IN THE SUPREME COURT OF FLORIDA

Before a Referee

THE FLORIDA BAR,

Complainant,

vs. Supreme Court Case no: SC08-1278

GARY ELVIN DOANE, TFB File no: 2008-90,049(02S)
TFB File no: 2008-90,094(02S)

Respondent.

_____/

RESPONDENT'S REPLY BRIEF

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Issue I - Insufficient Evidence to Support a Violation and Insufficient Findings of Fact in the Referee's Report

Counsel for The Florida Bar continues to misapprehend what this action is all about. The primary purpose of the Rules Regulating the Florida Bar is to protect the public. No member of the public has ever complained or been threatened with harm in this case. Bar counsel's Answer Brief fails to address the primary reason for the mere existence of the Rules. The Bar's Answer Brief repeatedly refers to the "Bar's position" or the "Bar's opinion" or their "contention".

The Answer Brief takes inordinate effort to recite a long history of facts showing the number of times that the Respondent had been informed of the Bar's opinion. Respondent, at all times, respectfully disagreed with the opinion of the Bar. Having received two prior findings of No Probable Cause, Respondent feels confident in his opinion. What exists then is a contest of wills.

It is apparent that since there is no complaint by any member of the public that the sole reason for the prosecution of this case is the vindication of the authority of the Bar. A demonstration of the willingness and ability of the Bar to impose its will on the members, despite the lack of any discernable harm that may

come to the public.

When we became lawyers and judges we swore to uphold the Constitution of the United States and of the State of Florida. We did not swear to uphold the authority of the Bar. The cases cited by Respondent involve the application of Constitutional rights, most notably, the right to Freedom of Speech. The right to Freedom of Speech extends to commercial speech. The right to be free from infringement of that right is well presented in the cases cited, especially the Fetterman case. The Florida Bar v. Fetterman, 439 So.2nd 835 (Fl. 1983)

The Fetterman case plainly states that in matters such as the instant case, the Bar must prove that the speech sought to be prohibited is "inherently misleading". There has been no evidence of such.

There is no finding by the referee that the speech sought to be prohibited was "inherently misleading".

The use of the word "expert" by an attorney who is Board Certified such as Respondent, is expressly permitted. Rule 4-7.2(c)(6). The legal contest over the use of the word "expert" is over...over I say, over. The majority of this Honorable Court felt the use of the word was not misleading, certainly then it is not "inherently misleading". In Re: Amendments to the Rules Regulating the Florida

Bar - Advertising, Revised Opinion dated December 20, 2007.

The Bar's citation to The Florida Bar v. Lange, 711 So. 2nd 518 (Fla. 1998) is indeed useful for comparison purposes. There Lange advertised that he practiced in "All Federal & State Courts in 50 States". He was only licensed to practice in Florida. He was indeed unable to pass the "inherently misleading" test..... the statement was not true. Respondent herein in not accused of making any statement that is not true.

Issue II - The Bar Destroyed Evidence that Would Have Been Useful to Respondent and is Guilty of Spoliation and a Denial of Due Process

Respondent moves to strike those references on page 19 of its Answer Brief concerning the types of files destroyed and why, as they are not of record and improper. The sworn interrogatory answers of the Bar state that .... "files and records of complaints in which no discipline are imposed are destroyed after one year as a matter of Bar policy and the information is purged from the Bar's records after one year." This Honorable Court should confine its consideration of this issue to the sworn interrogatory answers of the Bar, and not the unsupported statements in its brief.

In a case of dueling opinions and differing interpretations, where the Ninth

Circuit Grievance Committee on two prior occasions found No Probable Cause, the destruction of evidence of prior findings where no discipline was imposed is a spoliation of evidence and a denial of due process.

Issue III - The Referral of the Matter to the Statewide Grievance Committee was Improper

(Initially note that the Bar's Answer Brief refers to its referral of the case to the "Second Judicial Circuit Grievance Committee "S" ", which never occurred and is likely an inattentive rendition of fact.) After two No Probable Cause findings by the Ninth Judicial Circuit Grievance Committee, the Bar improperly referred the matter to the Statewide Advertising Committee. In attempting to defend such, the Bars Answer Brief contends that there was no forum shopping, but fails to address the plain language of Rule 3-7.4(j)(3) Effect of No Probable Cause Finding. That Rule allows a grievance committee to reopen a file. There is no provision in the Rules for the Bar seeking a determination of probable cause from an entirely different grievance committee. The Bar is not permitted to invent its own procedure.

The Bar also argues that the members change on grievance committees, which is quite disingenuous. Members change on the Supreme Court - that

doesn't mean you can just take your issues elsewhere, to a more friendly forum of your choosing.

Issue IV - Referee Did Not Have Authority

The Bar's answer Brief doe not deny that the referee was not properly appointed, instead argues that the case of The Florida Bar v. Sibley, 995 So.2nd 346 (Fla. 2008) excuses the lack of a properly appointed referee. The Sibley case had little to do with the issues herein, the Respondent contending that the Justices had not taken a particular oath. The Honorable Court deftly pointed out the factual inaccuracies in that contention and the Respondent's erroneous interpretation of, and reliance upon, a statute concerning the issuing of pay vouchers.

The Court ratified the validity of the actions of - "A 'de facto' officer exercising the functions of office in consequence of a known and valid appointment ..." That is exactly the issue in the case at Bar - there is no valid appointment. The judge who was to select and appoint the referee did not do so. There has been no compliance with the Order of this Court, and there is no authority in the referee.

In determining the Sibley case, this Court cited to State v. Andrews, 113 So. 2nd 701 (Fla. 1959) for the proposition that where the constitution prescribes the

manner in which something may be accomplished, the means are exclusive. It is undisputed that the procedure provided provided for the appointment of a referee was not followed and the is nothing in the record to support the failure to comply with this Court's order.

Issue V - The Taxing of Costs

The Bar's Answer Brief argues merely that there was no evidence that the Bar's costs were excessive - Respondent is unable to respond as nothing was provided by Bar counsel other than just some numbers. I don't even have a bill from a court reporter. Some evidence of costs must be provided. The swearing of Bar counsel that particular number of dollars was incurred is violative of the best evidence rule, and hearsay - the bills are the best evidence of what amounts they purport to show.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Respondent's Reply Brief has been furnished to the Clerk of the Court, The Supreme Court of Floirda, Supreme Court Building, 500 South Duval Street, Tallhassee, Florida 32399-1927; and a true copy hereof has been furnished to Jan K. Wichrowski, Esquire, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804; Kenneth Lawrence Marvin, Esquire, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399 and John F. Harness, Jr., Esquire, Executive Director, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, by mail delivery, this _____ day of July, 2009.

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