IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Supreme Court Case No. SC19-1913
Complainant,	The Florida Bar File No. 2018-50,518 (13F)
v.	The Florida Bar Initial File No. 2018-50,508 (17A)
WENDELL TERRY LOCKE,	
Respondent. _____/	

RESPONDENT'S CROSS-REPLY BRIEF

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I. The Florida Bar failed to rebut that fundamental error occurred.

The fundamental error that occurred in these proceeding infringed on the validity of said proceedings in that it implicated the Respondent's constitutional rights and the error was significant enough to require a new final hearing. The Florida Bar does not refute that fundamental error occurred because the Respondent could not defend himself, and essentially concedes that the Referee made factual findings *adverse to the Respondent* in Mr. Patterson's final hearing, resulting in the Respondent's case being heard in an unfair and partial tribunal.[70]

The record evidence in this proceeding suggested favorable testimony for the Respondent would have come from Judge Honeywell's testimony. Further, The Florida Bar failed to address the significance of not having Clerk Warren's testimony at deposition and/or the final hearing for the obvious reason – The Florida Bar has no answer. In fact, The Florida Bar completely failed to address that the Referee did *not* have the power to compel both Judge Honeywell and Clerk Warren to appear for either deposition or the final hearing, which resulted in the Respondent being denied due process.

[70] *See* Amended Record of Index, Tab. 88; *see also* Respondent's Answer/Cross-Initial Brief, pg. 41-42.

The Florida Bar essentially concedes that the right of an accused to due process is the right to a fair opportunity to defend against the State's accusations, including the right to call witnesses in one's own behalf to establish a defense.

The Florida Bar even misinterprets the Respondent's reference to "we" in the October 17, 2012, hearing. The Florida Bar wants this Court to ignore the Respondent's testimony and the plain language in the transcript, and disregard that The Florida Bar never questioned the Respondent concerning the language or choice of words he used in that hearing. What is true and accurate is that the Respondent made it clear at the final hearing in this proceeding and in his October 23, 2012, correspondence[71] to PR Bussey-Morice that she should not have been sanctioned, that nothing done by PR Bussey-Morice was the basis of the sanction, and that at no point would she have ever pay the sanction.[72]

The Florida Bar argued that the questioning of Judge Mendoza's exclusive jurisdiction, the requests for judicial oversight, the complaint to the Judicial Council, the motion to stay proceedings in the district court, the

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[71] *See* Respondent's Trial Exhibit 51.

[72] Under FED. R. CIV. P. 37, Judge Honeywell had the authority to sanction the party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees.

petition for writ of mandamus and the lawsuit against Clerk Warren were without merit. The case law says otherwise, and supported the exclusive jurisdiction and access to judicial records arguments. A request for judicial oversight and a complaint to the Judicial Council are legitimate venues to seek redress when there are deviation of policy and practice in the federal courts, as it is circumstantial evidence of unlawful intent.[73]

II. Rule 3-4.3 (Misconduct and minor misconduct)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 3-4.3.

The report and recommendation failed to identify *any* conduct of the Respondent that was "unlawful or contrary to honesty and justice." The Florida Bar pointed to the purported conflict of interest, which was addressed under the argument below pertaining to Rule 4-1.7. As for use of the phrase "Brutality Officers," Judge Honeywell never held the Respondent in contempt for violating her ruling concerning name-calling (because it was not name-calling), nor did the defendants file motions for contempt concerning use of the phrase, but instead filed motions in limine.

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[73] *See Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635, 645 (7th Cir. 2013)("Significant, unexplained or systematic deviations from established policies or practices can no doubt be relative and probative circumstantial evidence of [unlawful] intent.").

The Florida Bar erroneously argued that the Respondent attempted to have an uncollectable judgment entered against PR Bussey-Morice. That is not true, as the Respondent never argued that an adverse ruling should be made against his client or that she should pay it.

III. Rule 4-1.7 (Conflict of Interest; Current Clients)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-1.7.

The Florida Bar's argument is flawed because the Respondent paid the sanction *before* raising the argument, thereby eliminating any possible conflict *and* all possible harm to his client.[90] After paying the sanction, the Respondent filed Plaintiff's Motion for Reconsideration, and at no point within the argument concerning the law of the case doctrine did the Respondent state or suggest that the client should have been sanctioned or was the cause of said sanction ordered by Judge Honeywell.[91] In fact, the Respondent always maintained that PR Bussey-Morice would never have to pay the sanction and that, if all else failed, the Respondent and Patterson would pay said sanction.

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[90] *See* Respondent's Trial Exhibit 102.
[91] *See* Respondent's Trial Exhibit 83.

The Respondent made it clear to PR Bussey-Morice that she should not have been sanctioned and that the Respondent and Mr. Patterson would pay said sanction if it actually had to be paid. The Respondent paid the sanction, not as a volunteer as stated by The Florida Bar, but instead because the Respondent was ordered to do so by Judge Mendoza.

IV. Rule 4-3.1 (Meritorious Claims and Contentions)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-3.1.

The Florida Bar argued that there were fillings beyond the amended motion to vacate judgment that were without merit. That's simply not true. Further, those purported filings were neither identified as frivolous filing in the Complaint filed by The Florida Bar nor alleged as frivolous in the final hearing and should not bear weight in the Court's analysis.

As for the court order entered by Judge Mendoza denying the Amended Motion to Vacate Judgment, which was the only evidence beyond the Respondent's testimony concerning Rule 4-3.1, the Report and Recommendation does not suggest that the Referee relied on said court order to conclude that the Respondent violated Rule 4-3.1, even though he could have. The Respondent relies on his prior arguments concerning the reliability of Judge Mendoza as a witness in this proceeding.

V. Rule 4-3.2 (Expediting Litigation)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-3.2. The Referee based his finding on the scheduling conference. The record does not contain any evidence or testimony showing or suggesting that the Respondent was lead counsel for PR Bussey-Morice. In fact, the record shows that Mr. Patterson was lead counsel for PR Bussey-Morice.

The Florida Bar voiced that the Respondent's conduct would not warrant sanctioning at all if he paid the sanction ordered by Judge Honeywell rather than use PR Bussey-Morice as the target for the sanction. The Respondent did pay the sanction in February 2018 (when ordered to pay it in January 2018) before ever raising the law of the case doctrine, and at no point did the Respondent ever state or suggest that PR Bussey-Morice should pay the sanction.

VI. Rule 4-3.4(c) (Fairness to Opposing Party and Counsel)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-3.4(c).

The Referee erroneously interpreted Judge Honeywell's statements from the October 17, 2012, telephonic hearing to mean that the Respondent was prohibited from using the phrase "Brutality Officers" in his court filings.

That is not true. Judge Honeywell's testimony would have resolved this issue. The Respondent contends that the phrase "Brutality Officers" was not name-calling, and it definitely was not failing to comply with a court directive. Notably, the Respondent no longer used the "Brutality Officers" phrase once final judgment was entered, recognizing that the courts had found that the law enforcement officers' killing of the decedent was somehow justified.

The Florida Bar concedes on the issue concerning the defense attorneys violating Rule 4-3.4(c) by not responding to the interrogatories in violation of FED. R. CIV. P. 33.[92] The Florida Bar did not prosecute them.

VII. Rule 4-3.5(c) (Impartiality & Decorum of the Tribunal);

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-3.5(c).

The Florida Bar has already conceded that Rule 4-3.5(c) is aimed at disruptive conduct in open court. The record does not contain any evidence of disruptive conduct of the Respondent. Filing motions and responses to motions that the opposing party and The Florida Bar does not like is not the type of conduct that falls within Rule 4-3.5(c).

[92] *See* Respondent's Trial Exhibit 12-13.

VIII. Rule 4-8.2(a) (Impugning the Integrity of Judicial Official)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-8.4.

"Criticism" never occurred in the Civil Rights Case. The Respondent identified Judge Mendoza's conduct that resulted in due process violations, evidenced judicial bias and/or constituted significant, unexplained and/or systematic deviations from established policies or practices. His testimony further established those things. As to Clerk Warren, the Respondent identified significant, unexplained and/or systematic deviations that was the basis for the *ultra vires* conduct allegation in the lawsuit against Clerk Warren.[93]

The Florida Bar's position suggests that attorneys like the Respondent should not point out unexplained deviations from policy and practice, coupled with ignoring of the law, that impact the rights of his clients and himself. That goes against improving confidence in the courts. It is a far cry from justice, and mirrors acts of past years done to discourage advocacy by certain groups of people concerning certain legal rights and issues.[94]

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[93] *See* Guide of Judicial Policy, Chapter 8, §§ 820-850 (Respondent's Trial Exhibit 38).

[94] *See e.g. In re Brown*, 346 F.2d 903 (5th Cir. 1965)(Attorney prosecuting claim to descregate public schools in Mississippi sanctioned by federal judge without exclusive jurisdiction reversed by the appellate court.); *see also*

IX. Rule 4-8.4(d) (Misconduct)

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on the findings of guilt of violating Rule 4-3.5(c).

The Florida Bar argued that the Respondent disparaged or humiliated litigants or court personnel. The litigants were law enforcement officers that killed an unarmed Baker Act patient in the hospital. Telling the truth about the officers' conduct is not disparaging, and at no point was it done with the intent to humiliate them. The court personnel purportedly disparaged or humiliated engaged in what the case law describes as "significant, unexplained or systematic deviations from established policies or practices."[98] Pointing out those deviations is not humiliating, and was done in pursuit of justice.

Notably, The Florida Bar argued that the question of exclusive jurisdiction was found to be meritless. No such finding was ever made by any competent court. The Eleventh Circuit rejected the argument, even though law from the *Old Fifth Circuit* is "binding as precedent."[99] Also, the

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United States v. Figueroa-Arenas, 292 F.3d 276, 281 (1st Cir. 2002)(attorney questioning a case reassignment and the judge's authority to act sanctioned by federal judge but reversed by the appellate court).

[98] *See Hobgood v. Ill. Gaming Bd.*, 731 F.3d 635 (7th Cir. 2013).

[99] *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)("We hold that the decisions of the United States Court of Appeal for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30,

Eleventh Circuit but did not have the benefit of reviewing the transcript of Judge Mendoza's subsequent deposition or hearing his live testimony (like the Referee) wherein he admitted that the reassignment did not comply with the Local Rules. And in the case against Clerk Warren, that district court never stated or suggested that the issue of exclusive jurisdiction was meritless, but instead concluded that it did not have subject matter jurisdiction to hear the case.

X. The evidence and mitigating factors does not justify a recommendation of a 90-day suspension.

The Florida Bar conceded on all mitigating factors except emotional trauma, but argued that they should have limited weight because of the Respondent's questioning of the legality of the reassignment to avoid paying the sanction. The Florida Bar's analysis is flawed because the Respondent paid that sanction on February 9, 2018, after he was ordered to pay it by Judge Mendoza (on January 12, 2018).[106] Additionally, The Florida Bar took issue with the Respondent's efforts to obtain information concerning

1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in this circuit.").

[106] See Respondent's Trial Exhibit 102; *see also In re Brown*, 346 F.2d 903, 910-911 (5th Cir. 1965)(Jones, J., concurring).

exclusive jurisdiction, even though jurisdiction can be raised anytime.[107] Lastly, the law permits the challenging of a reassignment without sanction, even when the language used, which might "impugn a jurist's character in some contexts," was to argue that said jurist overstepped the limits of its authority.[108]

As to The Florida Bar's arguments concerning the need for a one-year suspension for the Respondent to have time to address his personal trauma and its intentions not to punish the Respondent, said arguments are disingenuous at best. The Florida Bar vigorously argued against emotional trauma being considered a mitigating factor despite the testimony and evidence. Further, The Florida Bar combed through and scrutinized the Civil Rights Case, which contained 652 docket entries, well beyond the United States of America's request, in search of purported violations done by only the Black attorneys, including the Respondent.

Additionally, the record is void of *any evidence* showing or suggesting that the Respondent's emotional trauma has ever prevented him from representing his clients, and despite The Florida Bar's statement that the Respondent has not taken steps to address his emotional trauma, the record

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[107] *See Henderson v. Shinseki*, 562 U.S. 428, 434-45 (2011); *see also Cunningham v. Std. Guar. Ins. Co.*, 630 So. 2d 179, 181 (Fla. 1994).
[108] *See United States v. Figueroa-Arenas*, 292 F.3d 276, 281 (1st Cir. 2002).

is void of any evidence and testimony proving or suggesting that. In fact, the Respondent testified at the final hearing, and The Florida Bar chose not to probe the extent of the Respondent's experiences, including whether the Respondent sought treatment and therapy.

The Florida Bar argued that the Respondent impugned the integrity of Judge Mendoza and Clerk Warren.[109] The Respondent merely identified conduct and statements, which was described in sworn testimony and evidence admitted at the final hearing, that were contrary to the law, showed significant, unexplained or systematic deviations from established policies or practices, and supported the questioning of Judge Mendoza's credibility as a witness *in this proceeding*.

The division between suspension and reprimand or admonishment hinges on whether the Respondent knowingly or intentionally engaged in misconduct. Further, as it relates to the allegation of a conflict of interest, determining whether the appropriate sanction is suspension verses reprimand or admonishment hinges on whether there was harm, or a lack

[109] The Florida Bar also took issue with the Respondent's complaint to the Judicial Council concerning Judge Conway, but failed to mention that the complaint against Judge Conway was contingent on whether Judge Conway sent an e-mail ordering the reassignment of the case. The Respondent was unable to obtain information concerning whether that was true beyond the statements of Judge Mendoza's deputy clerk and an assistant clerk in the Clerk's Office.

thereof, to the client. There is no record evidence or testimony proving that the Respondent knowingly or intentionally engaging in misconduct or otherwise violating the Rules Regulating The Florida Bar. Similarly, there is no evidence or testimony proving that the client was harmed or possibly harmed *or* that a conflict of interest ever existed.

Aside from the Due Process issues raised in Respondent's Answer/Cross-Initial Brief and herein, as articulated in the March 1, 2021, hearing transcript (Respondent's Appendix, Tab 13, pages 001138-001198), the Respondent did not have a prior disciplinary history (3.3(b)(1)), there was an absence of a selfish or dishonest motive (3.3(b)(2), which The Florida Bar concedes, the Respondent made a timely good faith effort to make restitution or to rectify the consequences of the purported misconduct (3.3(b)(4), the Respondent was full and free in his disclosures to The Florida Bar *and* he cooperated in this proceedings (3.3(b)(5)), the Respondent complied with all sanctions in spite of Judge Mendoza lacking exclusive jurisdiction to act on behalf of the federal court based on his own deposition and trial testimony (3.3(b)(11), and the emotional trauma (3.3(b)(3)).

Based on the arguments raised herein and in the Respondent's Answer/Cross-Initial Brief, the Respondent contends that he should be *not* sanctioned at all because The Florida Bar failed to prove that the

Respondent violated any of the alleged rules by clear and convincing evidence, and because the Respondent proved that the referee's report is clearly erroneous or lacking in evidentiary support. Further, if this Court disagrees with the Respondent and finds guilt as to any of the alleged violations, the appropriate sanction should be a public reprimand as to said violations based on 6.2 of Florida's Standards for Imposing Lawyer Sanctions, and an admonishment on the conflict of issue claim under 4.3 of Florida's Standards for Imposing Lawyer Sanctions if this Court concludes, despite the evidence, that a conflict of interest existed.

XI. The Referee abused his discretion concerning the proposed cost award.

The Florida Bar concedes that it failed to properly authenticate <u>*any*</u> of the taxable costs it sought to recover from the Respondent, and even offered to authenticate the taxable costs now in its Reply/Cross Answer Brief.

The Referee explained that he needed the transcripts to prepare the Report of Referee. However, the Referee had the benefit of seeing the witnesses testify in person at the final hearing, thereby eliminating the *necessity* of the hearing transcripts. Judges make findings of fact and conclusions of law in bench trials after actually seeing and hearing witnesses testify without the transcripts. The transcripts were not necessary.

The Florida Bar also argued that the Respondent would have needed the hearing transcripts for his review of the findings of guilt. That's not true. Further, the Respondent could have ordered only the portions of transcript he deemed relevant. Additionally, as it stands today, the Respondent paid for an *entire* original hearing transcript and a copy.[110]

The Florida Bar failed to authenticate *any* of its costs. On this bases, the cost award should be denied. Further, the transcripts from the final hearing were unnecessary, justifying reducing of a cost award, if awarded, by the cost of the transcripts from the final hearing.

CONCLUSION

The referee's report and recommendation is erroneous and unjustified, and should be disapproved on all findings of guilt. Should this Court disagree with the Respondent and find guilt on any of the purported violations prosecuted against him by The Florida Bar, the sanction(s) against the Respondent should not exceed public reprimand based on 6.2 of Florida's Standards for Imposing Lawyer Sanctions for sanction violations, and not exceed admonishment under 4.3 of Florida's Standards for Imposing Lawyer Sanctions if this Court finds guilt on the conflict of issue claim.

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[110] The Respondent ordered a copy of the hearing transcripts from the Final Hearing at a significantly lower cost of ordering the original hearing transcripts.

Dated: November 19, 2021.

Respectfully submitted,

/s/ Wendell Locke

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on November 19, 2021, a true and correct copy of the foregoing was served via e-Mail to all persons identified on the Service List below.

/s/ Wendell Locke

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CERTIFICATE OF COMPLAINCE

The undersigned hereby certifies that the brief complies with the font requirements (Arial 14), word count requirements (3,257 words) and page limit requirements (15 pages) set forth in FLA. R. APP. P. 9.045 and FLA. R. APP. P. 9.210.

/s/ Wendell Locke