

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC07-1425

v.

TFB File Nos. 2006-00,493(2B)

2006-00,827(2B)

BENJAMIN DAVID RUST,

2006-01,221(2B)

2007-00,070(2B)

Respondent.

_____ /

AMENDED CROSS-REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent filed his Petition for Review in this matter and asserted the only issue for review was the appropriateness of the Referee's recommendation that the Bar be awarded costs in the sum of \$7,359.68. Respondent filed his initial brief and limited his argument only on the issue of costs.

The Florida Bar filed its Cross-Petition for Review and cited two issues to be reviewed: the Referee's finding Respondent not guilty of having threatened two defense counsel with Bar complaints to gain an advantage in a civil matter and the recommended discipline of a public reprimand as being inappropriate in light of the record.

ISSUE I

The arguments raised by Respondent in this issue deals with his questioning the costs assessed by the Referee in this matter. The Bar appropriately responded to this issue in its Answer Brief and under the rules cannot make further argument in what must be viewed as Respondent's Reply Brief to the Bar's Answer Brief.

ARGUMENT ON CROSS-APPEAL

ISSUE I

THE REFEREE ERRED IN FINDING RESPONDENT NOT GUILTY OF THREATENING A BAR COMPLAINT

Respondent starts his argument against the Bar's position that the Referee erred by stating he had a belief that Mary K. Simpson's threat was a rule violation. The only threat being addressed is Respondent's proceeding in a deposition by threatening Bar complaints against two defense counsel if they proceed with scheduled depositions in light of a Motion to Stay in the District Court of Appeal which had not been received by defense counsel.

Respondent vainly tries to argue that Ms. Simpson was in violation of Bar rules by not submitting to his threats and announcing she was proceeding with the depositions scheduled following Respondent's deposition of Jill Krueger.

At the formal hearing, Respondent was asked what rule violation he intended to charge Ms. Simpson or Ms. Demme with if they proceeded to take the scheduled deposition. He was unable to provide a basis within the Bar rules for such a complaint.

Ms. Simpson confirmed there was no stay by the District Court of Appeal and Respondent's Motion to Stay did not result in an automatic stay. Ms. Simpson was

within her legal rights to proceed and such is in no way misconduct under any rules of The Florida Bar.

Respondent testified that appellate counsel had prepared the District Court of Appeal filings and he had done no research on the effect of a Motion to Stay. Such cannot be seen to provide any basis for a belief that Ms. Simpson should forego any legal right on her client's behalf.

Respondent also argues that his threat was to point out opposing counsel's misconduct in not allowing the administration of the court system. Again, Respondent fails to point out how this is misconduct.

Respondent fails to address the fact that his clients had failed to comply with discovery demands resulting in a Motion to Compel and the trial court ordering these depositions beyond a discovery deadline. Respondent's belief that there would be an expeditious ruling by the District Court of Appeal in no way guarantees such an event.

The intent of Respondent's threat was plain. If you proceed with the depositions, I will file Bar complaints against you. The advantage gained would be the cancellation of the depositions and further delay in obtaining discovery materials they had a right to receive. The fact the threats did not work cannot excuse Respondent's reprehensible behavior.

This Court can review a Report of Referee and its conclusions if such were made in error in light of a record that supports a clear violation. In the instant matter, the Referee erred when he ruled there was no intent to gain an advantage or an advantage was not obtained. To hold otherwise would open the practice of law to similar outrageous conduct and threats. Where is the responsibility to lie? Must a litigant be prepared to forcefully exercise a legal right in the face of baseless threats of Bar complaints? Will the Court tolerate such conduct if no substantiated right is forfeited or specific gain obtained?

What must be shown is that the actions of a lawyer making such threats were designed with an intent to gain an advantage in the civil trial.

Here the evidence clearly shows Respondent made these threats of Bar complaints with an intent to have defense counsel forego their right to a legal deposition. That was the advantage he sought.

The conclusion by the Referee that Respondent was not guilty of violating Rule 4-8.4(h) is contrary to the record and can be an issue for review. Since the record established by clear and convincing evidence that Respondent was guilty of violating this rule, the Referee's finding of not guilty should be reversed.

Respondent attempts to reflect culpability for his misconduct by attributing a comment to the Referee that many of the Bar witnesses who testified against Respondent were antagonistic. Respondent does not cite to the transcript or Report of Referee where such statements are found. Such a statement ignores the evidence showing the same attitude by Respondent. He next claims the Referee delineated where these witnesses had given false testimony. Again, no citations. Respondent fails to connect such allegations to this charge of making threats. Respondent admitted he made the threats. The transcript of the deposition showed such threats being made. The threats were testified to by two members of The Florida Bar. Respondent cannot show the existence of any antagonism or false testimony which would justify or excuse such misconduct on his part. To make such an argument in his reply is frivolous and baseless and must be ignored.

CONCLUSION

The rule prohibiting threats of a Bar complaint to gain an advantage in a civil matter does not require such a result. The case law provided in the Bar's Answer Brief on this issue supports this position. All that is required is that such threat be made with an intent to gain an advantage. It is clear Respondent's threats of Bar complaints were made with the intent to stop scheduled discovery depositions. Respondent had no reason to believe opposing counsel would stop the depositions. To continue a deposition where there is no legal impediment cannot be argued as misconduct. The Referee's conclusion that Respondent's threats did not violate Rule 4-3.4(h) is not supported by the record and should be reversed. Respondent should be found guilty of this violation.

Based upon Respondent's misconduct and the case law cited, the appropriate discipline should be a rehabilitative suspension.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Cross-Reply Brief regarding Supreme Court Case No. SC07-1425 has been hand-delivered to Benjamin David Rust, Respondent, at his record Bar address of 359 North Monroe Street, Tallahassee, Florida 32301-7621, on this 20th day of January, 2009.

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

Undersigned counsel does hereby certify that the Amended Cross-Reply Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Symantec AntiVirus.

James N. Watson, Jr., Bar Counsel