the value of the $6,000,000 in Biochem Pharma stock would be payable to the United States? As we anticipated in the Initial Brief (p. 35, n.5), the Bar points to Bailey's January 21, 1996 letter, in which he wrote to Judge Paul: "I had in principle agreed to hold the funds in the nature of a trust, with final approval for legal fees to be approved by your Honor." Answer Brief, p. 5. See Appendix D to Initial Brief and Appendix D to Answer Brief. But that comment referred to the $6,000,000 original value, not any increase in the value of the stock. After all, Bailey assumed the risk that a decrease in the stock value would leave him with no fee. The Bar omits Bailey's clear explanation. Addressing the critical conference before Judge Paul, Bailey wrote:

> I interjected that the payment of fees was to be ultimately approved by your Honor (and as I recall your Honor merely nodded). I did this to impress on Mr. Shohat that without Court approval any fees taken would be at the risk of disallowance. There was no discussion as to any trust in which the government and I had any sort of joint interest other than "six million dollars."
>
> * * *
>
> 1 viewed that money as held by me as an account in which the United States had an interest to this extent: after the payment of

> costs associated with the case, and fees approved by your Honor, *any balance of the $5,891,352.00 remaining* ***would*** *revert to the United States.*

Appendix D to Initial and Answer Brief, **p. 5** (emphasis supplied).

Thus, the question is whether the **Bar** proved, by clear and convincing evidence, that Bailey's understanding of the events and his obligations was "a lie." We use that strong word because the Referee called him "a liar." Amended Report, p. **23,** Appendix **A** to Initial Brief and Answer Brief.

How can one fairly come to that conclusion on a record that is replete with differing views about precisely what was said, even from those who testified "against" Bailey? Indeed, the only written evidence is the letter transferring the stock to Bailey without reservations (Initial Brief, Appendix G) (which the **Bar** downplays as being created with "clerical assistance of the United States Government") (Answer Brief, p. 4), and Bailey's letters. That written evidence supports Bailey. The Government typed, authorized, and transmitted the letter that unreservedly gave the Biochem stock to Bailey. TR 409, 437; Initial Brief, pp. 13-14.

What does "clear and convincing" evidence mean? Here is what this Court said in *In re Davey,* 645 So. 2d 398 (Fla. 1994):

> "[T]he facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty, and the witnesses must be lacking in confusion as to the facts in issue." *Slomowitz v. Walker,* 429 So. 2d 797,800 (Fla. 4th DCA 1983) *(quoting Nordstrom v. Miller,* 227 Kan. 59,605 P. 2d 545, 552 (1980)).

Id. at 405. The evidence before the referee in this case fails that test.

AUSA Miller said he told Judge Paul the stock was given "in trust." TR-259-260. **AUSA** Kirwin, who took notes, said "I don't remember that the words 'in trust' were ever used." Supplemental Record, Kirwin Deposition pp. 266-268. Co-counsel Ed Shohat said "This trust agreement was spelled out for the Judge." TR-520. The Special Counsel in the Department of Justice Asset Forfeiture and Money Laundering Section spoke with the AUSA's and was never told the stock had been given to Bailey in trust; nor had her supervisor, the Director of the Asset Forfeiture Office, been told the stock had been given to Bailey in trust. *See* Initial Brief, pp. **25-28.**

The **Bar** says that Bailey is trying "to elevate the clear and convincing standard" to one requiring facts "proven beyond a reasonable doubt" because Bailey's Brief noted the demanding evidence required to prove an "oral trust." Answer Brief, pp. 9-10. But the **Bar** overlooks Bailey's bottom line argument: "No matter how one

frames the clear and convincing standard, the evidence in this case does not meet it." Initial Brief, p. 39.

Given the contradictory testimony of a trust, the indistinctness of the recollections, the inexact narrations and the confusion about what was said to Judge Paul, juxtaposed with the written documents and their failure to define the terms of the stock transfer, it is fair to say that, given the high standard of proof required, the Referee's findings that Bailey lied, that there was a trust, that he misappropriated and commingled trust funds (Counts II, III, IV, V) were clearly erroneous.[2]

Bailey has acknowledged that the $730,000 in proceeds of the Japanese stock (Count I) remained in his personal account between July **13,** 1994 and August **15,** 1994, when it was transferred to the United States. TR-959; Initial Brief, p. 50. And

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[2] The chaos created by the unprecedented government-authorized 1994 transfer of the stock, and the unreported 1994 proceedings before Judge Paul, is evident from this question: whose "trustee" was Bailey? Was he Duboc's agent or the United States' representative? On January 11, 1996, when the issue of stock ownership first erupted because the Coudert Brothers law firm had apparently claimed the stock was Duboc's, **AUSA** Kirwin told Judge Paul:

> I wanted to make it clear on the record, the government's position is that if that were the case . . . that that was a misunderstanding of what had happened, that those funds really belonged to the United States; they were not Claude Duboc's funds anymore.

TR **164.** "Misunderstanding" is the most that the Bar can claim; Bailey's unique role in the confusing arrangement is not a basis for disbarring him.

Bailey has acknowledged that his January 4, 1996 letter to Judge Paul (Count VII) should not have been an ex-parte communication. Initial Brief, p. 53. But those violations do not merit disbarment. Indeed, given the unusual situation created by the Government's unprecedented handling, and handing over, of Duboc's assets, and Bailey's understanding of the arrangement, disbarment is not reasonably supported by existing case law.

III.

THE CASE LAW DOES NOT SUPPORT DISBARMENT

The Bar has submitted a host of cases that it says support disbarment because of their similarity to Bailey's case. The Bar's cases, when carefully analyzed, do not carry the weight assigned to them. We address them below, quoting from each of the opinions, to demonstrate their difference from this case.

In *Florida Bar v. Harper*, 421 So. 2d 1066 (Fla. 1982), the Court wrote, "Respondent has presented no defense to the charges asserted against him in these proceedings. . . ." Harper had been convicted of conversion, was serving a state court prison sentence, and had been previously suspended for six months based on prior misconduct.

In *Florida Bar v. Korones*, 752 So. 2d 586 (Fla. 2000):

> Korones. . . admitted that he converted the funds that he knew belonged to the other residual beneficiaries and then filed a false accounting to hide his misappropriation.
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> * * *
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> [T]his attorney affirmatively filed a false accounting with the beneficiaries of his uncle's estate and paid his son so that he would not be reported to the Florida Bar. The latter actions clearly indicate that the attorney was well aware of the wrongfulness of his conduct.

Id. at 590-591

In *Florida Bar v. Della-Donna, 583* So. 2d 307 (Fla. 1989), Della-Donna

> brought Nova University (a major beneficiary of one of the Goodwin Trusts) to the brink of financial ruin, by among other things, attempting to remove Nova as a beneficiary and to replace it with other organizations; fostering frivolous, unfounded and unauthorized litigation involving Nova; blocking any release of trust funds to the beneficiaries; and demanding that Nova pay him $1,100,000 of its trust distribution to stop further legal proceedings.

Id. at 308. Della-Donna also "promoted frivolous litigation to defeat the interests" of a granddaughter "when all agreed that she would take under" the will, and

"improperly refused to disburse portions" of another estate "in order to generate more attorney, execution and trustee fees for himself." *Id.*

In *Florida Bar v. Golub*, 550 So. 2d **455** (Fla. 1989), Golub admitted his violations, *i.e.*, that he "stole substantial sums of money over an extended period of time. . . ." *Id.* at 456.

In *Florida Bar v. Crabtree,* 595 **So.** 2d 935 (Fla. 1992), the Court wrote:

> [I]t is unrefuted that Crabtree was representing two different people in the same transactions without informing one of his representation of the other. Crabtree also took fees and an interest in the transactions without fully explaining his part and share in the transactions. Further, it is unrefuted that Crabtree wrote phony letters designed to mislead anyone who was looking into the transactions. We also find that Crabtree received a prior private reprimand for similar conduct.

Id. at 936.

In *Florida Bar v. Anderson,* 594 So. 2d 302 (Fla. 1992), Anderson "converted publicly owned funds to pay off her personal credit card debt." She did this by forging a signature and "pled no contest to third degree theft and uttering a forged instrument." *Id.* at 303. Furthermore, the Court wrote:

> [W]e cannot ignore the concession Anderson makes in her brief. **She** states that the money came into her hands as **part** of a purposeful surreptitious, and illegal act by others in the Housing Authority, in which she obviously participated. Thus, Anderson concedes conspiring in an illegal fraud involving the use of public money. . . ."

Id. at **304.**

In *Florida Bar v. Knowles*, 572 So. 2d 1373 (Fla. 1991), Knowles neglected legal matters, failed to communicate with clients, had "seven separate" trust account violations, failed to produce records, issued insufficient funds checks, misappropriated funds, had a "serious history of neglecting his clients and their cases," a "history of . . . not paying for" personal services he received, and had been twice disciplined for prior trust account violations. *Id.* at 1374-1375.

In *Florida Bar v. Tillman, 682* So. 2d 542 (Fla. 1996), Tillman "paid personal expenses from the trust account and charged the expenses to her client, drew excessive and premature fees and costs, and failed to pay clients' medical expenses with funds supplied to her to do so." Her trust account was "intentionally misused," and her "standard practice" was to commingle client and personal funds. *Id.* at 543.

In *Florida Bar v. Spann*, *682* So. 2d 1070 (Fla 1996), Spann procured forgery, notarized forgeries, placed advertisements misrepresenting a non-lawyer employee

as a lawyer, threatened clients, failed to supervise his staff, assisted the unauthorized practice of law and "'evidenced a total disregard for the Rules of Professional Conduct,"' leading the Court to disbar him for "multiple and serious disciplinary offenses?'over a "lengthy period of time." *Id.* at **1074** (quoting the referee).

In *Florida Bar v. Shanzer*, **572** So. 2d 1382 (Fla. 1991), Shanzer entered an "unconditional guilty plea" to violations of trust account record keeping, using trust account monies for personal use and five instances of misappropriation from his trust account. *Id.* at 1383.

In *Florida Bar v. Vining*, **761** So. 2d 1044 (Fla. 2000), Vining had a "pattern of disregard and contempt for his clients and opposing counsel during the course of the three year disciplinary proceedings, is currently serving a three year suspension [for 'dishonest, fraudulent and deceitful conduct' and] has another pending disciplinary proceeding. . . ." *Id.* at **1047-1048.** Disbarment was a consequence of Vining's long history of transgressions.

> In determining the appropriate discipline this Court considers prior misconduct and cumulative misconduct, and treats more severely cumulative misconduct than isolated misconduct.

Id., at 1048. "Vining's latest transgression is the proverbial 'straw that broke the camel's back.''' 761 So. 2d at 1049. Indeed, Vining's misconduct prompted three

disciplinary decisions: *Florida Bar v. Vining*, 707 So. 2d 670 (Fla. 1998); *Florida Bar v. Vining*, 721 So. 2d 1164 (Fla. 1998); and *Florida Bar v. Vining*, 761 So. 2d 1044 (Fla. 2000).

The analysis of all the Bar's cases underscores their differences from this case. Those disbarments were imposed upon lawyers with multiple violations relating to multiple clients; lawyers with patterns of misconduct; lawyers who were already under suspension or had been the subject of recent sanctions; lawyers who admitted their misconduct or who had no explanation, no defense, to their violations of the Rules of Professional Conduct.

F. Lee Bailey does not fit that profile.

CONCLUSION

For the foregoing reasons, the Amended Report of Referee should be rejected. If any of F. Lee Bailey's actions constituted misconduct, the sanction should not preclude Bailey's recognized ability to practice law, given his belief that his actions were consistent with his agreements with his client and the government, and his 30-year unblemished record as a lawyer.

Respectfully submitted,

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