IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. STEVEN F. JACKSON, Respondent-Appellant.	CONFIDENTIAL Supreme Court Case No. 65,432 The Florida Bar File No. 17D83F18

ANSWER BRIEF ON BEHALF OF THE FLORIDA BAR

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PREFACE

In all instances, appellant, Steven F. Jackson, shall be referred to herein as "respondent" and appellee, The Florida Bar, shall be referred to as the "bar".

All page references shall be to the trial transcript unless expressly otherwise indicated.

STATEMENT OF NATURE OF CASE AND FACTS

The bar generally concurs with the statement set forth in respondent's brief. There are three (3) areas that require clarification.

First, the grievance committee proceedings were concluded on August 26, 1983 when its report was rendered and served.

Second, upon presentation of the grievance committee report to the Board of Governors of The Florida Bar at its September 23, 1983 meeting, the Board rejected the committee's report and specifically determined that a suspension was appropriate discipline.

Third, although respondent testified that he consulted with his wife, a litigation attorney, concerning the propriety of the witness fees in question prior to making his telephone call demands (70), his wife, Sandra Jackson, testified that respondent made no such inquiry (107).

SUMMARY OF ARGUMENT

AS TO GUILT.

The evidence below clearly and convincingly established that respondent acted contrary to honesty, justice and good morals and in prejudice to the administration of justice. The bar's witnesses testified that on four separate occasions, respondent, unsolicitedly, sought to extort from Merchants Mutual Insurance Company, fees for the payment of material fact, non-expert witnesses, in excess of the parameters established by the Code of Professional Responsibility, viz., attendance costs and compensation for lost time; that respondent continued such conduct despite being advised that it was unethical, improper and possibly criminal. Respondent admitted seeking such fees despite instinctively knowing such requests were improper, despite advice from his attorney-wife as to the proper gauge for measuring witness fees, despite research of New York statutes confirming his wife's advice and continued to repeat his demands despite being informed that the requests were improper.

AS TO PROCEDURE.

The amendment to Fla. Bar Integr. Rule, article XI, Rule 11.04(6)(c) taking effect as of July 1, 1984, had no applicability to grievance committee proceedings which terminated on August 26, 1983. The consent judgment proffered by the respondent was rejected by the referee, a procedure expressly provided for and contemplated by this Court in its promulgation of Fla. Bar Integr. Rule, article XI, Rule 11.13(6)(b).

AS TO DISCIPLINE.

The freedom of witnesses from financial inducement is so fundamental a precept in the administration of justice that interference or attempted interference therewith constitutes an assault on the very foundation of our system. By knowingly attempting to subvert the process and, despite admonition and advice to the contrary, continuing to press his attempts to secure clearly excessive witness fees, respondent indulged in intentional misconduct requiring stern discipline. The referee's recommendation, under the circumstances of this case, will be protective of the public, educational and fair to respondent and necessary to deter others from similarly assaulting our system of jurisprudence.

ARGUMENT

I

KNOWING SUCH CONDUCT TO BE IMPROPER, RESPONDENT, BY PURPOSELY AND REPEATEDLY SEEKING PAYMENT OF WITNESS FEES IN EXCESS OF ETHICAL PARAMETERS, ACTED CONTRARY TO HONESTY, JUSTICE AND GOOD MORALS, AND IN PREJUDICE TO THE ADMINISTRATION OF JUSTICE.

Though axiomatic that a referee's fact findings are entitled to a presumption of correctness (The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984); Fla. Bar Integr. Rule, article XI, Rule 11.06(9)(a)), one need only examine respondent's own brief to view the overwhelming weight of clear and convincing evidence establishing his misconduct.

The testimony of Paul J. Campito, an attorney, paraphrased by respondent at pages 4 through 8 of his statement of the case, established that respondent, unsolicitedly and repeatedly attempted to extort from Merchants Mutual Insurance Company, Mr. Campito's employer, excessive witness fees ranging from $5,000.00 to $50,000.00. Successive demands were made despite Mr. Campito's admonition, expressly acknowledged by respondent, that respondent's conduct in demanding such fees was unethical, improper and, perhaps criminal, (respondent's brief, pages 6 through 8).

Indulging in whimsical advocacy, respondent urges that the Campito testimony was uncorroborated, denied by respondent and therefore not entitled to any weight. The folly of such assertion is manifest. The Campito testimony was corroborated not only by bar presented evidence, but by respondent, himself.

The bar produced testimony from Richard Ronda, an adjuster employed by Mr. Campito's carrier, who received one of respondent's many unsolicited telephone calls. Mr. Ronda explained that during his call, respondent related the witness compensation he sought to the value of the insurance claim, seeking $50,000.00 as a one-third percentage of a claim estimated by respondent to be worth $150,000.00. Though a layman, Mr. Ronda advised respondent that his company could not pay for testimony (respondent's brief, page 9). Respondent conveniently dismisses Mr. Ronda's testimony as not probative because the referee didn't mention Ronda in his report. It is respectfully submitted that a more logical and compelling inference can be drawn, viz., that the referee did not deem it necessary to tilt the scale beyond its capacity.

Even had the very damaging and corroborative evidence adduced through Mr. Ronda not been presented, respondent's own testimony established his misconduct.

When pricked by the horns of an ethical dilemma, the conscientious attorney applies a simple, time-honored and effective test, reasoning if the question must be posed, the conduct should be avoided.

Here respondent was not merely pricked, he was bayonetted, repeatedly. Before making his first demand of $50,000.00 he felt "uncomfortable" (63) and regarded the amount as patently "ridiculous" (70). He consulted his wife*, a litigation attorney, who opined that

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* Sandra Jackson, respondent's attorney-wife, testified that respondent had no such conversation with her prior to his making the calls (107).

"the only compensation that someone could receive, was the lost wages, traveling expenses and meals and lodging" (70). He researched the New York statutes which confirmed his wife's advice (57). When, notwithstanding his instincts, his wife's advice and his research, he made his call to the carrier's attorney, he was admonished that not only was his conduct unethical, but possibly criminal (19).

Rather than abandon his efforts, respondent continued to solicit fees in excess of loss wages, travel and lodging expenses, making demands ranging from $50,000.00 to $5,000.00 (20-24). In four separate telephone calls, each initiated by respondent, he pursued that which he had himself regarded as questionable and which others had characterized as wrong.

Respondent, conceding that he made the three calls to Mr. Campito requesting compensation in excess of ethical parameters, offered as mitigation that he was only informed by Campito that his (respondent's conduct) was improper, not unethical, and that he never asked for $50,000.00 but, rather asked for two times $25,000.00 (respondent's brief, page 18). Further, respondent urged that although he considered the two times $25,000.00 demand as ridiculous, he did not regard it as excessive (respondent's brief, page 19).

Having himself corroborated the calls, the demands asserted during each call (even though in respondent's view, a demand of two times $25,000.00 is somehow less than a demand of $50,000.00) there need be no lingering speculation or doubts concerning the basis of the referee's findings of fact or recommendation as to guilt.

II

THE JULY 1, 1984 AMENDMENT TO FLA. BAR INTEGR. RULE, ARTICLE XI, RULE 11.04(6)(c) HAD NO RETROACTIVE EFFECT TO THE GRIEVANCE COMMITTEE PROCEEDINGS WHICH WERE CONCLUDED ON AUGUST 26, 1983.

Respondent's second argument relating to the procedural change effected by the July 1, 1984 amendment to Fla. Bar Integr. Rule, article XI, Rule 11.04(6)(c) is specious. While it is true that procedural changes in the law are applied to pending proceedings and the cases cited by respondent stand for such proposition, respondent conveniently overlooks the fact that the grievance committee proceeding was concluded in August, 1983, eleven (11) months prior to the cited amendment.

While the formal discipline proceeding was commenced on June 8, 1984 by the filing of the bar's complaint with this Court, the rule in question, 11.04(6)(c) applies solely and exclusively to grievance committee level actions, not referee level proceedings.

III

THE SUSPENSION RECOMMENDED BY THE REFEREE IS FAIR TO THE PUBLIC AND TO THE RESPONDENT AND APPROPRIATELY SEVERE TO DETER OTHERS FROM ENGAGING IN SIMILAR MISCONDUCT.

Respondent urges that a private reprimand is the maximum discipline appropriate under the circumstances. He advances two (2) arguments therefor. On the one hand, he urges that the bar, itself, recommended

such discipline to the referee upon the proffer of a consent judgment under Fla. Bar Integr. Rule, article XI, Rule 11.13(6)(b). On the other, he urges that but for the vicissitudes of time the initial grievance committee recommendation, concurred in by the designated reviewer, had it occurred after July 1, 1984, would have laid the matter to rest.

The bar cannot but agree with the latter conclusion and does not shrink from acknowledging its past recommendations. The bar also does not shrink from its present enthusiastic endorsement of the referee's discipline recommendation and most respectfully submits that there are no inconsistencies in its positions.

The distillate of respondent's argument omits from consideration the respective roles played by each party to the discipline process. Taken to its logical conclusion, respondent's argument would mandate that once the bar has made a recommendation, it is thereafter binding and not subject to review. This view would deprive two levels of the discipline process from any input on the subject of discipline. Neither the referee nor this Court would be involved in the process.

The other fallacy to respondent's argument is that the bar's recommendations vis a vis private reprimand, were made prior to the testimony and evidence adduced during the referee hearing. Having had the opportunity to hear all of the evidence and observe the respondent's demeanor the referee concluded that a ninety (90) day suspension was warranted. It is respectfully suggested that this is precisely what this Court had in mind when it promulgated Rule 11.13(6) which requires that a consent judgment proffered thereunder be considered by a referee.

It was upon the hearing before the referee that the bar heard the respondent admit that he had a gut reaction that the fees he requested were improper (57), that he researched New York statutes and confirmed his reaction (57), that he consulted his wife who further confirmed his reaction (70), that he regarded the request as "ridiculous" (70), but that despite all misgivings and all advice and all research he nonetheless pursued his demands. It was upon the hearing that the bar also observed respondent attempt to excuse the repetitious nature of his misconduct because, as he explained, he had only been informed that it was improper and not unethical (73) and that he had never demanded $50,000.00, only two times $25,000.00 (73).

Respondent's obvious awareness of the improper nature of his conduct coupled with his apparent ease in casting his own instincts to the side, in the bar's view, renders respondent's misconduct as warranting imposition of the suspension recommended by the referee. It is respectfully submitted that the public must be protected from an attorney who, knowing his conduct to be improper, nonetheless engages therein and then repeats the proscribed act over and over again. Such conduct, it is respectfully submitted, is more akin to the intentional misconduct associated with dishonesty than the benign type conduct which might merit reprimand discipline.

Respondent attempted to portray himself as a real estate attorney not versed in the intricacies of the litigation bar and therefore excused from being conversant with the proscriptions relating to witness fees (71, 72). Such defense or attempt at mitigation must fly in the

face of this Court's mandate expressed in Fla. Bar Integr. Rule, article XI, Rule 11.01(1) that

> Every member of The Florida Bar... is within the jurisdiction of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court.

It is also interesting and significant to note that although respondent experienced his gut reaction, secured advice concerning witness fees from his wife, and researched the statutes of New York, he apparently never thought to look at his own professional code which provides:

> A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Fla. Bar Code Prof. Resp., D.R. 7-109(C).

The repetitive nature of respondent's misconduct occurring despite his misgivings to the contrary and the results of his research and the explicit advice he received warrants imposition of more severe discipline. Such repetitive misconduct demonstrates a reckless and wanton disregard and is the predicate for increased discipline. See The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Mitchell, 385 So.2d 96 (Fla. 1980).

The rationale for the recommended discipline is perhaps best articulated by the referee at page 3 of his report, where he states:

It would appear to me that the very heart of the judicial system lies in the integrity of the participants, that is the court officers, to promote fair and just resolutions of matters before all courts, without the fear that an injustice could occur by the procurement of witnesses' testimony. Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of testimony before courts of justice.

CONCLUSION

Having embarked upon a repetitive course of conduct intentionally, with knowledge of its impropriety, respondent's behavior was thereby contrary to honesty, justice and good morals. By his repeated attempts to secure excessive compensation for material fact, non-expert witnesses, respondent engaged in conduct prejudicial to the administration of justice. It is therefore respectfully submitted that the referee's report should in all respects be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief on Behalf of The Florida Bar was furnished to Louis M. Jepeway, Jr., Jepeway and Jepeway, P.A., Attorneys for Respondent, Suite 619, 101 East Flagler Street, Miami, FL 33131, by regular mail, on this 10th day of October, 1985.

/s/ David M. Barnovitz
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