IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. SC05-1225
TFB File No. 2002-00,195(2A)

JOHN JOSEPH KORESKO, V,

Respondent.
_____/

RESPONDENT'S REPLY BRIEF ON CROSS-APPEAL

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that Respondent's Reply Brief on Cross-Appeal in The Florida Bar, Complainant, v. John Joseph Koresko, V, Case No. SC05-1225, TFB File No. 2002-00,195(2A), is submitted in 14-point proportionately spaced Times New Roman font, and that the brief has been sent as an attachment in Word format to an email to the Supreme Court Clerk's office which was scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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POINT I ON CROSS-APPEAL

THE REFEREE ERRED IN DENYING RESPONDENT'S MOTION TO DISMISS FOR PROSECUTORIAL DELAY.

In its Answer Brief discussing Respondent's Point I on Appeal the Bar focuses only on the two-year delay between the grievance committee's finding probable cause on June 5, 2003 and the Bar filing its formal complaint on July 13, 2005. After noting that, as to the *two*-year delay in filing the formal complaint, the Bar "admitted that it has failed to diligently pursue this case . . ." (11/14/05 Order, par. 2 and 3), the Referee found on page 11 of his Report of Referee that the Bar's delay was actually four years; from the initial filing of the complaint with the Bar on August 23, 2001 until the Bar's service of a formal complaint on July 13, 2005. The Referee specifically found that "the Bar has offered no valid excuse for this delay."

On page 8 of its Answer Brief, the Bar rather coldly declares that "the delay benefited" Respondent because no witnesses died, because no public records requests were made, because there was no showing that his reputation had been tarnished, and because he had submitted and published articles in The Florida Bar's *Journal* during the period in question. During this entire period, however, from the moment the complaint was filed with the Bar in August, 2001 Mr. Koresko's

> professional reputation is shadowed and in danger of being permanently impaired.

Murrell v. The Florida Bar, 122 So.2d 169, 174 (Fla. 1960).

In *State ex rel. The Florida Bar v. Oxford*, 127 So.2d 107, 112 (Fla. 1960), the Court reiterated its language in *Murrell*:

> Disciplinary proceedings should be handled with dispatch. While they are pending, the defendant is suspended in limbo. . . .

Lawyers of impeccable credentials, such as Mr. Koresko, anguish over disciplinary proceedings and the impact they will have on their reputation. The element of an uncertain future constantly weighs on them. This is particularly true where, as here, the accused lawyer did nothing wrong.

The Referee here felt constrained not to grant Respondent's Motion to Dismiss for Prosecutorial Delay because he believed a finding of prejudice was required. 11/14/05 Order, par. 6. By reversing that decision, this Court has the perfect opportunity to stress that referees in future disciplinary proceedings have the discretion to dismiss Bar proceedings for prosecutorial delay even if there is no showing of specific prejudice to the Respondent. By so doing, this Court will be putting the Board of Governors of The Florida Bar on notice that this Court will tolerate no longer the Board's failure to heed the pronouncements of this Court for the last 46 years. This Court has been demanding since the *Murrell* decision in 1960 that disciplinary proceedings be handled with dispatch. It has repeatedly said

the responsibility for diligence rests with The Florida Bar. Repeated warnings from this Court, occasional dismissals for failure to prosecute diligently, and complaints from respondents and from lawyers filing grievances themselves (e.g., Mr. Montgomery's suit) have fallen on deaf ears. Only when the Board knows it will be subjected to the opprobrium of the bench, the Bar and the public for its failure to handle disciplinary proceedings with dispatch will these cases be handled diligently.

The Bar acknowledges that the *Murrell* case resulted in disciplinary proceedings being dismissed. There was no showing of prejudice there. The Bar correctly points out that Mr. Murrell prevailed in a related civil suit and that may have been a factor in the Supreme Court's ruling. Normally, there will be no such civil court determinations available for the referee's consideration in pretrial motions to dismiss for prosecutorial delay. To that extent, *Murrell* is an anomaly. It should be noted, however, that in the instant case Mr. Koresko was, indeed, acquitted by the Referee of all charges against him.

The Bar tries to distinguish the *Murrell* case by pointing out that Mr. Murrell was accused of misconduct that had occurred nine years prior to the Supreme Court's decision. In the case at bar, Mr. Koresko was being charged with alleged misconduct that occurred in 1988, 17 years prior to the Bar's formal complaint.

The setting up of Mrs. Magee's plan occurred in 1996, nine years (the same as in *Murrell*) prior to the Bar's formal complaint.

In *Florida Bar v. Walter*, 784 So.2d 1085 (Fla. 2001), the charges against Mr. Walter were dismissed without a showing of prejudice. The Bar observes that the misconduct in *Walter* had occurred seven years prior to the filing of the Bar's formal complaint. As noted above, the charges *included in the Bar's complaint* occurred 17 years and nine years prior to the filing of the complaint; longer than that in *Walter*. The action mentioned on page 11 of the Bar's brief, which was filed against Mrs. Magee's estate in 2003, related to *uncharged* allegations that were raised as an afterthought after the Bar's formal complaint was actually filed. The Bar took no action on that aspect of Mr. Koresko's conduct until after the complaint was filed.

The "close call" language in *Walter* refers, Respondent submits, to the fact that the Bar was moving on the case during the entire period of delay. The Bar was seeking the cooperation of an out-of-state witness. No such basis for the delay was offered by the Bar in the instant proceedings.

The only prejudice shown in *Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978), was the publicity that he attained. The theory behind *Rubin*, however, is applicable to this case: prosecutorial misconduct, i.e., violation of this Court's rules, can result in dismissal of Bar of proceedings even where, unlike the instant case, there

have been two findings of guilt by two referees. In Mr. Koresko's case the Bar violated Rule 3-7.6(g) of the Rules Regulating The Florida Bar. Specifically:

> Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with *utmost* diligence any case assigned. [Emphasis added.]

In actuality, there is a showing of prejudice to Respondent in these proceedings. The Referee indirectly alluded to the when he stated on page 11 of his report that

> In denying the motion [to dismiss for prosecutorial delay], I concluded that the Respondent had failed to articulate any such prejudice caused by the Bar's delay which would make it manifestly unfair to proceed. In that finding, it was assumed by me that the Respondent would only have to respond to charges made by the Bar in its complaint.
>
> Having reviewed the Bar's complaint, I hereby conclude that it has not sufficiently pled or raised the filing of the lawsuit in its handling . . . . The Bar did not prove its allegations by a preponderance *or* a clear and convincing standard. *It would be manifestly unfair, and violate due process, to make findings on the lawsuit issues that are not pled in the late-filed complaint.* [Emphasis added.]

At the time the Referee wrote that language, he did not know that the Bar would appeal his decision solely on his failure to find Respondent guilty of allegations not charged in the complaint. Respondent is now prejudiced by having to respond to charges not encompassed in the Bar's complaint, something the Referee "assumed" that Mr. Koresko would not have to do. The Referee

specifically found that it would be "manifestly unfair . . ." to rule on issues not pled in the Bar's complaint. In other words, it would inure to Respondent's detriment.

Notwithstanding the Referee's clear pronouncements, The Florida Bar has appealed the Referee's failure to find Mr. Koresko guilty of charges not contained with the Bar's complaint. That is "manifestly unfair" and is prejudicial to Respondent.

It is ironic that the Referee in these proceedings noted that when he served on a grievance committee in the mid-1980's the members of that committee were concerned with the Bar's lack of diligence in filing complaints after probable cause was found. TR. 10/21/05, p. 17.

Respondent asks regarding the Bar's track record on tardy prosecution: Would this Court tolerate similar conduct by any other party frequently appearing before this Court? Respondent submits not. Warnings appear to be futile. This case is the perfect vehicle for this Court to stress all who participate in disciplinary proceedings, the Bar, referees and respondents, that the Bar has the responsibility for handling disciplinary proceedings with dispatch and its failure to do so will result in dismissal of the case. When the Board is convinced that such is the case, it will ensure adequate staff, adequate support and adequate supervision to guarantee that grievances, such as the one at bar, do not languish for four years before a formal complaint is filed.

The 12 cases that did not result in dismissal were cited in Point I on Respondent's cross-appeal to show that this Court has been receiving complaints about dilatory prosecution by the Bar for 46 years. Notwithstanding those cases, and the *Bodine* and *Montgomery* cases alluded to in Respondent's motion to dismiss for prosecutorial misconduct, the Bar is still taking an inordinately long time to prosecute its cases. Even after this Court dismissed the charges against Mr. Walter in 2001, the Bar took four years to handle the disciplinary proceedings against Mr. Koresko. Clearly, the message in Mr. Walter's case was not heeded. Granting the relief sought by Respondent in his motion to dismiss is necessary to guarantee prompt disciplinary proceedings.

The Court should reverse the Referee's decision below and grant Respondent's Motion to Dismiss for Prosecutorial Delay.

POINT II ON CROSS-APPEAL

THE REFEREE ERRED IN NOT AWARDING TO RESPONDENT HIS COSTS IN DEFENDING HIMSELF AGAINST THE BAR'S ALLEGATIONS.

Respondent is asking this Court to do nothing more than what the Bar would have sought had it prevailed on *any* of its allegations. Indeed, in Point III of its Amended Initial Brief the Bar is asking that it be awarded $16,325.68 as its costs of bringing disciplinary proceedings. In so doing the Bar ignores the fact that the

Respondent was actually acquitted of all charges filed against him. The Bar argues on the one hand that it should be awarded all of its costs if it prevails on any single allegation, even a minor charge and one that is not pled in the complaint. On the other hand, it argues that Respondent should be awarded no costs, even though, in some instances, the Bar offered no evidence to support its charges. The double standard seems to be lost on the Bar in its appeal.

The Referee acquitted Respondent of all of the charges in the Bar's complaint. The Bar argues that the case turned on two crucial issues: (1) were Mr. and Mrs. Magee's wills properly executed and notarized in 1988; and (2) was the Magee Corporation a sham created solely to assist the Magees in tax evasion. There were, however, other very serious charges unsuccessfully brought against Respondent. They included the Bar's allegation that Respondent mishandled the $20,000 in surplus funds from Mrs. Magee's retirement account and that Respondent charged a clearly excessive fee. On page 10 of his report, paragraph III.C., the Referee found that Bar "presented no evidence . . ." on those charges. The Referee found the funds were "untouched in an appropriate account from the date of their receipt . . . ." He further noted that Respondent had drawn down no fees although they were "justly earned" and that Respondent received no compensation for the services that he rendered to the Magees in 1988 and in 1996. In other words, the Bar brought serious charges Respondent, and then failed to

drop them when it could discover no evidence to present to the Referee to support those allegations.

The Referee also acquitted Respondent for failing to timely respond to Mr. Magee and his lawyer's demands for information. ROR p. 10, par. III.D.

As to the first crucial issue discussed in the Bar's Answer Brief, the Bar acknowledges that there was a swearing contest between Mr. Magee regarding the execution of the wills in 1988 and Respondent. The Bar noted on page 17 of its Answer Brief that the case turned on the testimony of John Curran who, in the Bar's words, was "a very persuasive and disinterested witness. . . ." Mr. Curran absolutely contradicted Mr. Magee's testimony and corroborated Respondent's. His testimony was such that at closing argument the Bar acknowledged that it did not meet the burden of clear and convincing evidence as to its allegations that Respondent procured a false notarization in 1988 and then lied to the Bar when he quite properly denied those allegations.

The Bar was aware of Mr. Curran's testimony before it took the case to final hearing. Mr. Curran testified at final hearing that he described to a Bar investigator the events of the will signing in 1988 and Mr. Magee's subsequent excitement eight years later over Mr. Koresko securing for him and Mrs. Magee a Key West condo to live in payment-free. TR. 152. Notwithstanding the fact that it knew Respondent had a "very persuasive and disinterested witness (Curran). . ."

that would corroborate Mr. Koresko's' testimony and would contradict Mr. Magee's, the Bar did not drop the charges. It made Mr. Koresko defend them. It made Mr. Curran testify needlessly. Mr. Koresko and Mr. Curran should not have to bear the expenses of having to defend a baseless allegation.

The Bar basically argues that its charges regarding a sham tax transaction were filed in good faith. In other words, it was a close call. Had the Bar prevailed on such a close call, this Court would have given short shrift to any argument by Respondent that the Bar should not be awarded costs because it barely met its burden. The Bar would have been awarded costs had it prevailed on this count; Respondent should get no different treatment upon his prevailing.

Even ignoring the issue of the tax plan, in which the Referee noted that the Bar's expert supported Respondent's expert, there were three other significant areas in which the Bar did not prevail. It did not drop its charges on allegedly mishandling $20,000 and charging allegedly clearly excessive fees when it had no evidence to prove these allegations. It did not drop its charges on the allegedly false notarization in 1988 and its accusations that Respondent lied when he denied misconduct even though it knew that Mr. Curran, a very persuasive and neutral witness, would corroborate at final hearing Respondent's testimony and would contradict Mr. Magee's. It pursued the failure to communicate allegation when it

had in its possession documents clearly indicating that Respondent responded to the communications from Mr. Magee and his lawyer.

In *Florida Bar v. Bosse*, 609 So.2d 1320 (Fla. 1992), after finding the Bar "presented an extremely weak case" the referee assessed costs against the Bar. In upholding the award, the Court said, starting on page 1321:

> We have never held that the Bar is the only party entitled to recover costs. . . . In reaching this conclusion, we emphasize that it is this Court, and not the referee, that taxes costs against a respondent or the Bar. . . . the final discretionary authority to tax costs against the Bar rests solely in this Court.

Under the circumstances of this case, the Referee abused his discretion not awarding costs to Respondent. Respondent should be awarded costs to the same extent that The Florida Bar would have been awarded. The submission of an affidavit of costs, in like manner as the Bar would do had it prevailed, should suffice for an award of costs to Respondent.

CONCLUSION

This Court should reverse the Referee's ruling and grant Respondent's Motion to Dismiss for Prosecutorial Delay. The Referee's reasoning that a showing of prejudice by the Respondent was a necessary prerequisite to his granting the motion is not soundly based on law. This Court granting Respondent's motion with the declaration that prejudice is an element, but not a

prerequisite, to the granting of a motion to dismiss for prosecutorial delay will clarify the law in this regard.

Just as the Bar would have received its costs had it prevailed in these proceedings, Respondent should be awarded his costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief were hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were sent by U.S. Mail to Donald M. Spangler, Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 27th day of July, 2006.

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John A. Weiss