IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

COMPLAINANT,

VS.

MONTGOMERY BLAIR SIBLEY,

RESPONDENT.

CASE: SC06-1387

TFB File No. 2005-00,557(2B)
TFB File No. 2003-00,597(2B)

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RESPONDENT'S REPLY BRIEF

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What is most remarkable about the Answer Brief of The Florida Bar is this: Ignoring the basic tenants of federalism hard won and imposed on Florida by the Civil War, The Florida Bar urges this Court to adopt a disciplinary proceeding with less due process than afforded the recipient of a traffic ticket notwithstanding that the consequences for Respondent are exceeded in severity only by incarceration.

This matter is no longer about just this Respondent, but the very nature of "justice" in Florida. Accordingly, Respondent expressly challenges this Court to "say what the law is" after affording to Respondent the meaningful opportunity to be heard in person as is his inalienable right.

ARGUMENTS IN RESPONSE AND REBUTTAL TO ARGUMENTS PRESENTED IN THE FLORIDA BAR'S ANSWER BRIEF

I. ERRORS IN THE FLORIDA BAR'S STATEMENT OF THE CASE AND OF THE FACTS

The Complainant states: "Additionally, the Respondent failed to contact the Referee or Bar Counsel to explain his absence and failed to present any evidence for the Referee's consideration." (Answer Brief, p. 2). Later, the Complainant states: "Finally, the Respondent was given the opportunity to present any evidence he wished at the final hearing as he was noticed of the final hearing but he voluntarily failed to participate in the proceedings or introduce any evidence." (Answer Brief, p. 7).

These prevarications ignores the fact that Respondent immediately upon receipt of the "Notice for Final Hearing" on April 5, 2007, made a motion to continue the hearing for two weeks or, alternatively, appear by telephone for the yet-to-be held requisite Case Management Conference. Notably, the Referee denied that request leaving Respondent the *Hobson*'s choice of appearing for the hearing to protect his own interests or remain faithful to his pressing professional and personal obligations in Washington D.C. To Respondent, the choice was obvious.

Morever, Respondent was not "given the opportunity to present any evidence he wished at the final hearing" as his First Request for Subpoenas was

denied and his Second Request for Subpoenas was ignored by the Referee. Moreover, all documentary requests were denied.

Accordingly, the Complainant's representation of Respondent's failure to appear and present evidence at the final hearing are simply specious.

II. THIS COURT CANNOT "DICTATE" THE MANNER THAT DISCIPLINARY PROCEEDINGS OCCUR

As if the federal Constitution was not imposed upon this recalcitrant state by the Civil War, learned counsel for the Complainant maintains that: "Accordingly, as this Court has exclusive jurisdiction, this Court can dictate the manner in which disciplinary proceedings can occur." (Answer Brief, p. 8). Was the United States Constitution, Article VI, clause 2[1] repealed? If not, then this Court can promulgate any foolish disciplinary procedural rule it wants, but if it conflicts with federally guaranteed rights, such rule is *void ab inititio.*

Though Respondent carefully detailed the federal basis for his claims that the Florida attorney disciplinary proceeding violates federal guarantees, counsel for the Complainant failed to address any of those points for obvious reasons – he can't

[1] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; **and the judges in every state shall be bound thereby**, anything in the Constitution or laws of any State to the contrary notwithstanding." (Emphasis added).

and continue to maintain the fallacy of this Court's exclusive control over attorney disciplinary hearings.

Learned counsel for Complainant then continues – *ex cathedra* and without citation to a *single* authority – to state that: "There are no speedy trial rights in disciplinary proceedings."(Answer Brief, p. 8). Apparently, Respondent has no "right" to be brought to trial within a reasonable time. Given that Complainant has had notice for over three years that Respondent cannot be admitted to practice in Maryland until the Florida Bar disciplinary hearings are concluded, this is a new twist on the process-is-the-punishment power of The Florida Bar. Just let the matter fester forever and the harm is inflicted on Respondent without every having to render the process to the Respondent to which he is due.

III. DUE PROCESS REQUIRES CONFRONTING WITNESSES

Once again exclusively relying upon this Court's pronouncements without reference to the supervening authority of the federal Constitution, Complainant maintains that "the hearsay evidence that was presented was admissible and the Respondent had no right to request the opportunity to cross-examine any witnesses." (Answer Brief, p. 9).

Accordingly, the Complainant believes that Respondent's license can be suspended – and his reputation permanently impugned – by a process that is

conducted solely upon court opinion which the law specifically countenances to be issued: (i) not under oath and (ii) by judges who are permitted with impunity to be motivated by malice or corruption. *See*: *Pierson v. Ray*, 386 U.S. 547, 554 (1967)("immunity applies even when the judge is accused of acting maliciously and corruptly.").

How convenient such a process is for it avoids the necessity of presenting sworn evidence before rendering a verdict of guilty. Moreover, the Complainant states: "There is no right to cross-examine witnesses in disciplinary proceedings." (Answer Brief, p. 9). Why then have this sham of "a quasi-judicial administrative proceeding." when the whole matter can simply be "mailed" in for adjudication without the troublesome issue of allowing the accused to (i) confront his accusers to test their motives, (ii) challenge the veracity of their allegations against him and (ii) present any evidence in rebuttal.

As to the last point, the Complainant continues to misrepresent the facts and law to this Court. "The Respondent, however, is not entitled to subpoena members of the judiciary to testify. Specifically, courts have consistently held that a member of the judiciary may not be compelled to testify regarding the motivations behind his or her judicial actions." (Answer Brief, p. 9-10). As fully detailed in Respondent's initial brief, Respondent was (i) not seeking "the motivations behind his or her

judicial actions" but (ii) simply the facts upon which the decisions rested.

Moreover, Complainant's citation to *United States v. Morgan*, 313 U.S. 409 (1941) without further specific page citation or quote is professionally perfunctory and fails to address the long history detailed by Respondent of that case which resulted in the recognition by the United States Supreme Court of the very right Respondent claims here: the right to call judges as witnesses to testify as to the underlying facts of a decision. Likewise, Complainant's counsel's string-citation to *Fayerweather v. Ritch*, 195 U.S. 276, 49 L. Ed. 193, 25 S. Ct. 58 (1904), does nothing to enlighten as to the relevance of that case to the pending issues here.

IV. THE DENIAL OF THE CONTINUANCE OF THE FINAL HEARING

Continuing a pattern of taking liberty with the facts beyond the bounds of zealous advocacy, counsel for the Complainant states: "Like the attorney in *Kandekore*, the Respondent filed his motion to continue at the 'eleventh hour' in the case at bar." In *Kandekore*, the "eleventh hour" was the actual start of the hearing.[2] Here, Respondent promptly made the request for continuance immediately upon receipt of the notice of hearing. Contrary to Complainant's assertion, Respondent's motion to continue the trial for only two weeks or,

[2] "At the hearing, Kandekore presented no evidence. He only made a request for a continuance, which the referee denied.". *Kandekore* at 1005.

alternatively, appear by telephone hearing for the yet-to-be held requisite Case Management Conference was served on April 5, 2007.[3]

V. THE STRIKING OF AFFIRMATIVE DEFENSE WAS ERROR

This Court – and its putative impartial referee – are obligated to "afford an adequate opportunity to raise the constitutional claims. . . ." *Moore v. Sims*, 442 U.S. 415, 430 (1979). Here, by striking each of Respondent's affirmative defenses, the Referee denied to Respondent the opportunity to raises those constitutional

[3] The Court should note that the Referee ignored this Court's order on the timing of the hearings and ultimate sought and received a forty-five (45) day enlargement of time to file his report. However, he couldn't give Respondent two

claims by striking them from consideration as bars to the Complaint in this matter.[4]

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weeks to arrange his schedule and travel to appear for a final hearing in this matter.

[4] Respondent's constitutional claims raised in his stricken affirmative defenses included, *inter alia*, his: fundamental rights as a parent as a parent recognized in *M. L. B. v. S. L. J.*, 519 U.S. 102, 116 (1996), fundamental right to access court, First Amendment right to petition the government, Article IV, Privileges and Immunities Clause right to access court, Fifth Amendment Due Process right to access court, federal Fourteenth Amendment Equal Protection right to access court, Fourteenth Amendment Due Process right to access court, federal right to access federal court recognized in *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964). Likewise, Respondent's attempt to raise Florida Constitutional claims – such as they are – was also denied: Article I, Declaration of Rights, §21 right to access court, Article I, Declaration of Rights, §4 right to speak, write and publish sentiments on all subjects, Article I, Declaration of Rights, §5 right to petition for redress of grievances, and Respondent's "God given" rights as a parent recognized in *State ex rel. Sparks v. Reeves*, 97 So.2d 18, 20 (Fla.1957).

VI. THIS COURT CAN NOT ACCEPT UNCRITICALLY FACIALLY INCOMPETENT ORDERS

The Complainant asks this Court to accept uncritically an order finding Respondent in contempt for not paying child support when confronted with unequivocal evidence that the order was a prohibited *verbatim* adoption of a proposed order by the former wife's counsel.[5] Thus, upon this facially incompetent order, entered by a repeatedly documented hostile judge, Respondent's license to practice law is to be suspended without affording an opportunity to establish the grotesque circumstances surrounding the entry of that order? Verily, to accept such a result would be a continuation of the fine record of this Court's fundamenal mis-apprehension of federal principals of Constitutional law applicability in Florida. *See*: *Gideon v. Wainwright*, 372 U.S. 335 (1963)[6]; *Bush v. Gore*, 531 U.S. 98 (2000).

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[5] This Court in *Perlow v. Berg-Perlow*, 875 So.2d 383, 390 (Fla. 2004) noted that: "Based on the foregoing, we conclude that the trial judge erred in this case by entering as the final judgment the proposed final judgment prepared by the wife's attorney without giving the husband an opportunity to comment or object."

[6] This Court "[t]reating [Gideon]'s petition for habeas corpus as properly before it, . . .'upon consideration thereof' but without an opinion, denied all relief." *Id*. at 337.

VII. "MERITLESS" IS NOT THE SAME AS "FRIVOLOUS"

The Complainant's claims that: "The Referee properly concluded that the word 'meritless' is synonymous with 'frivolous.'" (Answer brief, p. 20). However, apparently not needing to cite authority for his pronouncements, neither the Referee nor counsel for Complainant bothers to support this conclusory statement.

Clearly, in Florida the definition of "frivolous" is specific. The Comments to Rule 4-3.1 state in part: "The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law." Once again, the Third District Court of Appeal never found any of the numerous lawsuits filed by Respondent to be "frivolous".

"Meritless", on the other hand, is something quite different. This Court has never defined that term. Fortunately, a superior court has addressed – and thereby bound – this Court. In *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 532 (2002), the Court stated:

> Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances." Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Like successful suits, unsuccessful suits allow the "'public airing of disputed facts,'" *Bill Johnson's*, supra, at 743 (quoting Balmer, *Sham Litigation and the*

> *Antitrust Law*, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force. See Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L. J. 557, 656 (1999)(noting the potential for avoiding violence by the filing of unsuccessful claims). Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved—or could prove—the contrary.

Here, each of Respondent's suits were "reasonably based" and as such, Respondent can not be sanctioned for pursuing them without this Court violating Respondent's First Amendment rights. Given that each suit arose in the context of family court proceedings – and that Respondent never resorted to violence though his minor children were ripped from him without hearing for two years – this Court treads on thin ice by establishing a precedent which punishes a father for properly, patiently, persistently and precisely petitioning for recognition of his fundamental rights as a parent by closing the courthouse to him and thereby leaving him no other avenue for redress but than to take the law into his own hands.

CONCLUSION

In conclusion, Respondent would make these final observations:

- Though Respondent cites seventeen (17) separate federal cases in support of his arguments, the Complainant failed and refused to address even one (1) of the relevant holdings in those cases. Plainly, this "ostrich" approach to legal argument is adopted as no distinguishing response is possible.

- No state under our federal system has the liberty to premise the suspension of the license to practice law upon a procedure that (i) is based solely upon unsworn allegations, (ii) denies to the accused the opportunity to confront his accusers, (iii) offer evidence in his defense and (iv) deny him the right to raise his defenses by striking them out of hand.

- Here, no "client" of Respondent has been harmed. Only a judiciary which resents even the slightest suggestion that it is careening widely out of control and is permitting an adjudicatory process to become prisoner to the legal profession for the sole purpose of that profession's profit.

Upon these grounds, Respondent properly demands oral argument so that this Court cannot hide behind its *praetorian* guards and act as a Nero Claudius Caesar Germanicus at the Coliseum deciding the fate of Christians by a fickle twist of his wrist.

Instead, this Court must address each claim raised by Respondent and determine not only the invalidity of the process crystallized here, but whether the

State was ever ceded power to silence those who rightfully raise voices against it.

CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure, Rule 9.210(a)(2) and a true and correct copy of the foregoing was served by U.S. Mail this November 20, 2007, upon Barnaby L. Min, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, Florida 33131, Kenneth L. Marvin, Director of Lawyer Regulation, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 and Brian D. Burgoon, Designated Reviewer, 999 Peachtree Street Northeast, Suite 2300, Atlanta, GA 30309.

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