IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KAYO ELWOOD MORGAN,

Respondent.
_____/

Supreme Court Case
No. SC04-1438

The Florida Bar File
No. 2004-50, 534 [17E]

RESPONDENT=S INITIAL BRIEF

FRED HADDAD, P.A.
Attorneys for Respondent
One Financial Plaza, Suite 2612
Fort Lauderdale, Florida 33394
Tel: 954-467-6767
Fax: 954-467-3599

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Kayo Elwood Morgan, Appellant, will be referred to as "Respondent" or "Morgan". The symbol "RR" will be used to designate the report of referee and the symbol "TT1" will be used to designate the transcript of the final hearing held in this matter. The transcript of the "Sentencing" phase will be by the symbol "TT2", again followed by whatever page number applies. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

STATEMENT OF THE CASE AND FACTS

This is an appeal from a May 3, 2005 Report of Referee that recommends a lawyer be suspended from the practice of law for ninety one days and pay the costs of prosecution.

On July 20, 2004, The Florida Bar [hereinafter sometimes for brevity the "Bar"] filed a complaint against the Respondent for conduct that occurred during the trial of a criminal case, that is State of Florida v. Greer, Case Number 00-9878CF10A before Senior Judge Robert Collins of the Circuit Court of the Seventeenth Judicial Circuit.

Respondent Morgan was cross examining the State's main witness and was making inquiry of the witness' manner of dress in a "non-sex" related matter as it had a bearing on what occurred.

According to the findings of the Referee in her report, the following occurred:

> Respondent, Kayo Elwood Morgan, represented John B. Greer in a criminal trial before the Honorable Robert Collins in the Circuit Court of the 17th Judicial Circuit In and for Broward County, Florida, Case Number 00-9878CF10A. On August 21, 2003, Morgan was cross-examining the State's witness and asked the witness how she was dressed. The State objected to relevancy and the court sustained the objection.

Assistant State Attorney Hager Simmons ("Simmons" testified that Morgan, in the presence of the jury, raised his voice and said to the judge that he did not understand why the judge was interfering with his cross-examination. After the jury was excused, Morgan continued to speak in a loud and angry manner and began to pace back and forth. The following exchange occurred outside the presence of the jury (Exhibit 1, Page 39, line 10-Page 40, line 25):

The Court: Mr. Morgan, I want you to -

Mr. Morgan: I am moving for a mistrial.

The Court: Mr. Morgan, I am not going to-

Mr. Morgan: Don't treat me like that in front of a jury.

The Court: I sustained the objection, and you -

Mr. Morgan: No Judge treats me like that, in front of a jury.

The Court: I heard the way you treat other Judges, and I don't appreciate it.

Mr. Morgan: I don't care how you think I treat other Judges. You don't great me - - you treat me with respect. I treat you with respect. I don't care what you think about other Judges.

The Court: Please come up, kindly. Please come up, sir.

Mr. Morgan: No, I'm staying right here.

The Court: I think you are out of line, sir.

Mr. Morgan: I think you are out of line. That's what I think. You don't talk to me like that in front of a jury.

The Court: You don' have to talk any further. Are you going to continue? I sustained the objection, for the record.

Mr. Morgan: Wait a minute.

The Court: If you continue we will have a contempt hearing, I don't want to go through this again.

Mr. Morgan: I object.

The Court: You are not going to pull stuff in my court without being- receiving -

Mr. Morgan: So you think I am pulling something on you, Judge Glare?

The Court: I think you are not respectful. Ive never heard anyone-

Mr. Morgan: You are not respectful to me.

The Court: I have sustained an objection. I don't want you to talk for one moment. I am controlling this courtroom. I am the Judge here.

Another exchange occurred a few minutes after Judge Collins agreed to proffer. Simmons objected that the proffer exceeded the scope of the subject of the proffer and the following exchange occurred (Page 43, line 21-Page 45, line 12):

Ms. Simmons: Judge, now it's gone beyond the proffer. It's gone beyond the item of clothing.

The Court: I don't know what he is doing.

Mr. Morgan: Now, wait a minute.

The Court: I have already ruled.

By Mr. Morgan:

Q. Were you dressed properly for the inside of that bar?

The Court: Hold it, one second.

The Witness: Yes

The Court: Hold it. I have ruled.

By Mr. Morgan:

Q. How do you know?

The Court: I want you to stop now. What's the matter with you?

Mr. Morgan: She answered something.

The Court: I am the Judge here. Now, you

continue, I am going to have you arrested.

Mr. Morgan: Go ahead and have me arrested. What are you threatening me for? I want a mistrial. Take me to jail and let's go with it. I want my mistrial. You don't talk to me like this. It's not going to happen.

The Court: Mr. Morgan?

Mr. Morgan: No, I am not going to be talked to like that, by you are anyone else, when I'm defending somebody in a felony case. It's not going to happen.

The Court: You are out of line. I don't want to hear anything further, here.

Mr. Morgan: Well, I move for a mistrial.

The Court: What you want to do?

Mr. Morgan: You are prejudice.

The Court: And you are obnoxious.

Mr. Morgan: So what?

The Court: You can't be obnoxious in a courtroom to a Judge.

Mr. Morgan: You are obnoxious to me.

The Court: I don't want to talk with you any further. You are not going to get me

excited, sir.

A hearing was had upon the Bar's complaint on 19 January 2005 (TT1, pages 4-115), wherein the referee, as noted above, heard testimony from the trial prosecutor, Hager Simmons, and the Respondent Morgan. That Aprosecution@ witness related the basic circumstances of the case, the transfer from Judge Gold's division to the trial division of Senior Judge Collins, where "things" were fine in jury selection, although Morgan had a dentist appointment.

The prosecutor related her objections to Mr. Morgan cross examining the main witness Carrie Mann about her "dress" in a bar, where the crime occurred (TT1, pages 16-18). The prosecutor then related her opinion of what occurred, Mr. Morgan's "pacing" (RR1, pages 21, 22) and Mr. Morgan's mistrial requests.

The Respondent cross examined the prosecutor, who testified as to the "pool" Judge scenario in Broward County, and acknowledged Ms. Mann was a witness, not a victim (TT1, page 30). She also testified that direct examination of the witness progressed normally. She was then questioned as to the cross examination and the proffer issue that led to the exchange that resulted in the issues at bench.

Mr. Morgan wanted to proffer the testimony that was the subject of the sustained objection and was having difficulty so doing.

The prosecutor acknowledged that Judge Collins never held Mr. Morgan in contempt or had him detained or indeed he never, to the prosecutor's knowledge, took any actions save declaring a mistrial [TT1, page 37], nor, it is known, did that Judge initiate the instant proceeding.

The Bar admitted the trial transcript as its exhibit.

Respondent Morgan testified he has been a sole practitioner for over twenty years in criminal law (TT1, pages 1-41, 42), but really had not much contact with Judge Collins (TT1, page 43), whom he thought was a fine person.

He explained what he wished to proffer, after cross examination, was denied and why it was necessary (TT1, pages 46-48) and explained what he did thereafter.

Morgan was extensively cross examined about the sustained objection, his request to make a proffer, the necessity thereof (TT1, pages 63-65) and he was cross examined on each issue that could be envisioned by Bar counsel.

Argument followed and the Court found Respondent guilty and set the matter for hearing on the issue of sanctions.

Two Circuit Judges, a prosecutor and several lawyers testified of Mr. Morgan's abilities as a lawyer, his dedication, and the fact as Judge Horowitz testified that some Judges had a problem with Mr. Morgan. As the Judge put it:

> You know, if you're a judge who is totally driven and you, you know, want to drop the gauntlet and invite the fight, I think Kayo will not, you know, back off from the fight. (TT2, page 10).

Prosecutor Scheinberg was in the undersigned's opinion, even on the cold record, moving in his description of the character and class of Mr. Morgan.

While the referee acknowledged the character witness, Morgan's pro bono services, and his reputation as an excellent and passionate advocate, she nonetheless credited two prior occurrences with Judges as a basis for the recommendation of a ninety one day suspension.

SUMMARY OF THE ARGUMENT

After considering the various mitigating and aggravating factors the Referee entered her recommendation that the Respondent be suspended from the practice of law for ninety one days, which of course, requires proof of rehabilitation. It is the Respondent's position that this sanction recommendation is not consistent with the relevant case law and precedent of this Court and that such sanction is unduly harsh for the conduct alleged and the Respondent will argue that this Court should find the sanction too severe.

ARGUMENT

I. A NINETY ONE DAY SUSPENSION FROM THE PRACTICE OF LAW IS AN INAPPROPRIATE SANCTION FOR A LAWYER WHO, WHILE HAVING ISSUES WITH A JUDGE, ENGAGES IN CONDUCT THE JUDGE DOES NOT HIMSELF FEEL IS CONTEMPTUOUS OR WORTHY OF A BAR COMPLAINT

The main issue on appeal is the appropriateness of the Referee's recommended sanction and in particular the appropriate length of the suspension that should be handed down by this Court, although the Respondent submits that since the "facts" that constitute the offense occurred outside the presence of the jury, and was during a discourse on seeking to make a proffer to protect the record and the Judge never held the Respondent in contempt or referred him to the Bar. This Court has consistently held that it has a broader discretion when reviewing a sanction recommendation because the responsibility to order an appropriate sanction ultimately rests with the Supreme Court. The Florida Bar v. Thomas, 698 So. 2d 530 (Fla. 1997). Compare also The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

The Referee found that Mr. Morgan should be found guilty of Rule 4-3.5(c), (a lawyer shall not engage in conduct intended to disrupt a tribunal), and Rule 4-8.4(d), (a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis...).

The Referee then stated:

> I recommend Respondent be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:
>
> A. A 91 day rehabilitative suspension.
>
> B. Payment of The Florida Bar's costs in these proceedings.
>
> Respondent's conduct qualifies for sanctions described in Sections 6.22 and 7.2 of the Florida Standards For Imposing Lawyer Sanctions. Section 6.22 recommends suspension when a lawyer knowingly violates a court order or rule and interferes with a legal proceeding. Section 7.2 recommends suspensions when a lawyer knowingly engages in conduct that violates his professional duty and causes injury to the legal system.
>
> The undersigned referee has considered the presence of aggravating circumstances which are enumerated in Section 9.2. The most serious aggravating circumstance is that the Respondent has

been disciplined on 2 prior occasions for similar conduct involving disrespectful conduct towards the judiciary. In Case No. SC92-301, Respondent received a public reprimand for which he was required to appear before the Board of Governors of The Florida Bar. In that case Respondent was found guilty of violating R. Regulating Fla. Bar 4-8.4(d) for making several intemperate and/or derogatory remarks to and about the judiciary in 1995 and 1996. In Case No. SC01-555, the Respondent received a ten day suspension.

In that case, he was found guilty of violating R. Regulating Fla. Bar 4-8.2(a) for making statements that the lawyers knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge. On or about January 6, 2000, while appearing as attorney of record, Respondent made the following statements to the court:

> "What is it Judge Educate me, 15 years practicing trial attorney, criminal law. I can read. I know more law than you ever forgot. Tell me about what it is."

and

> "Let me ask you something. Do you know what its like to defend somebody's liberty and have a Court close itself off, entirely, to an obviously arguable defense?"

Another aggravating factor is that the Respondent excused his wrongful conduct by claiming that he was forced to object to improper judicial rulings in order to protect his client=s right to a fair trial.

Respondent would note here his statement, or testimony, was that he had

to make a proffer to protect the record for Appellate review, and was attempting to so do, outside the presence of the jury.

He further testified as did Judge Holmes as to the type of person, and lawyer, that Respondent is.

The Respondent would note that the Judge involved did not engage in any contempt proceedings or refer the matter to the Bar.

Further, while the referee makes some note of the Assistant State Attorney and two judges, including the top rated Judge in Broward County that appeared for Mr. Morgan, and considered his character and reputation, both of which are superb, as mitigating factors together with his well known pro bono services, the words of the Judges should be considered.

Judge Horowitz stated:

> A. Over the ten years, he's appeared in front of me numerous times. He's tried a couple of cases in front of me. One case in particular was a murder one case.
>
> I happen to remember the Defendant was Shanton Bell (phonetic). Probably three of four years ago. I don't recall exactly. Case may have lasted a week.
>
> And, you know, I can tell you that before the trial - - and I had mentioned this to Kay when the case was over with - - before the trial, I had - - some judges approached me and, you know, sort of to forewarn, me,

you know, that I was going to have problems in this case with - - not with the case but with Kayo as an attorney.

And I just, you know, listened, don't comment. And I mentioned to Kayo afterwards that I had been forewarned.

And I didn't understand why that had occurred. Because I found him to be a very good lawyer. In fact, I may have mentioned to him that if I had my fanny in a crack, that he would be one of the lawyers that I would want.

As Judge Holmes said, he's passionate with his clients. You know, if you're a judge that is totally ego-driven and you, you know, want to drop the gauntlet and invite the fight, I think Kayo will not, you k now, back off from the fight.

But if you, from my vantage point, do your job, allow a lawyer to make the record when appropriate, Kayo makes his record, and you move on. I never had a problem with him.

Also, Judge Holmes testified:

A. Mr. Morgan is very passionate about his clients. When he gets in trial, it's like he's in a different zone. I had an opportunity to - - I had been on the bench all of three months. And met Mr. Morgan.

And he's quite animated in trial. But he apologized. I took his apology.

I'm sure that this court probably knows that the transcript of that proceeding would up with The Florida Bar. But I did not file a grievance against Mr. Morgan.

His apology was sufficient for me.

And he has been a wonderful litigator before me. He does get wound up. But there are certain judges that know how to, you know, look at Mr. Morgan and just tell him, okay sir, I've heard you, and that's good. It's just a matter of letting him do his thing but not running over.

Q. What do you think of his ability as a lawyer and his representational ability for his clients?

A. Excellent lawyer.

The Referee also stated:

Prior to recommending discipline pursuant to Rule 3-.6(m), I considered the following:

A. Personal History of Respondent
Age: 54

Date Admitted to the Florida Bar: November 19, 1984

B. Aggravating Factors:

9.22(a) Prior disciplinary offenses:

July 12, 2001, Suspension for violating R. Regulating Fla. Bar 4-8.2(a) for making statements that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

May 28, 1998, Public Reprimand for violating R. Regulating Fla. Bar 4-8.4(d) for engaging in conduct in

connection with the practice of law that is the prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis...

9.222(c) A pattern of misconduct

9.22(g) Refusal to acknowledge wrongful nature of conduct

9.22(I) Substantial experience in the practice of law

C. Mitigating Factors:

9.32(g) Character or reputation.

Respondent must take issue with the finding that he fails to acknowledge the wrongful nature of the conduct. In one previous matter he admitted the wrongdoing and agreed to suspension for that conduct.

In the instant case, he testified that he was very respectful in the presence of the jury, that he had a good relationship with the Judge, and was surprised at the Judge's reaction to his seeking to make a proffer (TT1, pages 45-59).

And, he was extensively cross examined by the Bar.

Further, Respondent, while, in essence, admitting intemperate remarks or at least disrespectful remarks [see ie pages 83, 88, 89], outside the presence of the jury, respectfully submits that the conduct is not as egregious as the conduct

contemplated by the rule or other cases that have resulted in a suspension with consequences such as at bar.

The Wasserman matter relied upon by the Bar and the Referee [Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996)] is measurably different conduct than that at bench. As the Court noted:

> In case number 84,814, the recommendation of the guilt is based on the following findings of fact. On April 14, 1994, after getting an unfavorable response to a question asked over the telephone of Judge John Lenderman through his judicial assistant, Wasserman said to the assistant, Cynthia Decker, "you little motherf- - -; you and that judge, that motherf- - - son of a b- - - - ." Ms. Decker was so upset by the incident that she had to leave the office early that day.

Which is somewhat different that making or attempting a proffer in the heat of trial outside the jury's presence as occurred in this matter.

Wasserman's other conduct was:

> The recommendation of guilt in case number 83,818 is based on the following findings of fact. On August 23, 1993, Wasserman attended a hearing before Judge Bonnie Newton and lost his temper after a ruling by Judge Newton. He stood and shouted his criticism, he waved his arms, he challenged Judge Newton to hold him in contempt and displayed his arms as if to be handcuffed, he stated his Acontempt@ for the court, he banged on the table and generated such a display of anger that the bailiff who was present felt it necessary to call in a backup bailiff. Immediately thereafter, outside

> the hearing room, in the presence of both parties and opposing counsel, Wasserman stated that he would advise his client to disobey the court's ruling. [Emphasis supplied].

Again, advising a client apparently in open Court to disobey a Court ruling is, it is submitted, singularly more egregious than what occurred herein. Too, Wasserman was found guilty of contempt, as that Judge obviously felt an affront to the Court.

Respondent acknowledges he has previously been reprimanded on two occasions and was suspended for ten days for somewhat similar conduct and that this Court in Wasserman, *supra*, recognized that mirror misconduct/public reprimands as handed down in cases cited by Wasserman [see ie Florida Bar v. Flynn, 512 So.2d 180 (Fla. 1987), Florida Bar v. Tindall, 550 So.2d 449 (Fla. 1989)] were for persons that had no prior disciplinary history, Respondent submits that the suspension should be thirty or sixty days, that in itself a devastating blow to a sole practitioner such as Mr. Morgan.

The Respondent's mitigating factors, his reputation, character, pro bono services, inspiration to others, including at the least, a long time homicide prosecutor should, it is submitted, have been given more weight by the Referee [compare Weinberger, *supra* for certain language].

This was not a public pleading calling the judiciary into disrespect In Re Shimek, Jr., 284 So.2d 686 (Fla. 1983) or Florida Bar v. Tindall, *supra*, but rather a matter of a heated discussion in Court and while the seriousness still acknowledges an occurrence during a trial, the Respondent submits the sanction is too great, if the Court finds that the facts support the finding of guilt.

Again, Respondent does not seek to justify what occurred but rather to place it in some perspective, as well as the sanctions that ought apply.

CONCLUSION

The Respondent submits that the Bar failed to prove its violations to the degree necessary, but even assuming arguendo, it did, the sanctions are much too severe.

WHEREFORE the Respondent, Kayo Elwood Morgan, respectfully requests that the Court reject the Referee's finding and sanction recommendation and instead either absolve the Respondent or impose a thirty day suspension from the practice of law, coupled with an appropriate three year term of trust accounting probation and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

FRED HADDAD, P.A.
Attorney for Respondent
One Financial Plaza, Suite 2612
Fort Lauderdale, Florida 33394
Tel: 954-467-6767
Fax: 954-467-3599

By:

_____

FRED HADDAD
Florida Bar No: 180891

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail on this 8th day of August, 2005 to Michael David Soifer, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale, FL 33309 and via U.S. mail to John A. Boggs, Staff Counsel at 651 E. Jefferson Street, Tallahassee, FL 32399-2300.

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

Undersigned counsel does hereby certify that this Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this Brief has been scanned and found to be free of viruses, by McAfee.

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FRED HADDAD