IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

LOUIS L. SUPRINA,

Respondent.
_____/

CONFIDENTIAL

Case No. 66,785
(TFB No. 1084C103)

COMPLAINANT'S ANSWER BRIEF

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POINTS INVOLVED ON APPEAL

(I) WHETHER THE REFEREE'S FINDINGS OF FACT ARE INACCURATE OR MISLEADING AND WHETHER THEY FULLY SUPPORT HIS RECOMMENDATION OF GUILT.

(II) WHETHER THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND IS APPROPRIATE WHERE THE SOLE ADMITTED PURPOSE OF THE JANUARY 6, 1984, LETTER WAS IN CLEAR VIOLATION OF DISCIPLINARY RULE 7-105(A) AND WHETHER SIMILAR WEIGHT SHOULD BE ACCORDED TO THAT GIVEN TO A REFEREE'S FINDINGS OF FACT. FURTHER, WHETHER THE REFEREE IS CONFINED TO RECOMMENDING THE DISCIPLINE AS THAT RECOMMENDED BY THE FLORIDA BAR.

(III) WHETHER, SINCE THE SUPREME COURT HAS EXCLUSIVE DISCIPLINARY JURISDICTION OVER MEMBERS OF THE BAR, THE LEGISLATURE IS WITHOUT POWER TO CREATE A STATUTORY EXCEPTION TO THE CODE OF PROFESSIONAL RESPONSIBILITY AND WHETHER UTILIZATION OF THE PROVISIONS OF SECTION 701.05 OF THE FLORIDA STATUTES MAY CONSTITUTE A VIOLATION OF 7-105(A) FOR THREATENING CRIMINAL PROSECUTION SOLELY TO GAIN ADVANTAGE IN A CIVIL MATTER DEPENDING ON THE CIRCUMSTANCES.

STATEMENT OF THE CASE

On December 13, 1984, the Tenth Judicial Circuit Grievance Committee recommended a finding of minor misconduct with a required Board appearance against the Respondent. After it was subsequently approved, Respondent rejected the reprimand pursuant to Fla. Bar. Int. Rule 11.04(6)(c)(i) in February, 1985. The Bar's complaint was sent to the court at the end of March, 1985. The Honorable W. Rogers Turner, a circuit judge in the Ninth Judicial Circuit, was thereafter appointed referee. Final hearing was held on June 21, 1985, and the referee's report dated August 23, 1985, was thereafter forwarded to the court. In that report, the referee recommends the respondent be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility:

(A) 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law and

(B) 7-105(A) for threatening criminal prosecution solely to gain advantage in a civil matter.

As discipline, the referee recommends respondent be publicly reprimanded by personal appearance before the Board of Governors of The Florida Bar and pay costs now totaling $609.55. At their September 1985 meeting, the Board of Governors of The Florida Bar

considered the referee's report, its' recommendations and voted to support them in all respects.

Respondent thereafter filed his petition for review on September 18, 1985, along with a motion for extension of time to file his brief which was granted. His supporting brief was thereafter filed on November 1, 1985.

STATEMENT OF THE FACTS

Complainant feels it necessary to set forth its statement of the facts based upon the referee's findings. Respondent has submitted a detailed statement of the case and of the facts, part of which apparently never became part of the record although it obviously is part of respondent's file. This matter was essentially presented to the referee without the need for live testimony based on the complaint, respondent's reply and a memorandum attached thereto setting forth the chronology. His statement elaborates on that chronology.

The Gangles had purchased five acres of property from Mr. Feagle. Later, they contracted to sell one of the acres to a third party by contract for deed which was assigned to a fourth party in 1981. In November 1982 this purchaser told the Gangles they wanted to pay off the agreement for deed and obtain a warranty deed on the one acre. Respondent apparently then was contacted and requested to secure partial release from Mr. Feagle, along with supporting documents. Respondent apparently had little success in contacting Mr. Feagle who wanted his entire mortgage satisfied. However, Mrs. Gangle went ahead and borrowed sufficient money to pay off their entire mortgage and secured in May 1983 a satisfaction of mortgage signed by Mr. Feagle, which

was duly recorded. In August 1983 the purchasers had a title search accomplished to obtain title insurance. Their attorney informed respondent that the note and mortgage covering the property had been held by both Roy Feagle and his former wife, Brenda, necessitating the latter's signature on a satisfaction of mortgage.

After soliciting correspondence from the purchaser's attorney which was forwarded in October, the respondent made several unsuccessful attempts to contact Brenda Feagle, both by telephone and letter, over the next several months. These attempts at contacts were made principally through her former husband, as well as Mrs. Feagle's former attorney. After consulting with an attorney for the Lawyers' Title Guarantee Fund in early January 1984 the respondent made formal written demand on both Roy and Brenda Feagle for a properly executed satisfaction of mortgage pursuant to Section 701.05 Fla. Stat. (1983), by letter dated January 6, 1984. The letter gave notice of possible incarceration and monetary penalties for failing to provide proper satisfaction within thirty (30) days. It concluded,

> "We can assure you both that if we do not receive the satisfaction timely, we shall do our best to have the court give you both the maximum sentence in jail and your

> pocketbooks." See Exhibit "A" to the Complaint. Referee Report, Section II, paragraph 4. A copy is in the Appendix.

Respondent wrote this letter to both Roy and Brenda Feagle, even though Roy had previously executed a proper satisfaction. In his statement of facts, he indicates this was done because Mr. Feagle had received the mortgage pay off proceeds. Mr. Feagle subsequently brought suit against his former wife and the transaction was concluded in March 1984 when she provided a proper satisfaction. Respondent notes that at the time he wrote the letter, it was some fourteen (14) months after he had been contacted and seven (7) months after Roy Feagle had received full payment for the mortgage on the five (5) acres, thus allowing the partial release.

The referee specifically found that the letter was forwarded to the Feagles solely to gain advantage in this matter and not merely as a mechanism for providing notice of possible penalties for non-compliance. In fact, the respondent testified the sole purpose of the letter was to acquire the satisfaction of mortgage. See transcript of referee hearing, page 12. The referee further found that the concluding sentence clearly issued a threat of criminal prosecution against the Feagles if they failed

to timely execute the satisfaction and that it had not been directed at Brenda Feagle alone, but also to Roy Feagle.

SUMMARY OF ARGUMENT

Point I. The referee's findings of fact are not inaccurate or misleading and fully support his recommendations of guilt.

Point II. His recommended public reprimand is appropriate in this instance where the sole admitted purpose of the January 6, 1984, letter was in clear violation of Disciplinary Rule 7-105(A). His recommendation should be accorded similar weight to that given to a referee's findings of fact. Further, he is not confined to recommending the discipline recommended by The Florida Bar.

Point III. Section 701.05 of the Florida Statutes is not a statutory exception to Disciplinary Rule 7-105(A) of The Florida Bar's Code of Professional Responsibility. The legislature is precluded from creating exceptions by the separation of powers doctrine since it vacated the disciplinary area with the adoption of the Supreme Court's exclusive disciplinary jurisdiction by constitutional amendment in 1956. It matters not that the statute long preceded the constitutional amendment or discipline

rules given the legislative withdrawal. The court's inherent power to admit attorneys and discipline same, which was not exercised while the legislature handled this area, also underscores this position. The recommended public reprimand should be the discipline in this case.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT ARE NOT INACCURATE OR MISLEADING AND FULLY SUPPORT HIS RECOMMENDATION OF GUILT.

Respondent asserts the referee's findings of fact are inaccurate and misleading. Review of his findings of fact versus the referee's findings reveals little actual difference other than perhaps an erroneous opening sentence in paragraph 1 of section II of the referee's report whereby respondent is found to be representing the Gangles in the sale of one of the acres. It appears respondent only became involved when the Gangles needed to obtain a partial release from Mr. Feagle to provide a warranty deed on the one acre parcel. Respondent also appears to be arguing that because the referee did not stress the difficulties he had in contacting the Feagles directly or through other counsel who could assist him in obtaining the necessary documents for some fourteen (14) months that referee paid inadequate attention to his difficulties and frustrations leading up to the January 6, 1984, letter. This is nonsensical. The issue is the language of the letter and whether the respondent was privileged to send same under the circumstances and not run afoul of the Disciplinary Rules.

Of course, a referee's findings of fact enjoy the same presumption of correctness as a civil trier of fact, pursuant to Fla. Bar Int. Rule Article XI, Rule 11.06(9)(a)(1). See e.g. The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984). This court reviews the report and if the recommendation of guilt is supported by the record imposes the appropriate penalty. See The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980) and The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). In the latter case, this court wrote:

> "Fact finding responsibility in disciplinary proceedings is imposed upon the referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968)"

Hirsch at page 857. In the Hoffer case, at page 642, this court also stated:

> "Our responsibility in a disciplinary proceeding is to review the referee's report and, if his recommendation of guilt is supported by the record, to impose the appropriate penalty. The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978) The referee, as our fact finder, properly resolves conflicts in the evidence. See The Florida Bar v. Rose, 187 So.2d 329 (Fla. 1966)

This case does not involve a conflict of fact. There is no question the respondent sent the letter giving rise to these proceedings or that he did it solely to gain the satisfaction of mortgage, which he admits. It was sent for no other purpose than to enable him to close out this matter. The question remains as to whether it was permissible under the circumstances.

ARGUMENT

POINT II

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND IS APPROPRIATE WHERE THE SOLE ADMITTED PURPOSE OF THE JANUARY 6, 1984, LETTER WAS IN CLEAR VIOLATION OF DISCIPLINARY RULE 7-105(A) AND SHOULD BE ACCORDED SIMILAR WEIGHT TO THAT GIVEN TO A REFEREE'S FINDINGS OF FACT. FURTHER, THE REFEREE IS NOT CONFINED TO RECOMMENDING THE DISCIPLINE AS THAT RECOMMENDED BY THE FLORIDA BAR.

The referee's recommendation of guilt and discipline are appropriate and should be accorded great weight. Respondent complains that the referee disregarded the stipulation between himself and counsel for The Bar, narrowing the legal issue as opposed to any factual issues, to the question of whether the furnishing of written notice required by a statute, including paraphrasing penalties and fines for failure to comply, constituted a violation of Disciplinary Rule 7-105(A) for threatening criminal prosecution solely to gain an advantage in a civil matter or whether providing such notice was a statutory exception to the rule. However, respondent's main thrust in this issue is to take exception to the referee's recommendation of a public reprimand. It is evident from a review of the final hearing on June 21, 1985, and the referee's findings that he found it

unnecessary to make a determination of the legal issue in order to render his recommendations.

The Bar never argued at the final hearing that merely sending a notice to invoke remedies under Section 701.05 would be a per se violation of Disciplinary Rule 7-105(A). The Bar's position was and is that given the language of the last paragraph of the January 6, 1984, letter and respondent's candid admission that it was done solely for the purpose of blasting loose the satisfaction of mortgage, that it did violate the rule. Under the circumstances, once the referee determined that the letter had in fact violated the rule, the appropriate question becomes the level of discipline. In issue three of the respondent's brief, he alludes to the monumental frustration over the matter having taken to that point some fourteen (14) months without success in obtaining a satisfaction as a matter in mitigation. Moreover, he states that given his utter frustration and anger by the time that he wrote the letter that the final paragraph was mildly put. Further, he indicates that it was not a threat of prosecution under the statute, but a promise. (Respondent's brief, pages 21, 28-29) The last paragraph of the letter reads:

> "We sincerely hope you will be able to work things out between you so that you can comply

> with the law before the penalty is assessed. We have tried to be pleasant about this, but you have exhausted our patience. We can assure you both that if we do not receive the satisfaction timely, we shall do our best to have the court give you both the maximum sentence in jail and in your pocketbooks." A copy of the letter is in the appendix.

The grievance committee had recommended a finding of minor misconduct for a private reprimand. Respondent rejected same and this case proceeded to trial. At that final hearing, Bar counsel recommended a private reprimand based on the previous but rejected recommendation. The referee disagreed. The only reported public case is The Florida Bar v. Kaufman, 409 So.2d 480 (Fla. 1982). The facts are not set forth in the case other than a violation of the rule occurred and public reprimand issued. Note also no petition for review had been filed by either side.

Just as this court is not limited to issuing disciplines to that either recommended by the referee or from the Board of Governors or the respondent, neither is the referee bound to making a disciplinary recommendation no greater than that recommended by Bar counsel. See e.g. Fla. Bar Int. Rule Article XI, Rule 11.09(3)(f) wherein the court can call for briefs on the question of discipline even where no review is sought. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). In this instance, the referee in rendering his recommended discipline

considered not only the letter which gave notice under the statute, but was personally aware as the referee of The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985) which was issued on May 2, 1985. In that case this court approved his recommendation and publicly reprimanded respondent. Just as his findings of fact are accorded the same presumption of correctness as a civil trier of fact, his recommendations should also be given great weight. The Bar submits that the referee's recommended public reprimand flows from the facts of this case.

Moreover, the referee was certainly within his rights to consider the entire January 6, 1984, letter. This is particularly so when there appears to have been a miscommunication between Bar counsel and respondent as to the nature and extent of the stipulation. In fact, the referee could have considered matters not squarely within the confines of The Bar's complaint, so long as they bore on respondent's fitness to practice. See The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984) and The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981). In this instance, the letter was attached as an exhibit to the complaint. The referee would have been remiss in determining whether disciplinary sanctions should be recommended against the respondent's privilege to practice law had he not considered it. In sum, the

referee has made his recommendation of a public reprimand, The Bar submits it should be not only accorded great weight but adopted by this court as the appropriate discipline in this matter.

ARGUMENT

POINT III

SINCE THE SUPREME COURT HAS EXCLUSIVE DISCIPLINARY JURISDICTION OVER MEMBERS OF THE BAR, THE LEGISLATURE IS WITHOUT POWER TO CREATE A STATUTORY EXCEPTION TO THE CODE OF PROFESSIONAL RESPONSIBILITY AND UTILIZATION OF THE PROVISIONS OF SECTION 701.05 OF THE FLORIDA STATUTES MAY CONSTITUTE A VIOLATION OF 7-105(A) FOR THREATENING CRIMINAL PROSECUTION SOLELY TO GAIN ADVANTAGE IN A CIVIL MATTER DEPENDING ON THE CIRCUMSTANCES.

As previously stated, The Florida Bar did and does not take the rigid position that merely providing notice of the statute and its provisions violates the rule. However, considering the language of respondent's letter and his stated purpose in sending the letter, The Bar successfully argued to the referee that it was a violation of the Disciplinary Rule. The Bar submits that this is the correct position.

Respondent's basic argument here is that this is a statutory exception which far preceded the Disciplinary Rule or the court's power to discipline attorneys. Section 701.05 was originally passed in 1901 as Section 2 of Chapter 4918 and has had few changes over the years. It does provide that anyone who fails to satisfy a mortgage thirty (30) days after written demand by the person(s) fully paying off the mortgage shall be guilty of a

second degree misdemeanor. Disciplinary Rule 7-105(A) was adopted as part of the Code of Professional Responsibility in 1970. See In re: Integration Rule of The Florida Bar, 235 So.2d 723 (Fla. 1970). The Rule provides:

> "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain advantage in a civil matter."

There is an apparent conflict between the statute and the Disciplinary Rule. Under the separation of powers doctrine, the legislature is without power to currently promulgate a code of conduct for members of The Florida Bar since the Supreme Court has the exclusive jurisdiction to discipline attorneys. See e.g. In re: The Florida Bar, 316 So.2d 45 (Fla. 1975). However, in this instance the legislative enactment preceded The Supreme Court's exclusive jurisdiction. The court received its exclusive grant of disciplinary jurisdiction from the electorate in 1956 when Article V, Section 23 was originally adopted giving the court exclusive jurisdiction over the admission of members to The Bar and their discipline. It became Article V, Section 15 of the current Constitution in 1972 when the electorate approved a substantial revision of Section 23.

Prior to 1956 it appears that the legislature had enacted statutes regulating admissions to The Bar and subsequent discipline with the acquiescence of the court. However, the court's inherent power over the admission of members of The Bar and their discipline was there notwithstanding. In Petition of Florida State Bar Association, 186 So. 280 (Fla. 1938) the court declined to assume full responsibility for admissions to The Bar, discipline of attorneys for misconduct and regulation of unauthorized practice of law by rule change alone. There was no constitutional provision at that time. The court stated:

> "If not defined by the constitution, we approve the well nigh universal doctrine that the power to regulate such matters by rule is inherent in the courts and cannot be taken from them by the legislature." At page 285.
>
> Further:
>
> "We are confronted here with a practical situation in which the courts of this state failed at the proper time to assert their prerogative in the premises, and in so far as the record discloses have not before been importuned to do so." At page 285.

However, the court went on to state that in Florida for more than one hundred (100) years the legislature had regulated matters of admissions to The Bar and disbarment of attorneys.

Further, that this had been acquiesced in by the people, not resisted by anyone and repeatedly approved by the courts.

> "It thus appears there was in part, at least, a concurrent authority on the part of the courts and the legislature. The Legislature entered the field and regulated for more than a hundred years. The Courts acquiesced and approved repeatedly. Approval of proposed rules 2 and 3 would amount to attempted repeal of the acts of the Legislature prescribing requirements for admission to The Bar and disbarring for unprofessional conduct. If it could be done, it would be unbecoming and improper to attempt the results sought in this way. If a change of policy is to be effective, it should be done in orderly fashion after the legislature has withdrawn from the field." At page 286.

The court went on to adopt standards for legal education which it could under section 4180 of the compiled general laws of 1927. It also noted it had previously entered an order in 1936 adopting the Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association as the measure of conduct and responsibility for the members of the bench and bar. At page 285. The key in this case is that the court recognized it always had the inherent power over the admission of attorneys to practice and their discipline. They declined to exercise that inherent power until such time as the legislature withdrew, which they have done.

In the context of this particular case, it does not matter that the statute in question was created in 1901; that the court received exclusive jurisdiction over discipline in 1956 through a constitutional amendment; or that the Disciplinary Rule was adopted in 1970. The point is that once the legislature withdrew, the conflict issue between the statute and the Disciplinary Rule paled before the doctrine of separation of powers. It further does not matter whether the legislative withdrawal occurred before or after the adoption of the statute. The point is that it has been done.

The question here is whether respondent in sending his January 6, 1984, letter violated the Disciplinary Rule. Putting the mortgagee on notice of the statute does not in itself constitute a violation of Disciplinary Rule 7-105(A), which reads:

> "A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter." (underscoring added)

Respondent's argument fails to take into account the operative word which is solely. Merely providing the notice, quoting the statute, providing the penalties, does not in itself indicate it was done solely to bring about advantage in a civil matter. However, given the language of the letter, and respondent's

expressed intention, there is no question that a violation of the Disciplinary Rule occurred.

Respondent asserts that the statute cannot be limited to lay individuals alone and that as the agent for his client, an attorney is entitled to utilize the statute. The Bar concurs. He must merely utilize it in a manner that does not run afoul of the Disciplinary Rule. As an aside, The Bar would note that the attorney is bound by the Code of Professional Responsibility whereas the client is not. Finally, respondent asserts that he had to send the notice to both Roy and Brenda Feagle and not Brenda alone, notwithstanding the fact that Roy had previously furnished the satisfaction of mortgage. The Bar's case rests not on the fact that it went to both Feagles, rather that the language of the letter was such as to bring it in violation of the Disciplinary Rule especially since the respondent asserted the sole purpose in doing it was to dynamite loose a satisfactory satisfaction of mortgage.

The respondent next asserts that Section 832.07 Fla. Stat. (1983) regarding worthless checks is a similar statute and exception to the Disciplinary Rule. The recommended notice set forth in the statute reads:

> "You are hereby notified that a check, numbered ....., issued by you on ....., drawn upon ....., and payable to ..... has been dishonored. Pursuant to Florida law, you have 20 days from receipt of this notice to tender payment of the full amount of such check plus a service charge of $5 or 5 percent [of the face amount of the check], whichever is greater, the total amount due being $..... and ..... cents. Unless this amount is paid in full within the time specified above, the holder of such check may turn over the dishonored check and all other available information relating to this incident to the State Attorney for criminal prosecution." (underscoring added)

Clearly, the operative word is may in the last sentence of the notice whereas the operative word in the Disciplinary Rule is solely. Providing the prescribed statutory notice would not in and of itself violate the Disciplinary Rule which the Professional Ethics Committee recognized in Florida Ethics Opinion 85-3. It is the intent that makes the difference.

There is no question respondent sent the letter. It's language is clear. It's purpose is clear and admitted by respondent. It violates Disciplinary Rule 7-105(A). The referee has found the respondent guilty and recommends he receive a public reprimand by personal appearance before the Board of Governors and pay the costs of these proceedings currently amounting to $609.55. The findings of fact are not inaccurate and misleading.

They fully support his finding. The referee's recommendation should be upheld.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's report and approve its finding of fact, recommendation of guilt and discipline and order the respondent to be publicly reprimanded by a personal appearance before the Board of Governors of The Florida Bar and pay the costs of these proceedings currently amounting to $609.55 in an appropriate public opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Answer Brief have been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been mailed by ordinary U.S. mail to Louis L. Suprina, respondent, Post Office Box 1505, Winter Haven, Florida, 33882-1505; and a copy by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 21st day of November, 1985.

DAVID G. McGUNEGLE
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