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AUG 10 1988

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

THE FLORIDA BAR,  
Complainant,

v.

DONALD McLAWHORN

Respondent.

CONFIDENTIAL

CASE NO: 69,240  
TFB #85-13,630 (13B)

RESPONDENT'S REPLY BRIEF

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## SUMMARY OF ARGUMENT

The Florida Bar would focus on the "Traverse" to indicate Respondent's intention to be deceitful. The Bar ignores the testimony, especially that of Judge Giglio, which clearly indicates that the Court was apprised of all of the facts as was everyone else, no one was misled.

The Bar argues that Donald McLawhorn's name on the property titles impeded the Court's ability to rule in the September 11, 1984 hearing. The testimony of the Judge allegedly so impeded was to the contrary.

If DR 5-103(A) is designed to prevent detriment to a lawyer's client then even the Bar agrees that Donald McLawhorn is not guilty. If the rule is extended to avoid detriment to the opposing client then Donald McLawhorn is likewise not guilty. Donald McLawhorn is likewise not guilty since the detriment to Ms. Varon, alleged by the Bar, was some delay of the September 11, 1984 hearing. Judge Giglio testified that Donald McLawhorn's name on the property, a fact known to the Court, was not the reason for delay.

Donald McLawhorn advised the Court and others that his name was on the title to the property and he explained why. This did not delay the proceedings nor did it deprive the Judge of his authority. Ms. Varon and Mr. Draughn finally entered into an agreement January 22, 1985 which was ratified by Court Order and consummated by the execution of Deeds by Donald McLawhorn and Ms. Varon.

In light of the testimony, if discipline must occur thirty (30) days suspension or any suspension is excessive.

DID THE REFEREE ERR IN FINDING THAT THE RESPONDENT'S FILING OF A "TRAVERSE" CONSTITUTED DECEIT OR MIS-REPRESENTATION UNDER DR RULE 1-102(A) (4)?

The Bar argues that the Referee's decision comes before the Court clothed with a presumption of correctness but such is a rebuttable presumption and any finding of the Trial Court must be founded on the totality of the evidence presented to it.

The Bar cites, R.pg. 12, line 14, of the testimony of Ms. Varon where she states that she did not know of the property transfer until the day of the hearing, September 11, 1984. From that testimony the Bar would like to show that the information contained in the "Traverse" indicating Mr. Draughn's joint desire with Ms. Varon, to sell the property worked some type of deception upon the Court. Yet, Ms. Varon's own testimony indicates that Donald McLawhorn advised the Court of the conveyances.

The Bar ignores Judge Giglio's testimony indicating that he knew of the conveyances but that had nothing to do with the fact that the case was not resolved. (R.49 line 4-19) When the testimony of all the witnesses is considered, instead of merely looking at the "Traverse", it is clear that at both hearings, both lawyers, both of the parties and the Court knew of the conveyances. The Court was not misled nor deceived. The fact that Donald McLawhorn advised the Court of the conveyances, (R.37 line 14-25; R 38 line 1-4) clearly shows that he was not attempting to hide anything or deceive the Court. It further stands to reason that had Donald McLawhorn deceived the Court or prohibited the Court from entering a ruling that he would

have immediately incurred the wrath of the Court with accompanying sanctions. Certainly had Donald McLawhorn deceived the Court or impeded the Court's ability to rule, Judge Giglio would have testified concerning such wrong doings by Respondent as opposed to giving the testimony that he did, which the Bar chooses to ignore.

DID THE REFEREE ERR IN FINDING THAT THE RESPONDENT DEPRIVED THE COURT OF THE ABILITY TO ORDER THE SALE OF THE PROPERTY BEING LITIGATED IN VIOLATION OF DR 1-102(A)(5); CONDUCT THAT IS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE?

The Bar basically argues that the issues would not have been resolved at the hearing of September 11, 1984 even if a full day had been reserved for the hearing because the Judge was powerless to rule due to the conveyances putting Donald McLawhorn's name on the property deeds. This simply ignores the testimony of all the witnesses. Donald McLawhorn explained to the court that his only interest in the property was in the nature of the lien for some security to insure cost funding for other representation of Mr. Draughn and that Donald McLawhorn would sign any instrument needed to effectuate a Stipulation between the parties or ruling by the Court.(R. 37;38 line 1&2). This same explanation was again brought to the Court's attention at the January 22, 1985 hearing and even Ms. Varon's testimony (R. 16 line 4-10) corroborates what Donald McLawhorn told her attorney and the Judge, namely that he would sign whatever necessary to resolve the issues. That is what took place at the January 22, 1985 hearing when the parties came to an agreement, during the recess, and the agreement was ratified by an Order of the Court. Thereafter, Respondent, true to his word, signed the Deed of conveyance to Ms. Varon as per Order of the Court. If it had been the intent of Donald McLawhorn to render the Court powerless on September 11, 1984, the Court would have been equally powerless January 22, 1985. All the testimony

shows quite the contrary, especially the testimony of Judge Giglio who indicated that the case wasn't settled September 11, 1984 because too many issues were presented for a thirty(30) minute hearing, not because of Donald McLawhorn's name on the property titles, a fact known by the Court.(R. 49 line 4-19).

DID THE REFEREE ERR IN FINDING THAT RESPONDENT ACQUIRED PROPRIETARY INTEREST IN THE SUBJECT MATTER OF LITIGATION IN VIOLATION OF DR 5-103 (A)?

The Bar argues that the cases referred to by Donald McLawhorn in his Initial Brief focus on whether the attorney's conduct was in some way detrimental to his client. The Bar further admits that Donald McLawhorn did nothing detrimental to his client, Mr. Draughn. Both of these statements are accurate.

It would appear, from the case law, that Rule DR 5-103(A) focuses on a lawyer acquiring a proprietary interest in a cause of action or subject matter so as to give rise to a situation where the best interest of the attorney is incompatible with the best interest of his client. Such is not the case as it concerns Donald McLawhorn and his client, Mr. Draughn.

Therefore the only logical conclusion is that the Bar is extending the rule, in the present situation, to say that Donald McLawhorn acquired a proprietary interest of subject matter of litigation(of the property) to the detriment of someone other than his client, i.e. Ms. Varon. That the detriment to Ms. Varon was the inability of Judge Giglio to rule on the issues of who should own which piece of property at the hearing of September 11, 1984. The testimony of Judge Giglio clearly shows that the case was not resolved at the hearing of September 11, 1984 because there were too many issues set for resolution in a thirty (30) minute time limit,(R. 49 line 4-19) even though Donald McLawhorn

was willing as was Mr. Draughn to sign any documents necessary to effectuate an agreement between the parties or to comply with any ruling of the Court.

UPON THE FINDINGS OF THE REFEREE, AS STATED, IS THE DISCIPLINE IMPOSED EXCESSIVE UNDER THE CIRCUMSTANCES?

The Bar argues that the Respondent failed to consider the impact that his actions had on the judicial system and the opposing party. There is no evidence that anything Donald McLawhorn did had any "impact" on the judicial system.

The Bar argues that Ms. Varon lost the Homestead Exemption on the Rome property which caused her taxes to increase. If Ms. Varon had received what she wanted at the hearing of September 11, 1984, namely ownership of the Rome property she would have lost whatever legitimate Homestead Rights she had, if any, (since it was Mr. Draughn who was living there) since she had no intention of moving in. Further, any Homestead Exemption rights were in effect because Mr. Draughn lived there, not Ms. Varon and her husband.

The Bar argues that "suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the Court or that material information is improperly being withheld and takes no remedial action", the Bar refers to the "Traverse". The testimony shows that Donald McLawhorn told the Judge and everyone else, about the conveyance and that it had no bearing on the outcome of the September 11, 1984 hearing, Judge Giglio's testimony confirms this.


The Bar argues that Standard 7.2 is applicable. Respondent violated no professional duty that caused harm or potential harm to his client, which the Bar admits. Respondent caused no injury or potential injury to Ms. Varon(the public) in that she got what she bargained for and any delay, if we believe Judge Giglio, was

not occasioned by any acts of the Respondent. Further, if we believe Judge Giglio there was no injury to the legal system.

With respect to Standard 9.22, Donald McLawhorn acknowledges a prior disciplinary proceeding and substantial experience in the practice of law. Donald McLawhorn refuses to acknowledge "wrongful nature of conduct" because he did not deceive or mislead Judge Giglio and neither did he do anything to impede Judge Giglio's ability or authority to resolve legal matters before his Court. Respondent has respected Judge Giglio and practiced before Judge Giglio for many years and would not deliberately deceive or mislead Judge Giglio's Court, or any other Court, or take any action that would thwart the Court's ability to resolve legal issues; had Respondent done so it would certainly be reflected in the testimony given by Judge Giglio.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 9th day of August, 1988 to: Richard A. Greenberg, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Fl. 33607.

  
Michael L. Kinney  
Attorney for Respondent