IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)

Complainant,)

v.)

JEFFREY E. LEHRMAN,)

Respondent.)

Supreme Court Case No. 63,270
Florida Bar Case No. 11L81M85

COMPLAINANT'S REPLY BRIEF TO RESPONDENT'S CROSS APPEAL

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as either "The Florida Bar", "The Bar", or "Complainant".

Jeffrey E. Lehrman, Respondent, will be referred to as either, "Respondent", "Jeffrey E. Lehrman" or "Mr. Lehrman".

Honorable J. Leonard Fleet, the Referee, will be referred to as the "Referee" or "Judge Fleet".

Transcript of proceedings concerning costs, dated December 6, 1984, will be referred to as "T. 1984" followed by Page Number.

Transcript of proceedings dated July 21, 1983, will be referred to as "Tr", followed by page number.

"RR" means Report of Referee, also identified as Finding of Fact, Conclusions of Law and Recommendation of Discipline.

STATEMENT OF THE CASE

This is an attorney discipline case tried before the Honorable J. Leonard Fleet, Circuit Judge, Seventeenth Judicial Circuit, who served as Referee.

On September 27, 1984, the Referee filed with this Court the Referee Report (Findings of Fact, Conclusions of Law and Recommendation of Discipline) and the record, in this case. The Referee recommended six months suspension and other discipline (RR. 7-8).

On January 28, 1985, The Florida Bar filed a Petition for Review, with Complainant's Brief, because it believed the Referee erred, when he charged $861.00 to the Bar, for court reporter fees for having the record of a grievance committee hearing held on August 10, 1982, transcribed.

On or about January 25, 1985, the Respondent filed Respondent's Petition for Review and Main Brief of Respondent Supporting Petition for Review (including Answer to Bar's Petition and Brief on Costs).

This Brief is an answer to the Main Brief of Respondent's Supporting Petition For Review. The Bar believes no reply is necessary to Respondent's Answer to the Bar's Brief on Costs.

SUMMARY OF ARGUMENTS

The Florida Bar respectfully submits that it has proven, by clear and convincing evidence, that Respondent has violated all of the disciplinary rules alleged in its complaint. Contrary to

Respondent's assertion, the Referee's finding of an attorney/client relationship did not shift the burden of proof to Respondent. The Bar believes the Referee correctly found there was an attorney/client relationship between Respondent and Guiking. However, no such relationship is necessary to find a violation of the disciplinary rules contained in the Bar's complaint. The Bar believes the Referee correctly characterized Respondent's conduct as a violation of the usury laws. However, regardless of whether Respondent's conduct was a violation of those laws, the Referee properly found his conduct to be "improper" and a violation of the disciplinary rules. Finally, dismissal of the complaint because of the 14 month delay is an inappropriate remedy because the primary purpose of discipline is to protect the public.

ARGUMENTS

I.

THE REFREE'S FINDINGS OF GUILT SHOULD NOT BE OVERTURNED ABSENT A SHOWING THAT SUCH FINDINGS ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT

Findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in the civil proceeding. Fla. Bar Integr. Rule art. XI, Rule 11.06(9)(a), The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

Florida Bar Integration Rule art. XI, Rule 11.09(3)(e) states:

> Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified.

This Court stated in The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968), "In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

In The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978), this Court stated:

> It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility

> in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence.

The Respondent has failed to make the required showing that the findings of the Referee are clearly erroneous or lacking in evidentiary support. Therefore, the findings of guilty by the Referee should be approved.

II.

THE DELAY IN THIS CASE DOES NOT WARRANT DISMISSAL OF THE CHARGES

Although there was a 14 month delay on the part of the Referee in submitting his report, it is noted that this case was extremely complicated and apparently required more study than the average case considered by other referees. In addition, the delay in this case was not so egregious as to warrant dismissal of the complaint. Furthermore, Fla. Bar Integr. Rule, art. XI, Rule 11.13(1) states: "Except as provided herein, the time intervals required are directory only and are not jurisdictional. Failure to observe such directory intervals may result in contempt... but will not prejudice the offending party, except where so provided."

This Court said in the case of The Florida Bar v. Guard, 453 So.2d 392, 393, 394 (Fla. 1984):

> Dismissal of the complaints would totally frustrate the primary purpose of discipline, namely, protection of the public from the misconduct of attorneys. We are satisfied that we can make clear to referees our dissatisfaction with dilatory hearings of discipline cases short of dismissing the complaints.

This court has held that even unwarranted delay in Bar prosecutions will not suffice to dismiss a complaint. The Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965), 197 So.2d 823 (Fla. 1967), 212 So.2d 770 (Fla. 1968) (11 year delay); State ex rel The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1960) (four-year delay); The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966) (three-year delay).

The complainant submits that despite the delays in this case, the paramount concern should be the protection of the public. In In re Ming, 469 F.2d 1352 (7th Cir. 1972), the court stated that the purpose of lawyer disciplinary proceedings are

> not for the purpose of punishment, but rather [to] seek to determine the fitness of an officer of the court to continue in that capacity to protect the courts and the public from the official ministration of persons unfit to practice. Ex parte Wall, 107 U.S. 265, 2 S. Ct. 569, 27 L. Ed. 552 (1882). Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession inbued with the public trust.

Therefore, even if this court should find that the delays were inordinate, it should nevertheless, sustain the Referee's findings of guilty, in the interest of protecting the public. Cf. The Florida Bar v. Blalock, 325 So.2d 401 (Fla. 1976); The Florida Bar v. Riccardi, 264 So.2d 5 (Fla. 1972); The Florida Bar v. Beaver, 259 So.2d 143 (Fla. 1972).

III.

AN ATTORNEY/CLIENT RELATIONSHIP BETWEEN RESPONDENT AND GUIKING IS NOT NECESSARY FOR APPROVAL OF REFEREE'S GUILTY FINDINGS

The Respondent devotes considerable space in his brief to the argument that "Guiking was not Lehrman's client in this transaction." (Main Brief of Respondent, 17-25). It is the Bar's position that an attorney/client relationship is not necessary in order to approve the Referee's finding the Respondent guilty of violating the disciplinary rules mentioned in the Referee's report. (Findings of Fact, Conclusions of Law and Recommendations, RR. 6 and 7).

Although the Referee apparently believed there was an attorney/client relationship between Respondent and Guiking, (See "Conclusions Drawn From Findings ofFact," RR. 5), he did not find the Respondent guilty of violating any disciplinary rule dealing with conflict of interest. However, he found violations of Ethical Considerations 5-1 and 514 (sic).

Since the Respondent was not found guilty of violating any Disciplinary Rule as a result of the conflict of interest situation, Respondent was not prejudiced. Nevertheless, the Bar contends that it is well established that it is not necessary to have an attorney/client relationship in order to be guilty of violating the disciplinary rules. The Florida Bar v. Davis, 373 So.2d 683 (Fla. 1979); The Florida Bar v. Capodilupo, 291 So.2d 582 (Fla. 1974) and The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984).

Even though an attorney/client relationship is not necessary to prove the allegations in the Complaint, the Bar believes the Referee was correct in considering that there was an attorney/client relationship, and a conflict of interest on the part of the Respondent. (RR. 5). Even if Mr. Guiking consulted with the Respondent solely for the purpose of borrowing money, rather than seeking legal advice, the Respondent, because of his past legal representations of Guiking and his corporations, (RR. 2) should not have represented Mr. Pawlitzek, the owner of Waddington, N.V., in his efforts to get Guiking to pay $25,000 for the return of the "Vizcaya Mortgages." (RR. 4) Also, because of the potential conflict, he should not have represented Mr. Pawlitzek concerning the loan to Guiking.

On Page 5 of the Referee's report, the Referee states: "when the borrower found himself unable to repay the loan according to the tenor thereof, Mr. Lehrman was immediately placed in a position of conflicting interest between clients but he failed to expeditiously withdraw from further representation of either of the involved clients; in fact, Mr. Lehrman continued upon a course of actively representing the lender-client to the detriment of the borrower-client."

Although the Bar did not allege an attorney/client relationship in its complaint, this does not prevent the Referee from coming to the conclusion that such a relationship did exist between the Respondent and Guiking. In The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981), this Court stated:

It was proper for the referee, in making his report, to include information not charged in The Florida Bar's complaint.

While the Bar believes the Referee was correct concerning his views about the attorney/client relationship, and conflict of interest, it contends that said relationship is not necessary, since an attorney/client relationship was not required to find respondent guilty of the disciplinary rules listed on pages 6 and 7 of the Referee's report. The Florida Bar v. Davis, supra; The Florida Bar v. Capodilupo, supra and The Florida Bar v. Adams, supra. Therefore, the Referee's findings should be approved.

IV.

THE EVIDENCE IS CLEAR AND CONVINCING THAT THE LOAN OF JANUARY 1981, WAS IN VIOLATION OF THE DISCIPLINARY RULES

With reference to the loan transaction of January 13, 1981 (Bar Exhibit 3), the Respondent contends he gave Guiking a trust account check for $6,000 and $500.00 in cash, from his pocket. (Tr. 75, 76 and 59). However, Guiking testified that he received the $6,000 check, but did not receive the $500.00 in cash. (Tr. 109; Bar Exhibit No. 6). Mr. Guiking stated that he borrowed only $6,000.00, but he was required to sign a note for $6,500.00 (Bar Exhibit No. 3). The note was dated January 13, 1981, and $6,500.00 was to be paid by Guiking on or before January 19, 1981. There was no interest required by the note (Bar Exhibit 3).

The Referee's views on this matter are as follows:

> It is the opinion, and finding, of your referee that, in reality, the principal amount of the loan to Mr. Guiking was $6,000.00 and the remaining $500.00 was an assessment of patently usurious interest. (RR. 4).

The Respondent contends the Referee's findings, as stated in the preceding paragraph, was in error, as it was not supported by clear and convincing evidence. Main Brief of Respondent, P. 25-32.

The Florida Bar respectfully submits that there was clear and convincing evidence to support the Referee's findings.

It is the position of The Florida Bar that this is not a case of Guiking's word against the word of the Respondent. In this case, there is also circumstantial evidence which supports Guiking's position that he was given $6,000.00 in return for which he had to sign a note for $6,500.00; thereby being required to pay $500.00 interest for a six-day loan of $6,000.00 (Bar Exhibit 3).

It is noted that the $6,500.00 note (Bar Exhibit 3) indicates the loan is without interest. Is it logical to believe that the Respondent's client, Mr. Pawlitzek, would loan $6,500.00 to a total stranger, without any interest? The Bar submits it is not logical.

Mr. Guiking testified that Lehrman told him that it was not necessary to put interest on the note because he already put $500.00 on it, so it was for a total of $6,500.00. (Tr. 110).

Nevertheless, the Respondent states Pawlitzek's interest was not in the interest but in Mr. Guiking's mortgages. (Main Brief of Respondent at 30). The note was secured by an assignment of mortgages valued at $200,000 or more (Resp. Ex. 10). Respondent says on Page 30 of his Main Brief,

> Pawlitzek's interest was not in interest, but in Mr. Guiking's mortgages in the likelihood that Guiking's money "in Holland available" would not timely materialize, in the possibility that Guiking would concede a great deal more than $500 to avoid formal foreclosure or Pawlitzek's further negotiation of his assigned security interest in the Vizcaya mortgages.

The Bar again submits that this contention is not reasonable. If Guiking failed to pay, Mr. Pawlitzek's recourse was to foreclose. In which case, he would only be entitled to the $6,500.00 mentioned in the note, plus attorney fees and costs.

In effect, the Respondent says Guiking would be willing to pay more than $500.00 to avoid formal foreclosure.

The Bar believes this is unrealistic, especially when one considers that Respondent tried to get $25,000 from Guiking (Bar Exhibit 8) -- allegedly to avoid foreclosure.

Furthermore, Respondent states that he gave Guiking a check for $6,000.00 and then took $500.00 cash from his own funds and gave it to Guiking (Tr. 59). Also, it seems improbable that after giving Guiking $500.00 of his own money that he didn't reimburse himself from the client's trust account. (Tr. 223). Respondent says Mr. Pawlitzek reimbursed him, "probably next summer." (Tr. 77). The referee stated: "which was a long time after the lawsuit had been filed against you by Guiking." Respondent said, "Yes." (Tr.77).

During the early part of January 1981, Mr. Guiking unsuccessfully tried to borrow $6,000.00 from realtor Ethel Snyder (Bar Exhibit 1, Tr. 9); $5,000.00 from dentist Stephen M. Grussmark (Bar Exhibit 2, Tr. 9), and he tried to borrow between $5,000 and $6,000 from John Austin, a realtor (Tr. 107). Mr. Guiking testified that he attempted to borrow $6,500 from Martin A. Tabor and Samuel L. Rose after the loan from Respondent, in order to get funds to pay off the $6,500.00 note (Tr. 112).

Since Guiking tried to borrow $6,000 or less, in early January 1981, it bears on the question of how much he received from the Respondent. The Bar submits that since Guiking tried to borrow $6,000.00 or less before the loan from Respondent, it lends credence to his testimony that he only received $6,000 from Respondent.

Although the evidence shows that the loan was actually made by Respondent's client, Mr. Pawlitzek, rather than the Respondent personally, the Respondent is responsible, as indicated in DR 7-102(A)(7), which states that a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

It is apparant that $500.00 interest on a six-day loan of $6,000 is usury, in violation of Florida Statutes, Sec. 687.03, and 687.071 and in violation of Florida Bar Code of Professional Responsibility, D.R. 1-102(A)(2)(4) and (6).

V.

RESPONDENT'S LETTER DEMANDING $25,000 WAS UNETHICAL

The Bar respectfully submits that Respondent's sending of the letter demanding $25,000 to Guiking, in return for the

mortgages, was unethical (Bar Exhibit 8). Furthermore, the Bar believes the Referee was correct when he referred to this transaction as usurious (RR.4). See Sec. 687.03 and 687.071 Fla. Stat. Ann. (Supp. 1983).

The Respondent, in his Main Brief, at 32 and 33 cites Home Credit Corp. v. Brown, 148 So.2d 257, 260 (Fla. 1962) which states in part, "usury is determined by the amount of interest reserved at the inception." He also refers to First Mortgage Corp. of Vero Beach v. Stellman, 170 So.2d 302, 305 (Fla. 2d DCA 1964), cert. den. 174 So.2d 32 (Fla. 1965), where the Court stated:

> [T]he usurious nature of the contract depends upon the liability of the borrower under its terms, or, to put it another way, upon what may be demanded of the borrower, under the terms of the contract rather than what is demanded from him.

The Bar submits that the two cases above-cited by the Respondent, were the law at the time those decisions were rendered. However, the present law is reflected in the case of In Feemster v. Schurkman, 291 So.2d 622, 628 (Fla. 3d DCA 1974), where the court stated:

> We first note that the usurious character of a transaction is no longer determined at the inception thereof, but rather on what actually develops. [It is noted that Sec. 687.07 Fla. Stat. was repealed by laws, 1969, C. 69-135, Sec. 2, effective October 1, 1969. The Bar believes the cases cited above, Home Credit Corp. v. Brown, supra and First Mortgage Corp. of Vero Beach v. Stellman, supra, relied upon Sec. 687.07 Fla. Stat. which was later repealed].

The usury statute must control over prior case law. St. Petersburg Bank & Trust Co. v. Hamm, 414 So.2d 1071 1074 (Fla. 1982). Section 687.03 Fla. Stat. (Supp. 1983) provides that it is unlawful for any person or agent to charge more than eighteen percent interest per annum on any loan or on any "forbearance to enforce the collection of any sum of money." Section 687.071(3) Fla. Stat. (Supp. 1983) specifically states that it is a third degree felony to even conspire to charge a rate exceeding forty-five percent per annum when making an extension of credit. "Extension of credit" is defined as including "any agreement for forbearance to enforce the collection of such loan." 687.017 (1)(d) Fla. Stat. (Supp. 1983).

Lehrman's proposal to Guiking was that if Guiking paid $25,000, Pawlitzek would return the mortgages. The Bar submits that this proposal was essentially an offer to forbear collecting the debt through foreclosure or sale of the mortgages to third parties. The proposal evidences a conspiracy to charge a usurious rate of interest ($25,000 for the forbearance to collect a $6,000 loan) which is illegal under Section 687.071(3).

Nevertheless, even if the Respondent should be correct in his assertion that there was no violation of the usury statutes, the Bar believes the conduct of the Respondent in this matter was unethical and in violation of the Disciplinary Rules of the Code of Professional Responsibility. The Bar contends the act of demanding $25,000 from Guiking (Bar Exhibit 8), was: "an act contrary to honesty, justice and good morales," in violation of Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a); "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation of DR 1-102(A)(4); a circumvention of the "disciplinary

rules through an act of another" in violation of DR 1-102(A)(2); and conduct which "adversely reflects on his fitness to practice law" in violation of DR 1-102(A)(6). This is especially so, as it is apparent that Guiking was led to believe that he would lose the value of his mortgages (approximately $250,000) if he did not pay the $25,000. In fact, the holder of the note and mortgages would have had a right to foreclose, subject to the debtor's right of redemption. Stepp v. First Federal Savings and Loan Association of Miami, 379 So.2d 384 (Fla. 4th DCA 1980); Allstate Mortgage Corporation of Florida v. Strasser, 286 So.2d 201 (Fla. 1973). The Bar submits that the Respondent should have told Guiking that the only reasonable recourse by Mr. Pawlitzek, upon default by Guiking, was to forclose on the $6,500 note. (Tr. 118-121).

Why would Guiking, or any sane person, pay $25,000 to get back the security on the note when Guiking would be responsible only for the amount of the note ($6,500) plus expenses? It is apparent that the letter demanding $25,000 (Bar Exhibit 8) was Respondent's method of attempting to lead Guiking into believing he would lose his security, if he didn't pay the $25,000.

Although Respondent made the request for $25,000 (Bar Exhibit 8), he testified that he did this on behalf of his client. Nevertheless, the Bar believes Respondent is responsible, as indicated in Florida Bar Code of Professional Responsiblity, DR 7-102(A)(7), which states:

> (A) In his representation of a client, a lawyer shall not:
>
> xxxxx

(7) Counsel or assist his client in conduct that a lawyer knows to be illegal or fraudulent.

Fraud includes the act of taking unfair advantage of another to his injury amounting to an unconscionable overreaching. Fishman v. Thompson, 181 So.2d 604 (3d DCA 1966), cert. den. 188 So.2d 814 (Fla. 1966). If the court finds that the proposal to forbear the collection of a $6,000 or $6,500 debt in exchange for $25,000 was a violation of the usury statutes, then Respondent has violated DR 7-102(A)(7) by assisting his client in conduct that he knew to be illegal. The Bar submits that even if the proposal is found not to be a violation of the usury statutes, Respondent has nonetheless violated DR 7-102(A)(7) by assisting his client in conduct he knew to be fraudulent. As noted above, Lehrman led Guiking to believe he would lose the value of his mortgages (worth approximately $250,000) if he did not pay $25,000. The Bar submits that it was fraudulent for Lehrman to represent that Guiking could reacquire his mortgages for $25,000 without disclosing that Guiking could redeem them for $6,500, plus expenses.

Thus, regardless of whether Respondent's demand for $25,000 amounted to usury, the Bar submits that the Referee properly found that Lehrman's demand was patently improper and in violation of DR 7-102(A)(7) and DR 1-102(A)(2)(4) and (6).

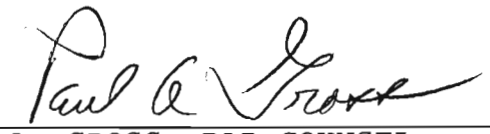
CONCLUSIONS

The Bar respectfully submits that the allegations in the Complaint were proven by clear and convincing evidence and should be approved. However, the Referee's recommendation that costs

amounting to $861.00 for the transcript for the grievance committee proceedings held on August 10, 1982, should not be approved, as those charges should be taxed to the Respondent.

Therefore, The Florida Bar recommends this Court approve the Referee's Findings of Fact, Conclusions of Law and Recommendation of Discipline. Furthermore, the Bar recommends that the Respondent pay the costs taxed against the Respondent, as shown in the Order on Respondent's Motion for Rehearing of the Referee's Order Taxing Costs (Appendix Ex. 2, to Complainant's Brief), to wit: $1,437.85, plus the $861.00 which was erroneously charged to The Florida Bar, for a total of $2,298.85.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Reply Brief to Respondent's Cross Appeal has been furnished by mail to Robert P. Smith, Jr., Appellate Counsel for Respondent, of Hopping, Boyd, Green and Sams, P. O. Box 6526, Tallahassee, Florida 32314 on this 15 day of March 1985.

Paul A. Gross

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