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 REPLY BRIEF

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PRELIMINARY STATEMENT

The parties have already each presented a preliminary statement setting forth the designators to be employed.

STATEMENT OF THE CASE AND FACTS

Both parties have set forth a synopsis of the case and facts, however the Respondent would observe that the Bar spent more of its presentation of the fact dwelling on Mr. Morgan's prior cases in an almost "Williams Rule" attempt to elevate an "outside the jury's presence" intemperate proffer attempt into a matter deserving a 91 day suspension.

The facts set out by the parties do not justify the sanction.

POINTS INVOLVED

ARGUMENT ON REPLY

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 Complainant begins its argument as follows:

The Respondent's initial Brief at page 13 states that the main issue on appeal concerns the appropriateness of the disciplinary sanction recommended by the Referee in this case. As this is the only issue raised and argued by respondent in his Initial Brief, The Florida Bar will restrict argument in its answer brief to the appropriateness of the sanction. The respondent has conceded the findings of fact and conclusions concerning guilt because he has not argued or demonstrated that the record either contradicts or does not support those findings. The party contesting the referee's findings of fact and conclusions as to guilt must demonstrate

either a lack of record evidence to support such findings and conclusions, or that the evidence in the record clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000), quoting The Florida Bar v. Sweeney, 730 So.l2d 1269, 1271 (Fla. 1998).

However, as Respondent asserted in his Summary of Argument:

> 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 sanction too severe.

Respondent was cross examined based upon his deposition wherein he admitted that his interaction with the Judge could be considered intemperate, but, it must be remembered as Respondent argued 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 further, and, it is submitted importantly, "the judge never held the Respondent in contempt or referred him to the Bar" [Brief of Respondent, page 13].

Respondent would, before addressing the sanction issue vis a vis the remarks digress for a moment to discuss certain other relevant issues. The Bar makes much of Respondent's two prior disciplinary cases, *Langbaum*

(involving a jury instruction applying in a case being disputed between the attorney and the judge) and *Jackson* (involving a limitation of defense cross-examination based on the trial court's sua sponte excluding evidence based on the court's sua sponte invocation of Miranda rights as to the 'alphabet test' which the client recited well). Respondent agreed to the sanctions imposed in those causes. Respondent is requesting this Court to construe the record as not so violative of the canons of ethics or, if so, as not warranting the sanction imposed.

The client whom Respondent represented in the trial court in this matter, as Respondent testified, was a convicted felon charged with a 'felony battery.' If convicted he would not have been entitled to an appeal bond and, under the sentencing guidelines, a mandatory prison sentence would have been imposed. A main defense witness was an elderly woman that had contracted pneumonia during the week of trial. This eye-witness would have directly contradicted the witness for the state that was testifying when the Respondent and judge began their colloquy. Respondent brought this the trial court's attention. The issue of this witness's availability at the time of the defense case never came to issue. The trial judge seemed to believe Respondent's actions during trial were purposed for a 'continuance,' and this has been the Bar's position. It ought be noted too that Respondent had disclosed and subpoened for trial two other witnesses (hotel officials) whom would have testified as to the 'dress-code' and 'anti-prostitution' concerns of the establishment at the time and management's efforts to enforce the same.

Respondent suggests that it may be reasonable to construe his actions as necessary for a proffer under the circumstances confronting him, even if not to be affirmatively condoned by all. The state's objection at the trial was a general one, i.e. 'relevancy,' which the trial judge barely sustained. In light of the ruling Respondent sought to make a proffer in order to preserve the error or to cause the Judge to reflect on that ruling. The Rules of Evidence requires: "A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and [w]hen the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked." 90.104(1)(b). The appellate courts as is well known will not consider an issue of evidence exclusion unless a proffer is specifically made known to the trial judge or is apparent from the context. <u>See</u>: ***Miller v. State***, 870 So.2d 15, 17 (Fla. 2nd DCA 2003) ("i*ssue was not adequately preserved for appeal because defense counsel never proffered the answer*"); ***Reaves v. State***, 531 So.2d 401 (Fla. 5th DCA 1988) (*proffer unnecessary where 'apparent from context,' the offer is a "useless ceremony," or the judge indicates it would be unavailing*); ***Filan v. State***, 768 So.2d 1100 (Fla. 4th DCA 2000) (*objection must be sufficiently precise*).

As the record reflects in Respondent's case the trial judge did not rule finally, but arguably asked Respondent to explain himself. Each time, Respondent did so or

attempted to do so. The cases, it is submitted, require the trial judge to make a ruling on the record, and that the party offended by the ruling is bound to secure it. See ***Carratelli v. State***, 832 So.2d 850 (Fla. 2002). ***J.J.T. v. State***, 810 So.2d 548 (Fla. 1st DCA 2002); ***I.B. v . State***, 816 So.2d 230 (Fla. 5th DCA 2002). Even when a judge makes a clear and final ruling on a matter a trial lawyer may ask the court to change its mind. ***Vizzi v. State***, 501 So.2d 613, 619 (Fla. 3rd DCA 1986).**1** One thing the cases continually recognize is that the attorney is bound to pursue all lawful avenues to protect the client. *See cases infra.*

Respondent, of course, could not know the trial judge regarded him to be 'obnoxious' or 'disrespectful' until he announced it to Respondent during the colloquy following the jury being excused, as neither could Respondent know the trial judge believed negative reports of another or others about the Respondent. Respondent did testify, however that he observed the judge's physical demeanor towards him in the

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1 "On the one hand, we expect vigorous advocacy in court by trial counsel and demand, in particular, that counsel's defense of a person accused of a crime be conducted, at times, with great courage. On the other hand, it is elementary that once a trial judge has made a ruling in a case, even if that ruling is legally wrong and is subject to reversal on appeal, defense counsel is obligated to obey the ruling during the course of the trial--***subject, of course, to counsel being allowed*** (a) to make a proper proffer so as to test the ruling later on appeal, and (b) to petition the court to reconsider its prior ruling, although abiding by any ruling on reconsideration. Plainly, "[n]o one [including trial counsel] is justified in disregarding court orders merely because he believes them incorrect." (*Emphasis supplied.*)

jury's presence – facial, tone of voice – and his demeaning of counsel in the jury's presence as to the procedure for making a 'proffer' of evidence. The record shows the judge regarded counsel's effort to have the court consider a proffer and perhaps change its ruling to be a personal affront to the judge, i.e. 'to show how the judge was wrong.' Based on these developments it appeared to Respondent's *client* that the judge was prejudiced at least against Respondent. Respondent therefor made the disqualification motion immediately <u>upon the jury being absented from</u> the courtroom.

Indeed, appellate courts have praised vigorous advocacy in trial courts. *<u>See</u>*, e.g., ***Olds v. State***, 302 So.2d 787, 792 (Fla. 4th DCA 1974):

> If there is a hint to be found that appellant was unduly aggressive or unmindful of the court's directions, same is not borne out by the record. Without doubt appellant was vigorous and zealous, and this under somewhat strained and provocative circumstances. However, it is indisputable that a lawyer should afford his client the best representation he can. He is duty bound to fully protect the interests of a client. The Supreme Court in ***In re McConnell***, 370 U.S. 230, 82 S.Ct. 1288, 8 L.Ed.2d 434 (1962) held that:
>
> > 'The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt of court so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty.' [] 'While we appreciate the necessity for a judge to have the power to protect himself self from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases.' []. 'In the instant case, appellant had a perfect right to seek the available remedies to protect the interests of his clients, and his action did not constitute contempt of court.'

Id at 792. Counsel for parties in a trial court are not expected to be "neutral and detached," but "[i]n an adversary system, they are necessarily permitted to be zealous * * *." ***Marshall v. Jerrico***, 446 U.S. 238, 248 (1980). In truth, a 'oneness' is anticipated by the client of a trial counsel.

> Though a **client** and his counsel are separate entities, they share a common bond forged by the **attorney-client** relationship and tempered in the rigors of litigation. Most **clients** find the courtroom to be an unfamiliar and, in some instances, uncomfortable atmosphere and so it is not unusual that they entrust themselves into their counsel's care and view their interests as one. Thus, it is understandable that a **client** would become concerned and fearful upon learning that the trial judge has an antipathy toward his lawyer and has expressed the opinion that the **client's** counsel "should not be in this case.

Hayslip v. Douglas, 400 So.2d 553, 557 (Fla. 4h DCA 1981). And the client is "guaranteed his right to 'a vigorous advocate having the single aim of acquittal by all means fair and honorable.'" ***G.B. v. State***, 576 So.2d 889, 890 (Fla. 1st DCA 1991) (*citation omitted*). In one case where the attorney was determined to have been contemptuous and obstructive the appeals court wrote,

> On the one hand, we expect vigorous advocacy in court by trial counsel and demand, in particular, that counsel's defense of a person accused of a crime be conducted, at times, with great courage. On the other hand, it is elementary that once a trial judge has made a ruling in a case, even if that ruling is legally wrong and is subject to reversal on appeal, defense counsel is obligated to obey the ruling during the course of the trial--subject, of course, to counsel being allowed (a) to make a proper proffer so as to test the ruling later on appeal, and (b) to petition the court to reconsider its prior ruling, although abiding by any ruling on reconsideration. Plainly, "[n]o one [including trial counsel] is justified in disregarding court orders merely because he believes them incorrect."

Vizzi v. State, 501 So.2d 613, 619 (Fla. 3rd DCA 1986). Respondent not only is a trial

attorney as well regarded as his "sanction" witnesses testified, but he also is an appellate attorney and is familiar with such appellate court holdings and requirements and orients himself to the same.

It is submitted this Court may consider the record to support that Respondent may or may not have been intemperate as he testified; it also does support that Respondent was attempting at all times to build a record for appellate purposes and promptly notified the trial court of legal objections, including the recusal/disqualification issue which had arisen.

The Bar on page 1 of its brief states:

> The transcript which the Bar introduced into evidence during the final hearing on guilt, demonstrates the disruptive conduct and challenge to the court's authority which the respondent engaged in with the Honorable Robert Collins.

However, Respondent submits requesting the excusal of the jury to present a proffer is <u>not</u> disruptive conduct; the jury was not present when the remander of the complained of conduct occurred in his heated exchange with Judge Collins [see Bar's Brief at page 12, wherein it states that Respondent acknowledged he went over the line].

The Bar again resorts to egregious cases to support its request for a 91 day suspension, that is <u>The Florida Bar v. Wasserman</u>, 675 So.2d 103 (Fla. 1996) and <u>The Florida Bar v. Price</u>, 632 So.2d 69 (Fla. 1994).

To its credit the Bar does advise this Court that, "… it is arguable whether the respondent's misconduct was as egregious as the misconduct in Wasserman", since Wasserman had 4 prior instances of misconduct and in the cases under review had, in one matter, inter alia, announced he would advise his client to disobey the Court ruling and in the other had some choice language to offer the judicial assistant.

Price is also unquestionably more egregious than the conduct of Mr. Morgan.

The Bar appears to make little of the testimony of witnesses that appeared on behalf of Mr. Morgan; however, the testimony of Judge Holmes is most notable as it was that Judge that was involved in the Jackson matter the Bar alludes to in its Brief.

The witnesses spoke of Mr. Morgan's effectiveness, his strong advocacy, his dedication to pro bono work, his inspiration to other lawyers and, as the judges observed, the fact that certain judges have some continuing issues with Mr. Morgan to the degree they feel the necessity to bring that to the attention of others, such as Judge Horowitz.

When all of this is considered, including Mr. Morgan's previous admitted conduct, Respondent submits that a 91 day suspension is excessive indeed.

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 and grant any other relief that this Court deems reasonable and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via U.S. Mail on this 22nd day of September, 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