IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.
DEWEY HOMER VARNER JR.,

Respondent.
_____/

Case No. SC06-1919

The Florida Bar File
No. 2005-51,022(15C)

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar." Dewey Homer Varner, Jr., Appellant, will be referred to as "Respondent." The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter. Exhibits introduced by the parties will be designated as TFB Ex. __ or Resp. Ex. __.

SUMMARY OF THE ARGUMENT

The Florida Bar's Answer Brief is a wonderful attempt at misdirection. This case is about misplaced trust in a partner's statement that a client had consented to the dismissal of one of his multiple workers compensation claims. The Bar would have this Court believe that one partner's oral testimony that she had no relationship to the client's case at the time of the dismissal and that this conversation did not occur. However, the documentary evidence in this case, directly contradicts this partner's testimony. Further, the only person with any type of motive to avoid a trial was Thorne. Her illness prevented her from wanting any type of confrontation and she avoided at all costs having to go to trial or a contested hearing. The testimony in this case was that this was Thorne's case to try and that while the Respondent assisted in the prosecution of the case, he would not be trying it.

Even if the Referee's findings of fact and guilt are upheld, the recommended sanction of a ninety one day suspension is not warranted under existing case law. While the Respondent does have one prior disciplinary suspension it is seven years old and should not be given the weight that the Bar has convinced the Referee to ascribe to same.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND GUILT ARE NOT SUPPORTED BY THE RECORD.

This case, and a related Bar prosecution, began with The Florida Bar charging two partners with taking a voluntary dismissal of a workers compensation claim without that client's permission. At the core of this dispute is whether or not one partner, the Respondent in this case, had a conversation with his partner, Patricia Thorne, wherein Thorne, advised the Respondent that she had spoken to the client and he had given permission for the dismissal. The Respondent in his initial brief fully explained the facts and circumstances leading up to this conversation and his reliance upon same for the actions that he took. As such, this reply brief will focus on explaining how the Bar's answer brief fails to support the Referee's findings in this case.

The Florida Bar begins its presentation by creating a story that the Respondent disliked Thorne, never really wanted to be her partner, that he took advantage of her and that he was not a good partner. Putting aside the fact that none of this is true or supported by the evidence in this case, one must ask the simple question – why is this relevant? It is not and is only argued to draw the Court's attention away from the testimony and documentary evidence in this case. A fair reading of the two partner's testimony was that the partnership formed and worked for several years, but that it hit a serious bump in May of 2003, when

Thorne lied to the Respondent and sent him to a hearing with a forged document. TT 143.[1] This act, by Thorne, ultimately lead to her being suspended. The partnership did not dissolve until well after the dismissal that forms the basis of this complaint.

The proper time frame that must be examined in this case is August 2003. All parties agree that the Notice of Voluntary Dismissal was served on August 14, 2003. Therefore, the actions taken by the Respondent and Thorne in early August through the end of the month are very important to the resolution of this file. This timing was discussed in some detail at pages 12 through 14 of the initial brief.

It is also important to consider why August 14, 2003 was important. Prior to August 2003, this case was set for mediation and trial, and they were to proceed in late August 2003. As such, defense counsel was trying to finish her depositions

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[1] This act, by Thorne, ultimately led to her being suspended from the practice of law for ninety days. See proffered Respondent's Exhibit 11 and Respondent 12. For some reason, the Bar at page 7 of its brief (just like they did at trial) tries to distance itself from its prior prosecution of Thorne, which prosecution was handled by the same Bar counsel in this case and was resolved by the same Referee in the instant matter. In fact, the Bar tries to blame the Respondent for Thorne's decision to draft a fraudulent pleading. This is an amazing attempt at revisionist history that this Court should find offensive. Thorne was disciplined for her actions in this prior case and the Referee's and Bar Counsel's attempt to discredit Thorne's former employee who filed the grievance that resulted in Thorne being sanctioned for actions that they assisted in the sanction being imposed is abhorrent and should not be condoned. During the Referee's pointed examination of this witness, the Referee even asked this witness if she had an affair with the Respondent, which was not relevant to her testimony and completely uncalled for. TT339.

and both parties were readying the case for trial. This included Patricia Thorne. Law firm records introduced at the final hearing indicate that Thorne was actively working on the Lindale trial and preparing the case for trial. See Resp. Ex 3 (billing statement with 45 of 50 entries showing as Thorne), Resp. Ex. 4 (a Petition for Benefits), 5 (correspondence), 6 and 10 (printouts from the Messages section of the case management software). For example, the Messages reflect that on August 5, 2003, Thorne was looking for the client's "journal" so she could prepare the case for mediation and trial which were scheduled for August 15, 2003 and August 25, 2003, respectively.[2] In fact, the Notes also reflect that Thorne was the person that rescheduled the deposition that was to take place just prior to the filing of the Notice of Voluntary Dismissal. TT170.

While the Bar attempts to contend that Thorne had no relationship to the Lindale case in August 2005, the documentary evidence clearly and convincingly refutes this argument. Further, if this was true why was Thorne telling her staff that she tried to call Lindale several times on August 13, 2003 and that she was continuing to try and call him. See Resp. Ex. 6 and in particular the first 8/13/2003

[2] The Bar argues that the computer records are not reliable because Thorne testified that they should not be relied upon. However, these very same records were copied from Thorne's own computer system, produced by Thorne in her own defense of Lindale's complaint and were copied and provided to the Respondent by The Florida Bar during discovery. In essence when they helper her, these records were accurate and when they hurt her, Thorne and the Bar state they should not be relied upon. The Bar can not have this both ways.

notation in Messages. The Messages also reflect a call to Thorne by Lindale on August 14, 2003 reflecting he had seen the videotapes, which he would not have done but for a phone call from Thorne. See Resp. Ex. 6.

The initial brief completely discusses the rule violations found by the Referee and as such these matters will not be reargued herein. However, since the Bar repeats one factual argument, a comment must be made about the expert deposition that was defended by the Respondent just prior to the voluntary dismissal. The Bar repeatedly claims that the Respondent read a magazine during the deposition. This is untrue and denied by the Respondent during his testimony. In fact, the Bar's own witness only testified that the Respondent was reading during the deposition but that she was unsure what he was reading and testified that it ". . . might have been a magazine . . . (but) . . . it could have been a file." TT26. She did not know and it was only speculation as to what documents he was examining or reading. Accordingly, the only possible evidence that helps the Bar's claim was that the Respondent may have been reading a document, but it could have just as easily been a document related to the case.

The Bar concludes its brief with a litany of what the Bar claims are fraudulent acts. None of these claims are set forth in the Bar's complaint or the Report of Referee and they include baseless innuendo that the Respondent induced his secretary (also his wife) to create a fraudulent document, that he caused the

computer records kept by Thorne and produced by Thorne to be altered. There is absolutely no proof of any of this in the record and no citation by the Bar to any document in evidence that supports these claims.

II. A NINETY ONE DAY SUSPENSION IS AN EXCESSIVE SANCTION.

A significant portion of the initial brief was devoted to the appropriate level of sanction that should be imposed in this case. Rather than repeat such argument herein, the focus will be on the only two cases cited by the Bar to support the 91 day suspension being recommended by the Referee. It must be noted that the Bar apparently must agree that the cases cited in their closing argument are not dispositive as they have made no argument in reference to them.

The first case cited by the Bar is not even similar to the case at hand. *The Florida Bar v. Lathe*, 774 So. 2d 675 (Fla. 2000). In *Lathe* the Court imposed a ninety one day suspension when the lawyer was found guilty of having made two knowing misrepresentations to a trial judge that he was unable to attend a scheduled deposition because another judge had ordered him to attend a pretrial conference. The facts of this case are dissimilar. The misrepresentation argument advanced by the Bar is that since Lindale had not authorized the dismissal of the case, the pleading must therefore be a misrepresentation. The dismissal, which was introduced as TFB Exhibit 1 reads: "Claimant, Jerry L. Lindale, through his undersigned counsel, dismisses without prejudice any and all pending claims filed

in the above matter." At the time this was drafted, the Respondent believed this statement to be true, and if it was not, the statement was made in misplaced reliance on his partner. This is a far cry from Lathe's outright lying to a judge regarding his reason for failing to attend a deposition. It should also be noted that Lathe was also being sanction for having been held in contempt of court for failing to meet his obligations regarding the payment of discovery sanctions, which is also not present herein.

The second case argued by the Bar is in no manner similar to the case at hand. *The Florida Bar v. Burton*, 396 So. 2d 705 (Fla. 1980) is a default disbarment for theft of client monies. In *Burton* the lawyer settled a personal injury case without authorization, forged the clients signature to the settlement documents and check, and then stole the settlement proceeds.

The Respondent believes that the public reprimands handed out in the only similar cases set the appropriate baseline for sanction in this case. See *The Florida Bar v. Price*, 569 So. 2d 1261 (Fla. 1990) [failed to discuss a dismissal of an action with the client]; *The Florida Bar v. Weidenbenner,* 630 So. 2d 534 (Fla. 1993). [failed to notify a co-trustee that the letters of administration had been revoked at the time that the lawyer wrote a letter to that co-trustee authorizing final disbursement]; *The Florida Bar v. Barcus*, 697 So. 2d 71 (Fla. 1997) [filing a notice of appeal with the client's consent for the sole purpose of delaying a

foreclosure]; *The Florida Bar v. Glant*, 645 So. 2d 962 (Fla. 1994). [asserting a position regarding custody that the lawyer knew was not what her client wanted].

The Bar makes no argument concerning the mitigation discussed at pages 26 through 28 of the initial brief and appears to concede that the mitigation found by the Referee was appropriate and that the other areas of mitigation established in the record are also appropriate. As in any case mitigation is used to temper any sanction being imposed by the Court. The sanction being recommended by the Referee and urged by the Bar do not give any weight to this mitigation which far outweighs any aggravation found in this case.

The Referee provides no reference to case law in reaching her sanction recommendation, and the two cases advanced by the Bar do not support the suspension being recommended in this case. The only case law advanced by either party that is on point indicates that a public reprimand is warranted.

Conclusion

In this case, the Respondent urges the Court to take a hard look at the evidence presented, as it is his belief that the Bar has failed to meet its burden of proof on the charges raised by the Bar. Further, the Respondent respectfully takes issue with the harsh sanction being recommended by the Referee where the Court's precedent indicates a lesser punishment. It is respectfully contended that the Bar seeks to discipline the wrong partner for causing a notice of voluntary dismissal to

be filed in that the only person who stood to gain anything (not having to attend a trial where the client was going to be accused of insurance fraud) was Patricia Thorne and not Dewey Varner.

WHEREFORE the Respondent, Dewey Homer Varner, Jr., respectfully requests that the Court find him not guilty of the Bar's complaint, and if the Court sustains some of the Referee's findings of guilt, impose no more than a public reprimand as a sanction therefore 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 ____ day of March, 2008 to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 900, Fort Lauderdale,

FL 33309 and to Kenneth Marvin, 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 or the e-mail forwarded to the Court has been scanned and found to be free of viruses, by McAfee.

By: _____
KEVIN P. TYNAN, ESQ.