IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Friday, November 1, 1985

THE FLORIDA BAR

Complainant,

vs.

LOUIS L. SUPRINA

Respondent

CONFIDENTIAL

CASE NO. 66,785
(1084C103)

PETITION FOR REVIEW OF

REPORT OF REFEREE

INITIAL BRIEF OF RESPONDENT - APPELLANT

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STATMENT OF THE CASE AND OF THE FACTS

This is a petition for Review of the REPORT OF REFEREE in this cause, entered August 23, 1985. The facts of the case, as reflected in the record are as follows:

1) In June of 1974 the Gangles purchased approximately five acres of property from Roy T. Feagle and Brenda Feagle, his wife. They received a Warranty Deed from the Feagles and gave the Feagles back a puchase money note and mortgage for part of the purchase price. Respondent had no knowledge of this sale and mortgage since it was handled by an abstract office. In 1978 the Ganglas contracted to sell approximately one acre of property to the Hughes, by contract for deed. In 1981, the Hughes assigned their interest in said contract for deed to the Hassons.

2) In November 1982, the Hassons told the Gangles that they desired to pay off the agreement for deed and obtain a Warranty Deed on their one acre. At that time Mrs. Gangle came to Respondent's office and asked him to contact Roy Feagle to obtain an amount he would accept for a partial release and to supply Respondent with a copy of his mortgage so that Respondent could have the information to prepare a partial release of the mortgage. Mrs. Gangle supplied Respondent with Roy Feagle's telephone number and Respondent phoned Mr. Feagle

on numerous occasions, leaving messages on his answering machine for him to return the phone calls. After receiving no response from Mr. Feagle from Respondent's numerous phone calls to him, Respondent wrote a letter to Mr. Feagle on January 5,1983. By January 15, 1983 there was still no response from Mr. Feagle so Respondent wrote his February 15, 1983 letter to Mrs. Gangle, telling her of the dilemna and asking her to personally contact Mr. Feagle to obtain the information requested.

3) On May 26, 1983 Mrs. Gangle brought in an instrument entitled "Satisfaction of Mortgage" that had been executed by Roy Feagle. She asked Respondent to record it for her and stated that when she personally contacted Roy, he would not give her a partial release and insisted on payment in full. This made it necessary for Mrs. Gangle to borrow the money, to pay off the Feagle's mortgage, from First National Bank of Winter Haven. The bank closed her signature only loan and evidently Mrs. Gangle received the signed Satisfaction from Roy Feagle directly, in return for her pay-off check to him.

Respondent never saw the mortgage so he had no way of knowing if the Satisfaction was correct. Respondent just recorded the Satisfaction Mrs. Gangle had supplied him and told Mr. Hasson to go ahead with obtaining his money to pay off Mrs. Gangle.

4) On August 27, 1983 Respondent received a phone call from Attorney Reiley stating that he had done a Title Search on the Hasson's property and found the mortgage in favor of Roy T. Feagle and Brenda Feagle, his wife and a Satisfaction by Roy T. Feagle only. He asked for Respondent 's help in obtaining a Satisfaction from Brenda Feagle . In response, Respondent asked Attorney Reiley for copies of his correspondence and the instruments. After a few more telphone calls, Attorney Reiley finally sent them to Respondent by his October 17, 1983 letter. In the letter he included a copy of a letter he had already sent to Brenda Feagle on July 27, 1983 , at her last known address, including a copy of the Mortgage, a copy of the Satisfaction signed by Roy and a copy of the new Satisfaction for Brenda to sign and return to him. Needless to say, Brenda never answered Attorney Reiley's letter nor did she execute the Satisfaction and return it to him. So Attorney Reiley continued to ask Respondent for help in obtaining the Satisfaction.

5) On November 10, 1983 Respondent prepared and Mrs. Gangle executed the Deed to the Hassons, in contemplation of them paying off their Agreement for Deed. The delay in the payoff was still being caused by not being able to obtain the correct Satisfaction of Mortgage from the Feagles. On November 22, 1983, after numerous more phone calls to Roy Feagle's answering

service, none of which were returned, Respondent determined, in discussions with Attorney Reiley, that according to his Title Search, Attorney Ray McDaniel had represented Brenda in her divorce from Roy. Once again Respondent prepared a new Satisfaction and sent it directly to Roy Feagle with his cover letter of November 22, 1983. In addition, during the period between Respondent's November 22, 1983 phone conversation with Attorney Reiley and December 12, 1983, he phoned Attorney Ray McDaniel's office on numerous occasions in order to ask for his help in obtaining a proper Satisfaction. He, too, never returned Respondent's calls but finally on December 12, 1983, Respondent was able to speak with Attorney McDaniel personally. After explaining the problem, Attorney McDaniel stated that he did represent Brenda in her divorce proceedings but that he did not represent her in this matter and would not accept correspondence for, or Service of Notice for Brenda in this matter. Respondent asked if he had an address for Brenda so that Respondent could send her the necessary notice directly. He stated that he did not and that Respondent should call Guy Bostic, her boss, to obtain a current address. Respondent did this but Mr. Bostic's employees refused to give Resondent an address for Brenda.

6) On January 2, 1984 Respondent received a letter from Attorney Reiley. Enclosed was a copy of a letter to Attorney

Reiley dated December 16, 1983 in which Attorney McDaniel stated, " I regret to inform you that Mrs. Feagle never received her portion of the monies paid to Mr. Feagle, and therefore she feels no obligation to execute the Satisfaction of Mortgage until receipt thereof." In Mr. Reiley's January 2, 1984 letter, he asked Respondent (as Mrs. Gangle's attorney), what he intended to do about getting the Satisfaction from Mrs. Feagle. On January 3, 1984 Respondent phoned one of the title attorneys for the Lawyers Title Guarantee Fund to discuss the matter and see if Respondent could obtain a waiver of the Satisfaction requirement from Mrs. Feagle,for the purpose of issuing Title Insurance on the property. He suggested that Respondent proceed under Florida Statute § 701.05.

7) On January 6, 1984 Respondent wrote the notice letter required under the statute. The notice letter was directed to both Roy Feagle and Brenda Feagle. Although Mr. Feagle had previously executed and delivered a Satisfaction Of Mortgage,the notice had to be sent to the two Feagles jointly since it was Mr. Feagle who had received the payoff monies, thus making him a necessary party to receive the notice under the statute. Since Respondent had still been unable to obtain a valid address for Brenda Feagle, the original letter was sent to Roy Feagle , together with a copy of the letter and instructions for Mr. Feagle to deliver Brenda

Feagle's copy to her personally. In the letter Respondent enclosed copies of the statutes and tracked the statute word for word.

By the time Respondent resorted to the statute for help in obtaining a properly executed Satisfaction of Mortgage from the Feagles, over fourteen months had expired since Respondent originally contacted Mr. Feagle for this purpose and over seven months had expired since Mr. Feagle had received payment in full on the mortgage. During that full seven month period, Mrs. Gangle had been paying interest on the money she had borrowed to pay off the Feagle mortgage and still she had not received a proper Satisfaction.

On January 6, 1984 Respondent also wrote letters to the Hassons and to Mrs. Gangle, enclosing copies of his January 6, 1984 notice letter to the Feagles. Respondent's statement: "This fight is properly between the two Feagles and should not concern Mrs. Gangle. By the Feagles incorporating Mrs. Gangle in their fight, they are causing Mrs. Gangle alot of additional expense."

8) On January 9, 1984 Respondent received a phone call from Attorney Bob Chambers stating that he was representing Mr. Feagle and that Respondent owed Mr. Feagle an apology for his notice letter of January 6, 1984. In response to this phone call Respondent wrote his January 9, 1984 letter to Attorney

Chambers. In the letter, among other things, Respondent stated:

> " I might be dense but I fail to see where giving the notice required under the Florida Statutes and pointing out the penalty reflected in the statutes, on behalf of one's client, is unethical in any way. If you have some specific authority to the effect that it is, I would appreciate receiving a copy of it."

Attorney Bob Chambers, who was and is a member of the Grievance Committee, never supplied Respondent with any such authority to support his request for an apology from the Respondent and thus none was forthcoming.

9) On January 14, 1984 Respondent received Bob Chambers' January 13, 1984 letter and phoned Attorney Chambers to ask for any help he could give in contacting Ray McDaniel since Respondent had been unable to get any cooperation from Ray McDaniel on this matter. On January 18, 1984 Respondent received Bob Chambers' January 17, 1984 letter and reviewed it. On January 24, 1984 Respondent received a copy of Bob Chambers' letter to Ray McDaniel and reviewed it. On January 30, 1984 Respondent received Ray McDaniel's letter of January 27, 1984 and reviewed it. No action was necessary for any of the above letters.

10) On February 1, 1984 Attorney Bob Chambers, representing Roy Feagle, finally started an action against Brenda Feagle to obtain her joinder in his Satisfaction of Mortgage.

In the meantime,the Hassons were still demanding their deed and Mrs. Gangle was still paying interest on the money she had borrowed to pay the Feagles' the previous May. Therefore, in early February ,1984, Respondent again phoned the Fund's attorney to inform them of his progress and ask if they had any further methods for being able to speed up the process of giving the Hassons an insurable Title so that Mrs. Gangle could be paid off by the Hassons and in return pay off the monies she had borrowed in May, 1983 to pay off the Feagles.

The attorney suggested that if Respondent could obtain the original Note and recorded Mortgage from Mr. Feagle that he would authorize Attorney Reiley's office to write the title policy without waiting for the Satisfaction to be forthcoming from Brenda Feagle. Respondent then phoned Attorney Bob Chambers, told him of his conversation with the Fund and requested the original Note and recorded Mortgage. Bob Chambers stated that he had the original Note and Mortgage in his possession but he refused to deliver it to Respondent, even though both he and Mr. Feagle recognized that the Mortgage had been paid in full by Mrs. Gangle.

11) On February 21, 1984, some sixteen months after Respondent's initial request to the Feagles, and over eight months after the full payoff of the Mortgage, Respondent received the additional Satisfaction of Mortgage executed by Brenda Feagle, from Attorney Bob Chambers.

12) Respondent recorded the additional Satisfaction and in March, 1984 the matter was concluded by the Hassons paying Mrs. Gangle and Mrs. Gangle paying off the money she had borrowed to pay off the Feagles.

13) Subsequently, Attorney Bob Chambers, acting on his own, not on instructions from his client, filed a grievance against Respondent. The net effect of the grievance was to charge Respondent with violating disciplinary rule DR 7-105 (A) (5) for threatening criminal prosecution solely to gain an advantage in a civil matter, in Respondent's January 6, 1984 notice letter to the Feagles.

14) A hearing was held on this charge and the Grievance Committee reported a finding of minor misconduct and a recommendation of a private reprimand. The Board of Governors considered the committee's report and approved it. Respondent however, did not agree with the Grievance Committee's finding of minor misconduct in this matter and filed his rejection to the committee's finding as approved.

15) As a result of Respondent's rejection of the Grievance

Committee's finding of minor misconduct and directing a private reprimand, the Florida Bar filed its March 14, 1985 complaint. This was followed by Respondent's April 5, 1985 Response and Affirmative Defense.

16) A hearing was scheduled before the referee assigned to hear the matter and by stipulation between the attorneys for the Bar and for the Respondent, the whole matter was narrowed down to one legal issue, that is:

> *Does furnishing the written Notice to the Mortgagees, required under FS 701.05 including a paraphrase of the penalties and fines for failure to comply and zerox copies of FS 701.05, 775.082 and 775.083 constitute a violation of Disciplinary Rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter or is such Notice a Statutory exception to said Rule? "*

The report of the Referee dated August 23, 1985 was the result of the above hearing. It is this report which Respondent seeks review of here.

ISSUES PRESENTED ON REVIEW

ISSUE ONE

THE REFEREE'S FINDING OF FACTS ARE INACCURATE AND MISLEADING

ISSUE TWO

THE REFEREE'S DETERMINATIONS OF LAW DO NOT SUPPORT THE REFEREE'S RECOMMENDATIONS IN THIS CASE

ISSUE THREE

DOES FURNISHING THE WRITTEN NOTICE TO THE MORTGAGEES, REQUIRED UNDER FS § 701.05 INCLUDING A PARAPHRASE OF THE PENALTIES AND FINES FOR FAILURE TO COMPLY AND XEROX COPIES OF FS § 701.05, 775.082, AND 775.083 CONSTIUTE A VIOLATION OF DISCIPLINARY RULE 7-105 (A) (5) FOR THREATENING CRIMINAL PROSECUTION SOLELY TO GAIN ADVANTAGE IN A CIVIL MATTER OR IS SUCH NOTICE A STATUTORY EXCEPTION TO SAID RULE ?

ARGUMENT

ISSUE ONE

THE REFEREE'S FINDING OF FACTS ARE INACCURATE AND MISLEADING

The Referee makes numerous findings of facts in his Paragraph # 2 of the Report of Referee dated August 23, 1985. They are so replete with inaccuracies and so misleading, that rather than point out each inaccuracy or misleading statement individually, Respondent refers the Court to the Statement of the Case and of the Facts previously stated in this brief. These facts are all in the record; first in the transcript of the Grievance Committee's hearing,and again in Respondent's answer and affirmative defense.

Therefore, Respondent respectfully pleads with the Court to reconsider the matter based on the actual facts of this case rather than on the misstatement of facts and damaging innuendos found in the Referee's report.

ARGUMENT

ISSUE TWO

THE REFEREE'S DETERMINATIONS OF LAW DO NOT SUPPORT THE REFEREE'S RECOMMENDATIONS IN THIS CASE

As stated previously, by stipulation and agreement between counsel for the Bar and Respondent, the whole matter was narrowed down to one legal question, that is:

> *"Does furnishing the written Notice to the Mortgagees, required under FS 701.05 including a paraphrase of the penalties and fines for failure to comply and xerox cipies of FS 701.05, 775,082 and 775.083 constitute a violation of Disciplinary Rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter or is such Notice a Statutory exception to said Rule?"*

A review of the Referee's report reflects that the Honorable Referee does not consider this issue or even speak to this issue. This, in spite of the fact that the attorney for the Florida Bar both recognized this as the issue before the Court; that he argued the issue at the hearing before the Court and that he presented cases which he stated were relative to the determination of the issue at hand.

The only case that the Referee refers to in support of his recommendation is: The Florida Bar vs Kaufman, 409 So 2d 480 (Fla 1982). The case itself does not reflect any of the facts upon which the Court found that the matter was serious enough to order a public reprimand. It merely states that, in that particular case, the Referee had found guilt and recommended a

public reprimand; that the Respondent had asked for an extension of time to petition for a review of the Referee's report and because no petition for review was filed (after granting Respondent an extension of time) the Court approved the Referee's findings and recommendations.

This issue is further exemplified by the Florida Bar's attorney's following statements at the June 21, 1985 hearing before the Referee:

> "If His Honor rules with the Bar, I would like to give just a little bit of the history of this case because it's a little different.
>
> In this instance, the Grievance Committee found minor misconduct under 1106 (C) which was duly approved by the Board. I think I actually had to go to the full Board before they made their change.
>
> In any event, it was approved under the rules. It was served upon Mr. Suprina; and Mr. Suprina sought review by a Referee, which is his right under that rule. We're here under 1106.
>
> The cut and thrust of that is that the position of the Bar was that they were satisfied in this instance that a private reprimand was sufficient.
>
> It has, of course, been rejected by Mr. Suprina and is here before you.
>
> I think in the cases that are set out in the Red Book, most of the dispositions are no more than a private reprimand by personal appearance before the Board of Governors and pay them the costs. I did, however, run across one case, although the factual situation is not set forth wherein a public reprimand was issued.
>
> That's the Kaufman case at 409 Southern 2nd 480.
>
> Given the Committee's recommendation and the Board's position, I would submit that unless His Honor disagreed, assuming he rules in our favor, I would submit that a private reprimand by personal appearance before the Board would be sufficient.
>
> I don't believe that one should necessarily be put in a position of jeopardy merely by

exercising their right under the rule to seek review."

Therefore, Respondent pleads with the Court to reconsider this matter based on the law governing this matter and the extenuating circumstances of this particular case.

ARGUMENT

ISSUE THREE

DOES FURNISHING THE WRITTEN NOTICE TO THE MORTGAGEES, REQUIRED UNDER FS 701.05 INCLUDING A PARAPHRASE OF THE PENALTIES AND FINES FOR FAILURE TO COMPLY AND XEROX COPIES OF FS 701.05, 775.082, AND 775.083 CONSTITUTE A VIOLATION OF DISCIPLINARY RULE 7-105 (A) (5) FOR THREATENING CRIMINAL PROSECUTION SOLELY TO GAIN ADVANTAGE IN A CIVIL MATTER OR IS SUCH NOTICE A STATUTORY EXCEPTION TO SAID RULE?

The Referee, in reaching his decision in this case was limited to the consideration of the above question since the whole issue was narrowed down to the consideration of this one legal question by stipulation between the attorney for the Bar and the Respondent. (See Letter to the Honorable W. Rogers Turner of May 8, 1985 by Attorney Louis L. Suprina and Transcript of June 21, 1985 hearing before the Honorable W. Rogers Turner and also Ciravolo v The Florida Bar 361 So2d 121 (1978).

Respondent has readily admitted to writing and sending the Notice letter of January 6, 1984. He has consistently admitted that the whole purpose of the letter was to blast loose the Satisfaction of Mortgage, which he had unsuccessfully been trying to obtain, by every other means possible, for the previous fourteen months, However, it is Respondent's position that the giving of the notice under the Statute is an exception to Disciplinary Rule 7-105 (A) (5) and therefore does not violate it.

Respondent further admits that if the giving of the notice

under FS § 701.05 is not an exception of some sort to the above rule, then he is guilty of the minor misconduct the Grievance Committee found. However, if as Respondent claims, the giving of such notice is an exception to the rule, then he is not guilty of any misconduct. In no case was there ever any consideration of being found guilty of major misconduct under the present factual circumstances.

The Florida Bar's attorney claims that the issue involves a Separation of Powers matter. He cites Article Five of the Florida Constitution as support and also the case of: IN RE: The Florida Bar, 316 Southern 2nd 45, which case he himself states is not directly on point.

It is Respondent's position that this issue is not one of Separation of Powers but one of Cooperation and Coordination of Powers between the Legislative and Jucidial Branches of the government and of mutual respect and acquiescence between the Legislative and Judicial Branches of the government.

The Florida Constitution, Article 5 § 15, which the Bar uses as supporting its contention provides:

> "The Supreme Court shall have exclusive jurisdiction to regulate the admissions of persons to the practice of law and the discipline of persons admitted."

Upon review of the history of this Article we find that it was just adopted in 1972. A further review reflects that the earliest the courts received the right to regulate attorneys was by the act of the Legislature in 1907 when it passed Chapter 5650 entitled:

"An act to Prescribe and Regulate the Procedure for the Admission of Attorneys to the Practice of Law in the courts of Florida."

This was followed by the Legislature's passage of Chapter 10175 (No. 153) in 1925, which was entitled:

"AN ACT to provide for the Appointment of a State Board of Law Examiners and Prescribe Their Powers and Duties, Including the Authority to Prescribe Rules of Professional Conduct and Ethics in Their Practice, and to Make Investigations as to Any Immoral or Sharp Practice or Other Unprofessional Conduct and Report the Same to the State's Attorney of the Circuit Court for Investigation; and to Provide for the Maintenance of Said Board and the Expenses of Conducting its Business, from Fees to be Collected for Admission Certificates, and Additional Sources When Necessary; and to Provide Penalties for violations of the Provisions of This Act."

This history is reiterated and fortified by Florida Supreme Court in: Petition of Florida State Bar Association 186 So 280 (1938) where it states:

"Where the Legislature for over 100 years had regulated admissions to the bar and disbarment of attorneys for unprofessional conduct, and the Supreme Court had not exercised its prerogative to regulate such matters but had acquiesced in legislative regulation, Supreme Court would not adopt rules which would repeal legislative acts and prescribe new requirements for admissions to bar and rules relating to disbarment as long as Legislature had not itself withdrawn from such field of regulation. Acts 1907,c 5650; Acts 1925,c.10175; Comp. Gen.Laws 1927, s 4172, 4180."

Disciplinary Rule DR7-105, which is the rule Respondent has been accused of violating, provides:

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

This rule of course, was adopted by the Supreme Court under the Legislative authority granted to it as provided above.

Thus, the original authority for the courts to regulate the attorneys, including the adoption of DR7-107 came from the Legislative Branch and only started in 1907.

On the other hand, Florida Statute § 701.05 has been a law since its original passage in 1901 as Chapter 4918. As one can see by reading the statutes as originally passed in 1901 and as presently stated, the actual wording of the statute has changed very little over the years and the intent has not changed at all.

FS Chapter 9918; (1901)

> "AN ACT to Provide for the Cancellation and Satisfaction of Mortgages, Liens and Judgments, and Providing a Penalty for the Failure to Make Such Cancellation and Satisfaction....
>
> Sec. 2 Any person entitled to and receiving the payment of the amount of money due upon any mortgage, lien or judgment, who shall fail for thirty days after written demand made by the person paying the same, to cancel and satisfy of record, as provided in the foregoing section, any such mortgage, lien or judgment so paid, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment.
> Approved May 31, 1901

FS § 701.05 (1983)
"Failing or refusing to satisfy liens: Punishment for: - Any person entitled to and

receiving the payment of the amount of money due upon amy mortgage, lien or judgment, who shall fail for 30 days after written demand made by the person paying the same, to cancel and satisfy of record, as provided by law, any such mortgage, lien or judgment so paid shall be guilty of a misdemeanor of the second degree, punishable as provided in § 775.082 or § 775.083.

775.082 Penalties
....(b) For a misdemeanor of the second degree, by a definite term of imprisonment not exceeding 60 days ....

775.083 Fines
....May be sentenced to pay a fine in addition to any punishment described in § 775.082.... not exceeding,
(e) $500, when the conviction is a misdemeanor of the second degree.
(f) Any higher amount equal to double the pecuniary loss suffered by the victim...."

With this history and statutory wording and apparent intent of the statute, the question then becomes," Does the attorney's furnishing the notice required under FS § 7-105 fly directly in the face of Disciplinary Rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter?

In answering this question, one first has to answer a number of sub questions.

1) Can anyone seeking the action of obtaining a Satisfaction, supply a notice merely requesting the furnishing of the Satisfaction as required under the statutes, without reference to the statutes and the penalties for their failure to comply? Respondent believes the answer to that question is self evident. Upon receipt of such a notice, failing to make reference to the statute and to the penalties for failure to comply, the

mortgagee would be unaware of the criminal penalties for his failure to comply and respond in just the same way as the mortgagees had previously responded - - that is, with no response at all. Our present case is an excellent example of this fact. In this case the Respondent had tried unsuccessfully and by all other means that he knew how, for some fourteen months prior to sending his notice letter of January 6, 1984, to get the mortgagees to furnish him with a valid and complete Satisfaction. It took Respondent's notice letter to finally obtain the Satisfaction. Thus, we see that as a practical matter, in order to obtain the results the statute contemplates (that of obtaining a Satisfaction) , the bereaved party must set out the penalties for failure to comply in their written demand notice under the statute.

2) Does a notice letter required under Florida Statute § 701.05 threaten criminal prosecution solely to gain advantage in a civil matter?

As one can see from reading the statute, its purpose is to enable the mortgagor, who has paid off his mortgage, to obtain a Satisfaction of Mortgage , without his having to resort to the time and expense of having to file a civil action against the mortgagee in order to obtain his Satisfaction of Mortgage. Therefore, the very wording and purpose of the statute itself is to threaten criminal prosecution in order to obtain the civil action of execution and delivery of a Satisfaction of Mortgage. The purpose of the statute is so clear that few cases have been recorded construing it. Apparently, the mere threat of criminal

penalties has been sufficient to accomplish the results.

We have already determined that, as a practical matter, the notice letter must include the penalties for failure to comply , in order to obtain the required action. Thus, this question must be answered in the affirmative also. A notice letter required under FS § 701.05 must and does threaten criminal prosecution solely to gain advantage in a civil matter.

3) Is the furnishing of the notice letter required and contemplated by the statute limited to use by laymen - - that is, non-attorneys? Nowhere in the statute does it state that an attorney at law cannot send the notice letter required under the statute. Even the attorney for the Florida Bar in his argument on the issue admits that an attorney has a right to furnish a notice letter. As a practical matter, the notice letter would come from an attorney in the great majority of cases since few laymen are cognizant of this statute and its use.

4) Did Respondent violate DR 7-105 simply by sending the notice to Roy Feagle and Brenda Feagle, instead of sending it to Brenda Feagle alone, since Roy Feagle had previously executed and delivered a Satisfaction signed by him individually? Counsel for the Florida Bar and the Referee seem to put a tremendous weight on the fact that Respondent sent his notice letter to both Roy Feagle and to Brenga Feagle, the joint-mortgagees, since Roy Feagle had previously executed and delivered a Satisfaction signed by him individually. They appear to be saying that it would have been acceptable to send a notice letter to Brenda Feagle, but because it was sent to both Roy and Brenda

Feagle, it violated the above rule. In response to this accusation Respondent points out the following facts:

a) The mortgage was made jointly to Roy Feagle and Brenda Feagle, his wife.

b) It was Roy Feagle alone who represented that he owned the mortgage and had the right to receive the monies and satisfy the mortgage.

c) It was Roy Feagle who individually received the payment on the mortgage.

d) The statute requires the notice to go to "any person entitled to and receiving the payment of the amount of money due upon a mortgage". Under the above facts, had Respondent given the notice to Brenda Feagle alone, the prosecutor could not have applied the penalties of the statute since Brenda Feagle would merely state that she had not received the payment.

Therefore, it was not only proper to serve Roy Feagle the notice, in addition to serving the co-mortgagee, Brenda Feagle, it was necessary to include Roy Feagle as a necessary party. The results of the notice letter bear this out. Ultimately, and because of receiving the notice letter, Roy Feagle entered an action against his former wife, Brenda Feagle, asking the court to require Brenda Feagle to join in the execution of Satisfaction of Mortgage. Roy Feagle was successful in this action and the Satisfaction was finally forthcoming from Brenda Feagle.

Thus, Respondent did not violate DR 7-105 by sending the notice to both Roy Feagle and Brenda Feagle, since they were both necessary parties to obtaining the Satisfaction of Mrs. Gangle's mortgage.

Therefore, we must conclude that: 1) Yes, the notice letter must include reference to the statute and to the penalties for failure to comply. 2) Yes! The furnishing of a notice letter prepared in accord with what the statute contemplated is in itself, threatening criminal prosecution solely to gain advantage in a civil matter. 3) Yes! An attorney is authorized to furnish such a notice letter even as a layman is and 4) Yes, it did not violate DR Rule 7-105 by Respondent furnishing the notice to both Roy Feagle and Brenda Feagle, co-mortgagees.

But! Disciplinary Rule 7-105 (a) (5) says that it is a violation of an attorney's professional ethics to threaten criminal prosecution solely to gain advantage in a civil matter.

Thus, FS § 701.05 and DR 7-105 are in direct conflict on this issue.

The conflict between DR 7-105 and the statutes is not limited to FS § 701.05 alone. Respondent has noticed that there is at least one more statute (and probably more) which is in conflict with the above rule.

FS § 832.07 (1983) having to do with worthless checks and drafts requires a notice letter in substantially the following form.

> "You are hereby notified that a check, numbered _____, issued by you on (date) , drawn upon (name of bank, and payable to _____, has

been dishonored. Pursuant to Florida law, you have 7 days from receipt of this notice to tender payment of the full amount of such check plus a service charge of $10 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 prosecution."

Thus we see that conflict does exist between the statutes and this particular disciplinary rule.

Would the Florida Bar contend that these statutes were unconstitutional when used by an attorney because they were in conflict with DR 7-105? We doubt that, and do not even express it as a possible solution. Respondent merely requests that the Florida Bar recognize the conflict and recognize that in these particular cases an attorney's compliance with the notice required in the above statutes, even though they threaten criminal prosecution solely to gain advantage in a civil matter, are excluded from or exempt from being considered violations of DR 7-105.

In reaching this conclusion the Supreme Court could use some of the same reasoning it previously used in the case of Ciravolo v The Florida Bar, 361 So2d 121 (1978) . Although the following quotes from said case are out of context, Respondent feels that they should be of some help to the courts in considering the present issue:

> When the legislature "professes to extend total immunity by statute its judiciary should

not circumscribe or hedge or renege in part its solemn promise with exceptions permitting imposition of certain penalties and forefeitures in administrative proceedings.... Fundamental fairness dictates an open and aboveboard agreement between both parties, the state and the witness...

> "Is there any way in which an attorney may be granted immunity from disciplinary proceedings? Yes, by application to and order of this court. Where it appears that the greater good to society will be served by granting immunity from disciplinary action to any attorney, we will do so...
>
> ...The court is concerned about the practice of law by those involved in wrong doings of a criminal nature, but we are also mindful that this court and the profession should not place a stumbling block in the path of the citizens of this state who strive mightily to uncover and rid our communities of criminal acts."

Although this particular case had to do with the more serious problem of ruling on Florida's immunity from prosecution statute, the reasoning still applies in this court's consideration of the present issue. That is, the branches of government (in this case the Judicial and the Legislative Branches) should and must work together in a spirit of cooperation and respect for each other. One branch should acquiesce in the decisions made by the other branch of the government even though they conflict with their own powers, if the greater good of society is served by such acquiescence.

As it applies to the present issue,this means that the

Judiciary should recognize the disparities between the provisions of FS § 701.05 (and for that matter § 832.07) and DR 7-105 and find that the good of society is better served by upholding the provisions of the statutes and declaring that the giving of the notice required under them is a judicially approved exception to DR 7-105.

Having reached the conclusion that the giving of the notice required and contemplated in F.S. § 701.05 itself constitutes a threat of criminal prosecution solely to gain advantage in a civil matter, Respondent would feel remiss if he did not touch on the topic of the particular wording of his particular notice letter.

Consideration of the gravity of the threat of Respondent's particular notice letter was specifically removed as a consideration for determination in this matter, by the stipulation between counsel for both the Bar and the Respondent, and rightly so. However, counsel for the Bar in his argument before the Referee at the June 21, 1985 hearing tries to renege on this stipulation by his statement:

> "Well, the only thing I would add to that, Mr. Suprina, is I may have not as carefully as I should have read your letter." (referring to the May 8, 1978 stipulation letter.)

Therefore, Respondent merely "touches base" so to speak, on this topic.

The attorney for the Bar appears to be saying in his argument on the whole case: First, that the writing of the notice letter required under F S 701.05 does constitute a threat of criminal

prosecution for the purpose of gaining advantage in a civil matter and thus conflicts with DR 7-105. Therefore, because of the separation of powers, the Bar has a right to find Respondent guilty of violating this rule.

Secondly, failing in this argument, he seems to be saying, " O.K. Even though the writing of the notice letter required under F.S. § 701.05 does constitute a threat of criminal prosecution for the purpose of gaining advantage in a civil matter and even though this violates Rule DR 7-105, the Bar would ordinarily say nothing, but because of the "extreme" language in the last paragraph of Respondent's letter we are going to try to prosecute Respondent for violating DR 7-105. In other words, to follow the statute and violate the Rule is O.K., but to follow the statute and violate the rule " extremely" is a no-no.

Under both theories the attorney for the Bar appears to be admitting that the furnishing of the notice letter itself constitutes a threat of prosecution for the purpose of obtaining advantage in a civil matter, all of which the Respondent has been stating all along. Therefore, for the Bar to try to say that Respondent's threat was of a greater extent and therefore punishable would be both absurd and ludicrous if this were not such a serious matter as that of damaging the reputation of the Respondent, who has been a respected member of the Bar for over nineteen years.

Actually, in view of the utter frustration and anger of the Respondent by the time he had to resort to writing his

notice letter, the wording of the last paragraph of the letter, when read together is extremely mildly put.

> "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."

Furthermore, although it may be a matter of semantics, Respondent did not mean for his last sentence to be considered a threat of prosecution under the statute but to be considered a promise of prosecution.

Be that as it may,the point is still the same, if, as Respondent contends and the Florida Bar attorney appears to concede, the furnishing of the written notice required and contemplated under the statute, itself,constitutes a threat of criminal prosecution in order to obtain advantage in a civil matter, then the "extent" of the threat is not an issue to be considered here. This is why the attorneys stipulated to the limitation on the issue in the first place.

Therefore, Respondent respectfully pleads with the court to reconsider this matter and overrule the Referee's report by finding that:

> "furnishing the written Notice to the Mortgagees, required under FS 701.05, including a paraphrase of the penalties and fines for failure to comply and xerox copies of FS 701.05, 775.082 and 775.083 does not constitute a violation of Disciplinary Rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter since they are a statutory or judicially recognized exception to said rule."

CONCLUSION

The record reflects that the Referee's findings of facts are both inaccurate and misleading and that the Referee does not even consider the legal issues stipulated to be before him for his consideration. Thus, said report is erroneous, unlawful and unjustified.

Therefore, Respondent pleads with the court to review this case and reverse or reject the report of the Referee dated August 23, 1985.

Respondent further pleads with the court to rewrite the facts as actually reflected in the record. In addition, Respondent pleads with the court to consider the legal issue posed in this case and that after consideration of said issue, it find that:

> "furnishing the written Notice to the Mortgagees required under FS 701.05, including a paraphrase of the penalties and fines for failure to comply and xerox copies of FS § 701.05, 775.082 and 775.083 does not constitute a violation of Disciplinary Rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter since they are a statutory or judicially recognized exception to the rule."

Having made such finding, Respondent further pleads with the court to find that the Respondent is not guilty of any misconduct in this matter and accordingly enter its order dismissing the case against Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 1st day of November, 1985 to Mr. David G. McGunegle, Esquire, Bar Counsel, The Florida Bar, 605 Robinson Street, Suite 60, Orlando, Florida 32801 and Mr. John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301.

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