

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ANNA L. BROWN,

Respondent.

CASE NO.: SC04-2119

TFB NO.: 2003-11,109(20B)

THE FLORIDA BAR'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

The issues which Respondent raised in her Answer Brief on Remand are not meritorious. First, her claim that the conflict of interest issue was not properly pled is based on a misreading of the Complaint and Respondent's own lack of diligence. Furthermore, this issue has been previously resolved by this Court.

Second, Respondent's claim that the conflict of interest was unforeseeable is an attempt to inject a knowledge requirement into the rule, which this Court should reject. In any event, Respondent's own testimony and argument demonstrate not only that the conflict was foreseeable, but also that it was actually foreseen by Respondent.

Third, Respondent's argument regarding conflict of interest and her revisiting of the issues of the prior brief are based on distortions of the Referee's findings.

Fourth, Respondent's analysis is dependent on her claim that both clients needed to be co-defendants in order for a conflict of interest to exist. Conflicts exist when the clients have adverse interests, which is not dependent on co-defendant status.

Finally, Respondent claims that the Bar's interpretation of the Rules would have required Respondent to mislead the Court or to advocate frivolous positions.

In fact, the Bar's position is that, having recognized a conflict of interest, Respondent should have made a legitimate referral of Spillman to other counsel, rather than a sham referral to hide her dual representation.

ARGUMENT

I. THE ALLEGATIONS REGARDING CONFLICT OF INTEREST WERE SUFFICIENTLY PLED.

In her Answer Brief on Remand, Respondent argues that the allegations of the conflict of interest were not sufficiently pled and that Respondent was therefore denied due process. In support of this argument, Respondent claims that only one paragraph of the Complaint relates to the conflict of interest allegation.¹

Respondent ignores several other paragraphs of the Complaint which relate to the conflict of interest allegations. Complaint, paragraphs 19, 101-103. If she found the allegations were too vague or conclusory, Respondent was free to file a motion for more definite statement or pursue discovery in order to understand the Bar's allegations better. Respondent pursued neither course.

Respondent also complains that the Bar's theory of the case somehow changed during the course of the prosecution, but provides no support for this claim. Ironically, Respondent complains that the details of the conflict of interest allegations were not included as part of the discovery in the case nor was evidence regarding the conflict of interest allegations presented at the original final hearing

¹ In her Answer Brief on Remand, Respondent claims to quote paragraph 110 of the Complaint, which she repeatedly refers to as the sole relevant paragraph. In fact, the purported quote does not appear in the Complaint, although a substantively similar allegation appears in paragraph 10.

in 2005. Again, if Respondent had wanted discovery on the issue, Respondent was free to pursue such discovery. Instead, Respondent conducted no discovery between the remand of this proceeding on October 12, 2006, and the supplemental final hearing on March 2, 2007. Respondent should not be heard to complain about the consequences of her own neglect.

Similarly, Respondent's complaint that no evidence related to the conflict of interest was presented at the 2005 final hearing is also without merit. The conflict of interest allegations had been erroneously dismissed with prejudice by the Referee prior to that hearing. Offering evidence on the conflict of interest issue at that hearing would have been improper and likely raised an objection from Respondent. In fact, in her Motion to Dismiss, Motion to Strike, Motion for More Definite Statement filed in response to the Amended Complaint, Respondent sought to strike approximately 40 paragraphs of the Amended Complaint based on her claim that they constituted an impermissible re-allegation of the conflict of interest. The suggestion that the lack of evidence of a conflict of interest demonstrates that the Bar has changed the basis of its charges is untenable. In any event, this Court has already ruled on the sufficiency of the original Complaint in raising the conflict of interest rule when it remanded the case for further proceedings before the Referee. Respondent provided no reason for this

Court to revisit its earlier decision. Respondent's claim of surprise is disingenuous and merely an attempt to reargue an issue on which this Court has already ruled.

II. THE CONFLICT OF INTEREST WAS NOT SPECULATIVE, HYPOTHETICAL OR IMPLAUSIBLE.

Respondent claims that she should not be found guilty of violating Rule 4-1.7 because the Bar did not prove Respondent's knowledge of the conflict, and that the conflict was speculative, hypothetical, or implausible. In its Initial Brief, the Bar previously addressed the knowledge requirement which the Referee improperly added to the rule. Even if these considerations were relevant, Respondent's claim (and the Referee's conclusion) that the conflict was speculative, hypothetical, or implausible must fail based on Respondent's acknowledgement of the conflict.

In her testimony before the grievance committee, Respondent claimed that she did not represent Spillman, testifying that she advised both Parks and Spillman that she could not do so because of a conflict of interest. For example, Respondent testified that, "I told them they were co-defendants, and I thought there might be a conflict of interest[.]" Exh. 22, p. 7. Throughout her testimony before the grievance committee, Respondent discussed her belief at the time that a conflict existed in the representation of both Spillman and Parks. Exh. 22, pp. 7, 8, 21, 24-25, 52, 55, and 59-60. Although she also claimed during that hearing that her fears

of a conflict were in error, her acknowledgement of the issue demonstrates that the conflict was not unforeseeable.

Respondent has thus put forth two contradictory explanations for her claimed innocence. At the grievance committee, she claimed that she referred Spillman to another attorney because of a perceived conflict that did not really exist. Now, after a) the Referee considered the evidence and concluded that the referral of Spillman to Flood was a sham, and b) this Court has found the allegations of a conflict sufficient to state a violation of the Rules, Respondent claims ignorance of the conflict. Her own testimony contradicts her claim. In addition, Respondent points out in her Answer Brief on Remand that the issue of ownership of the gun was so obvious that even the prosecutor likely identified it, but somehow it was too speculative for her to anticipate. Answer Brief on Remand, p. 14. Although Respondent now claims that the conflict was not foreseeable, that claim is contradicted by her own testimony and her own argument.

III. RESPONDENT'S ARGUMENT IS DEPENDENT ON A MISREPRESENTATION OF THE FINDINGS OF THE REFEREE.

Respondent's argument that she should be found innocent of misconduct depends on her characterization of her involvement in representing Spillman as *ad hoc* interventions to assist Flood, thus limiting her obligations. This argument is not only lacking in legal support, but is also contrary to the factual findings made

by the Referee.

In her Answer Brief on Remand, Respondent claims, “[t]here is no finding, and no clear and convincing evidence, that [Respondent] did assume the full panoply of professional responsibilities with respect to Spillman[.]” Answer Brief on Remand, p. 29. That claim is false. The Referee rejected Respondent’s position, which Respondent made at the initial final hearing. TT1 9-23, 169-173.

After the first phase of the original 2005 final hearing, the Referee found that Respondent represented Spillman, applying the standard set forth in *Bartholomew v. Bartholomew*, 611 So. 2d 85 (Fla. 2d DCA 1992), which has been adopted by this Court. *Florida Bar v. Beach*, 675 So. 2d 106 (Fla. 1996). In the Partial Final Judgment of Referee, the Referee made the following finding:

Respondent Brown claimed that she did little or no actual legal work on behalf of Spillman, and then, only to assist Flood, and further claimed that the written evidence indicating that she regularly represented Spillman for months was accidentally created. ***These representations are not persuasive. The evidence introduced to support the representations is not believable.*** The evidence supporting her continued representation of Spillman and regular treatment of his case as her own is most persuasive.

Partial Final Judgment of Referee, paragraph 3 (emphasis added).

Respondent challenged the findings of the Referee in her cross-petition for review and the issue was fully briefed prior to the remand of the conflict of interest

issue. The Bar urges this Court to reject the Respondent's position for the reasons set forth in those earlier briefs. Clearly, if this Court were to conclude that Respondent did not represent Spillman, then Respondent could not have been guilty of a conflict of interest. On the other hand, unless this Court rejects the Referee's findings and relies on the evidence which the Referee found not to be believable, Respondent's argument collapses.

Similarly, Respondent misrepresents the Referee's findings with regard to her intentional misrepresentation. As more fully discussed in the prior briefs, the Referee found that the acts were intentionally committed, but that Respondent did not have a selfish motive. Respondent tries to argue that the Referee's finding of a benign motive precludes a finding of intent. This Court should reject Respondent's distortion of the Referee's findings and uphold the recommendation of guilt for the reasons discussed in the prior briefs.

IV. THE APPLICABLE STANDARD FOR A CONFLICT OF INTEREST IS WHETHER THE CLIENTS' INTERESTS WERE ADVERSE, NOT WHETHER THE CLIENTS WERE CO-DEFENDANTS.

In her Answer Brief on Remand, Respondent claims that no conflict of interest existed in representing both Parks and Spillman because they were not co-defendants. Respondent reaches her conclusion based on analysis of appeals of criminal convictions, rather than attorney disciplinary cases. Although the

inquiries may have similarities, each analysis has distinct concerns. Even applying these cases, however, the facts demonstrate an impermissible conflict of interest in representing both Parks and Spillman.

For example, Respondent relies on *Webb v. State*, 433 So. 2d 496 (Fla. 1983), in which this Court analyzed whether dual representation denied the defendant his right to counsel when a public defender was appointed to represent both a criminal defendant and that defendant's wife, who was charged with contempt for failing to appear as a witness against her husband. *Id.*, at 499. Even in that context, status as co-defendants did not preclude the finding of a conflict of interest. This Court summarized its reasoning by stating:

Appellant and his wife were not co-defendants in either of their respective cases, ***nor were their interests adverse or hostile to each other.*** Additionally, as defendants, neither appellant nor his wife had an interest in the outcome of the other's proceeding such as would render the public defender incapable of advising and representing either client adequately.

Id. at 498. Clearly, the determination that the two were not co-defendants was relevant to this Court's analysis, but not completely dispositive of the issue.

In *Webb*, the majority found no conflict of interest. Applying this Court's analysis in *Webb* to the representation of Parks and Spillman results in a different conclusion. Although Parks and Spillman were not prosecuted

in the same proceeding, they had adverse interests, with each having an interest in the other being deemed owner of the gun. Therefore, notwithstanding the fact that Spillman and Parks had separate case numbers, representation of both men constituted a conflict of interest.

V. RESPONDENT HAD A SIMPLE COURSE OF ACTION TO AVOID CONFLICT.

Respondent argues in her Answer Brief on Remand that the Bar's position would have required her to mislead the prosecutor and the court or to fabricate frivolous defenses. This argument is a blatant distortion of the Bar's position. The proper course of action for Respondent was simple. Respondent should have referred Spillman to another attorney for handling his defense, rather than misleading Spillman and the court by creating a sham referral, while collecting Spillman's fees. A genuine referral to would have avoided misconduct and allowed Spillman conflict-free representation.

CONCLUSION

The facts and argument of the Bar's Initial Brief demonstrate that Respondent engaged in a conflict of interest. Respondent's arguments in her Answer Brief are dependent on distortions of the pleadings, evidence, and orders of record in this proceeding. This Court should reject Respondent's arguments and find Respondent guilty of violating the rule against conflicts of interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 34358729042 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. Mail to **Brett Alan Geer**, Attorney for Respondent, 3837 Northdale Boulevard, Suite 350, Tampa, FL 33624; by regular U.S. mail to **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, FL 32399-2300, all this 2nd day of August, 2007.

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CERTIFICATION OF FONT SIZE AND STYLE

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

Troy Matthew Lovell
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