IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

J. B. HOOPER,

Respondent.
_____/

Case No: 67,875

Case No: 13B85H92

RESPONDENT'S TRIAL BRIEF

J. B. HOOPER
Post Office Box 1891
Tampa, Florida 33601
(813) 229-7438

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STATEMENT OF THE CASE AND FACTS AND THE FACTS

A contract was entered into between Suncoast Service Center, Inc., a Florida corporation, hereafter "Suncoast," and Respondent on behalf of himself and others, for the installation of a central air conditioning system. Following the installation, a dispute arose between the parties which later resulted in litigation. (Case Number 83-14083, Circuit Court, Hillsborough County, Florida) Upon losing the circuit court case by the granting of Respondent's Motion for Summary Judgment, and then facing the possibility of substantial liability for attorney's fees and costs, the president of Suncoast, a Ms. Bonnie Rodriguez filed a second complaint with The Florida Bar. A prior complaint alleging substantially the same facts was closed by The Bar after its investigation. (R Ex 15.) A copy of the second complaint was sent to the Respondent with a cover letter granting him fifteen days within which to respond. (R Ex 1-a.) Prior to the expiration of the alloted time, the complaint was forwarded to a grievance committee for further action. (R Ex 1-b.) Ms. Rodriguez complained

- that Respondent had failed to pay for the contracted work,
- that her company had retained the services of an attorney,
- that a lawsuit was filed by Suncoast,
- that Respondent had failed to appear at a deposition,
- that Respondent had offered to settle the case and that she had refused the offer offer of settlement,
- that Respondent had harrassed her by writing letters to her bonding company and regulatory agencies,

- that Respondent had improperly received a rebate from Tampa Electric Company without her approval,
- that Respondent bragged to her former attorney after winning the case and receiving the TECO rebate.
- that Respondent, after prevailing in the Circuit Court action, wrote to her new attorney and threatened further legal action unless all matters were settled.

The Respondent was noticed on a grievance committee hearing. After the hearing was rescheduled by the Bar on several occasions, the Respondent appeared to testify on May 31, 1985. At that time, the hearing was cancelled and the Respondent was informed that it would be rescheduled for a later date. The Respondent requested through Ms. Carolyn Fields, the investigating member of the committee and the only member of the committee with whom he had had any contact, that the matter be continued beyond the July meeting during which time the Respondent would be out of the country. The Respondent's request was noticed to the committee chairman. (B Ex 1-a.) In spite of the Respondent's request, the hearing was held on July 12, 1985, at which time the only witness to testify was Rodriguez. (Tr.) Ms. Diane Kuenzel, staff Bar counsel, who had in the meantime taken over from Carolyn Fields as the committee investigator, presented the case against the Respondent to the committee and participated in the committee deliberations during which probable cause was found. (Tr.)

Without further investigation, including even a cursory examination of the underlying circuit court case, the Bar charged the Respondent with all of those allegations made by Rodriguez along with

its own allegation based upon a phone call which Respondent made to a corporate employee of Suncoast and another regarding phone calls allegedly made by the Respondent during the pendency of the litigation.

At no time did the Committee review the basis of the Summary Judgment granted in the circuit court action or interview any witnesses except Rodriguez. The numerous violations of state statutes and local ordinances by Suncoast had been set out in the Respondent's Memorandum of Law filed in the Circuit Court case, (App A-1.), and were the basis of the Order of Summary Judgment entered by the circuit court against Suncoast. (App A-2). Neither did the Committee consider any evidence, except a subtle reference by Ms. Rodriguez, that Suncoast's original attorney, Andrew Miroblole, had withdrawn from representation after loosing the circuit court case and then sued Suncoast for $24,000.00 in attorney's fees. (App A-3, R Ex 1.) Although essential to the Respondent's defense, The Bar has consistently refused to allow any evidence to be presented to the Referee regarding the interrelated complaint against Mr. Mirobole.

Respondent filed a Motion to Dismiss the Bar's complaint. A telephonic hearing was held after which the motion was denied. An extensive answer was filed by the Respondent, and a hearing was scheduled by the Bar and the matter was heard on March 11th and 21st, 1986, in Tampa.

Testimony from Ms. Fields was unavailable at either hearing since she is no longer a Florida resident. A copy of the affidavit sought from her is attached hereto. To date, she has not returned the affidavit or offered any substitute thereto.

SUMMARY OF CIRCUIT COURT CASE

83-14083, Hillsborough County

The Bar's complaint relates to and arises out of a dispute between a mechanical contractor and the Respondent regarding property owned by the Respondent and others. It is undisputed that the contractor, Suncoast Service Center, Inc., initiated litigation shortly after the work was completed (within approximately 30-days) and while the work was still well under the protective umbrella of the mechanics lien law. The Respondent attempted to settle the $3,000.00 case for $2,700.00, (App A-4.), an offer that was refused by Suncoast.

The following points extracted from the court file and related discovery are noteworthy:

a) In the ensuing litigation, it became apparent that Suncoast was in violation of numerous state statutes and local ordinances, (App A-1, pp. 7-12), including but not limited to (i) its failure to require its qualifying agent to supervise the work on the job, (ii) allowing an unlicensed person to supervise the work, (iii) failure to obtain permits, (iv) failure to have the work inspected, (v) allowing a certificate holder's permit to be improperly utilized by an unlicensed entity, and (vi) failure to place property owner on notice as to possible mechanic's lien law provisions and sanctions.

b) Testimony was taken on several occasions. The Court heard argument of counsel and ruled on several motions. Discovery was had and was available to the Court for its review. There is a complete absence of any evidence to suggest that the Court was not well informed. No improper conduct was ever suggested by the Court and certainly no

sanctions were ever imposed for any such conduct. As stated above, the Respondent moved for and was granted summary judgment on all matters within the court's jurisdiction.

c) The Bar's allegation that "Respondent requested two changes in the installation, which were completed shortly thereafter," is preposterous. The Bar should be well aware that the record does not reflect that fact and a statement so clearly contrary to the evidence by those who are responsible for prosecuting lawyers is outrageous. The Bar accepted the testimony of a Suncoast principal as to this and other allegations when in truth, neither she nor her "qualifying agent" ever visited the job site. (App A-1, p 8.)

d) As the moving party, Suncoast refused to allow discovery to proceed in an orderly fashion, even about matters critical to its licensing qualifications. (Id. at p 3.) It also refused to answer questions regarding other litigation, similar complaints and other jobs started and completed without permits.

e) All settlement efforts during the pending circuit court action were initiated by the Respondent, -- all were rebuffed by Suncoast. (R Ex 22.) The Respondent will not attempt to address in detail related issues including the attitude of opposing counsel toward settlement except to say that in all matters before the Court and at depositions, Suncoast was represented by **two attorneys**. While this was questioned at first, it soon became clear that the intent was to engage in protracted litigation, win and then go for the attorneys fees, as evidenced by the fact that opposing counsel has incurred approximately

$1,600.00 in attorney's fees and costs during the first ten-days of representation.

The Bar has conveniently overlooked all of the foregoing facts and circumstances in its efforts to weed out skullduggery among its ranks and in the process has added new meaning to the term harassment. Why should an unscrupulous contractor be given gratuitous support for its illegal actions by the Bar after denial of relief by a Court of proper jurisdiction? Perhaps the Bar should consider removing itself from the collection agency business, or at least constrain itself from performing those exact activities which it undertakes to prosecute.

POINT I

WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED DR 1-102(A)(4), 1-102(A)(6) AND 7-104(A)(1), CODE OF PROFESSIONAL RESPONSIBILITY AND RULE 11.02(3)(A) OF THE INTERGRATION RULE OF THE FLORIDA BAR?

ARGUMENT

Count I of the Bar's complaint may be summarized as follows:

(a) The Respondent, on behalf of himself and others, and Suncoast entered into a contract. A dispute arose out of which the Respondent and his clients were the prevailing party. Thereafter the Respondent refused to voluntarily pay or to require his clients to pay to Suncoast the contract sum after spending several thousand dollars in the defense of a lawsuit which was filed by Suncoast within approximately 30-days after the work was completed.

As a result of the above circumstances, and in spite of the fact that the circuit court made a finding that Suncoast "violated various state statutes and local ordinances," (App A-2), The Bar hurls some very strong charges of misconduct against the Respondent. One must then ask at what point did the Respondent engage in "conduct involving dishonesty, fraud, deceit or misrepresentation," DR 1-102(A)(4), or engage in "conduct that adversely reflects on his fitness to practice law." DR 102-(A)(6). Was it in his failure to require his clients to pay for a substandard installation? Should he not have undertaken the defense of the lawsuit filed by Suncoast shortly after the job was completed? Perhaps the Bar is suggesting that he should have acquiesced early on in the lawsuit thereby leaving himself and his clients liable for thousands of dollars in attorney's fees and costs. Did he fall short by offering to settle the pending action for almost the full amount of the claim

after expending several hundred dollars repairing the work undertaken by Suncoast? Any such suggestions would certainly be nonsensical. The Respondent defended his clients in a professional manner and followed the Rules of Civil Procedure as promulgated by the Florida Supreme Court. The circuit court never suggested otherwise.

This Court framed the real question very succinctly when it asked:

> "[H]ow does the Bar disassociate the actions of Mr. Hooper in litigation where he is, in effect, defending . . . I don't think that Mr. Hooper should be deprived of the opportunities to seek redress in court the same as any lay person would. The fact that he was an attorney representing himself doesn't deprive him of the right or opportunities that any other litigant would have in such litigation." (Tr.)

Such an observation surely takes on even greater meaning when an attorney is representing not only himself but others.

(b) After receiving a demand letter from Suncoast, the Respondent communicated directly with a Suncoast corporate employee.

The Bar has consistently misled this Court in its allegations that the Respondent telephoned Suncoast, a corporate entity, directly. In that regard, several points are undisputed. **One**, Mr. Alexander, to whom the call was made, was not even a corporate officer. **Two**, there has never been <u>any</u> testimony that an attempt was made to communicate with the opposing party. In fact, Ms. Rodriguez herself has testified on several occasions that the call was to Mr. Alexander. **Three**, DR 7-104(A)(1) is clear and unequivocal. A lawyer shall not communicate "<u>with a party</u> he knows to be represented by a lawyer...." (Emphasis added.) To suggest otherwise would be to make all corporate employees

immune from informal discovery. Even a novice civil litigation lawyer would be aware of how impractical such a rule would be. Mr. Alexander was a corporate employee, nothing more, nothing less. He was not even a licensed contractor. **Finally,** a lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In fact, the attorney not only has the right but the duty to interview and examine any persons who are supposed to know the facts so as to ascertain the truth. Devlin v. Rosman, 205 So.2nd 346 (Fla. 3rd DCA 1967), as cited in 24 Fla.Jur.2nd, Evidence and Witnesses §391. See also, Mathews v. State, 44 So.2nd 664, (Fla. 1950). The Bar fails to offer any controvertible case.

What the Bar does offer is:

Florida Bar v. Kirtz, 445 So.2nd 576 (Fla. 1984), where the "referee found that Kirtz knowingly communicated directly with an adverse party. . . " (Emphasis added).

Florida Bar v. LeFave, 409 So.2nd 1025 (Fla. 1982), where the "referee found that LeFave had improperly communicated with a judge . . . and with a party . . . " (Emphasis added).

Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), where the complaint alleged "that Shapiro communicated an offer of settlement directly to an adverse party . . . " (Emphasis added).

Note: The Bar also cites Hanley v. Hanley, 426 So.2nd 1230 (Fla. 2nd DCA 1983). This is a divorce case, not a discipline case. The Bar improperly misleads this Court by suggesting that the appellate court found the attorney had acted improperly in violation of Rule 7-104(A)(1) by contacting a party directly. Such was not the case. It is presumed that the Bar knows the difference between findings of fact, interpretation of the law and mere dictum.

The Bar with all of its resources fails to cite even one case where an attorney has ever been prosecuted for communicating with an

employee of the opposing corporate party. There is a very strict procedure which the Bar must follow should it wish to rewrite or expand upon the Code of Professional Responsibility as presently endorsed by our Supreme Court. To attempt such activity in the process of prosecuting attorneys is not authorized by statutory law, the Integration Rule or the Supreme Court of Florida.

POINT II

WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED DR 1-102(A)(4) AND 1-102(A)(6), CODE OF PROFESSIONAL RESPONSIBILITY AND RULE 11.02(3)(A) OF THE INTERGRATION RULE OF THE FLORIDA BAR?

ARGUMENT

Although the Bar has consistently objected to inquiry into the circumstances of the underlying circuit court case and although it apparently has not yet seen fit to review the court file, it insists on making references to the case which are clearly out of context. The Bar alleges that the Respondent failed to apppear at a deposition and then offered to settle the case for $2,700.00. Given the testimony at the referee hearing and the obvious court file revelations that the Respondent was not subpoenaed but noticed one day prior to the deposition, (R Ex 21.), the Bar irresponsibly states that

"Although Respondent does not **deny** that he failed to appear, he **claims** that he was not subpoenaed to the depositions and was given notice only one day prior to the deposition. . . .[H]e **sought to justify** his failure to appear . . . Respondent does not **deny** . . ." Complainant's Brief at p.8. (Emphasis added).

In the first place, the Bar cannot point to one case remotely similar where an attorney was prosecuted for failing to appear at a deposition to which he was duly subpoenaed. Even if the allegation were true, (which it is not as reflected by the court file), the prosecution for such behavior is petty and well outside the boundaries of any case law supporting the punishment of lawyers anywhere in the United States.

Secondly, the Respondent strongly resents the inuendoes highlighted above where the Bar suggests that the Respondent is justifying

something that never occured in the first place. The Respondent does not deny, claim or justify anything other than what is clearly a part of the circuit court record which the Bar has consistently refused to review. Almost a full page of the Bar's brief should not have been wasted attempting to place the Respondent in a defensive light for those actions which clearly were not supported by the evidence at the hearing.

[Note: It may assumed that the Bar no longer wishes to prosecute the Respondent for attempting to settle the initial circuit court case through the offer of settlement since no further mention is made of this purported offense in the Bar brief.]

As to paragraph thirteen of the Complaint, the Bar again misstates the facts, grossly misrepresents the evidence and again attempts to place the Respondent in a defensive position for misdeeds which are clearly unsupported by the evidence or the case law. The Bar did not strike paragraph thirteen of its complaint because, "its proof hinged on the state of mind of the Respondent . . . . " (Complainant's Brief at pp. 8-9) The paragraph was stricken by the Bar in a futile attempt to keep any references to the related circuit court case out of the prosecution of the Respondent and because the Bar lacked proof of any of the allegations in paragraph thirteen. It is now clear that there was a complete absence of any proof supporting the proposition that any letter written by the Respondent was: "misleading" or "resulted in unnecessary investigations" by any agency. It is highly doubtful that any agency was ever contacted by the Bar in its superficial investigation of this matter.

Again, the Respondent strongly resents the Bar attempting to place the blame for its total lack of proof on the Respondent's "state of mind" or on the Referee. Given the vigor with which the Bar has prosecuted this matter, it is seriously doubtful that the Bar is likely to relinquish any point based upon the Respondent's "state of mind." To make such a suggestion is in itself a highly questionable act.

The balance of the allegations in paragraph thirteen are frivilous as well. They will not be restated here but the Respondent stands on the responses given in paragraph thirteen of his Answer. [In that regard, the Bar failed to take up the challenge and produce **one** qualified witness who could testify that the installation was without defects.]

As to the allegation of misrepresentation to TECO, the Respondent would suggest that to have misrepresentation, it must be assumed that someone has been misled. And the person who was misled must have standing to object to having been misled. When the Bar speaks of "clear and convincing evidence," it surely must have the burden to produce at least one witness with standing to allege the misrepresentation. Whether Ms. Rodriguez, the grievance committee, bar counsel or the court reporter might have been misled by the TECO form is just not relevant. When an attorney completes an Internal Revenue Service form, a bank loan application, census form or even a pre-neptual agreement, does the Bar see itself as having standing to prosecute what it perceives as misrepresentation absent a complainant with standing to complain.

The testimony was clear and unequivocal. Respondent contacted and received instructions and a rebate form from an employee (V. Palori)

in the energy conservation section of Tampa Electric Company. The Respondent completed the form according to the instructions which he had received and returned it. The only credible testimony was from the TECO employee and the Respondent himself and each testified to the absence of any misrepresentation. Does not the Bar have the burden of proving misrepresentation other than through the dishonest contractor? The Bar's only effort in this regard, except the bare allegaton of misrepresentation, was a weak attempt to impeach Palori's testimony by the suggestion that Respondent's acquaintance with Palori was somehow an attempt to justify actions which have yet to be shown as improper. Just as there must be a corpus delecti for a murder conviction, there must be someone who has standing to complain that they were misled before one can be convicted of misrepresentation. The evidence on this point would not likely even reach the probable cause level necessary to sustain an objection to a Rule 3.190(c)(4) motion to dismiss in a criminal proceeding, much less the more stringent standard set by the Supreme Court in these proceedings of clear and convincing evidence.

(Note: The Respondent shall not attempt to address the several other elements necessary to prove an act of misrepresentation including but not limited to the statutory requirement of intent.)

The next allegation in the Bar's complaint is most fascinating. How a letter to former opposing counsel could be construed as reflecting upon an "attorney's judgement as well as the Bar as a whole" is beyond compreshension. (Complainant's Brief at p. 10.) Although, the Bar has refused to allow this Court to have the benefit of knowing just what kind of person Mr. Mirobole is, several things should nevertheless be

noted: (a) Mr. Mirobole filed the claim of lien and the lawsuit within approximately 30-days after the demand for full payment was made notwithstanding the defects in workmanship as outlined in Respondent's reply to Mirobole's demand letter. (B Ex 4, R Ex 2, App A-1.) (b) At every turn throughout the litigation, the Respondent was up against two attorneys, neither of which would consider settlement. (R Ex 1.) (c) **Within the first 10-days of representation, Mr. Mirobole had incurred over $1,600.00 dollars in attornys fees and costs.** (R Ex 1.) (d) Upon the entry of the summary judgment, Mr. Mirobole withdrew from representation and sued his client for an additional $24,000.00 in attorneys fees. (App A-3.) Perhaps, as some would suggest, the Respondent's good judgment is reflected by the fact that he did not do more than send correspondence to Mr. Mirobole.

The crucial question appears to be: "Is it the intent of the Supreme Court of the State of Florida and the Supreme Court of the United States of America that an attorney should be subject to prosecution based upon private communications with another attorney?" If so, what about commuications between business partners or associates who are attorneys? What about communication between husband and wife or between neighbors, one or both of whom are attorneys? What about the prevailing attorney who says to opposing counsel as they leave the courtroom after doing battle; "Better luck next time!" Nonsense! This allegation belongs in the same category with several others which have no legal, moral or ethical basis.

Finally, the Bar suggests a second time that the Respondent should be found guilty of attempting to settle the controversy between

himself and Ms. Rogriguez. Several things, however, are significant. First of all, and most important is that nowhere in the Intergration Rule or the Code of Professional Responsibility is there even a hint that an attempt to include a withdrawal of a Bar complaint as part of a total settlement is somehow improper. The Bar fails to cite any case remotely on point which would support such a proposition. In fact, as the Bar states, Article XI, Rule 11.04(4) is clearly stated in that settlement will not excuse the completion of an investigation. It does not, however, state that the inclusion of a complaint withdrawal as part of a settlement is improper or that such an act may be used as a basis for disciplinary action. For direction as to what acts may be utilized as a basis, one must turn to the Code of Professional Responsibility which "points the way to the aspiring and provides standards by which to judge the transgressor." Code of Professional Responsibility, Preamble.

Secondly, since the Bar has refused to consider the facts and circumstances arising out of the underlying circuit court case, it would hardly seem to be in a position to judge whether the Respondent's so called "threats" as alleged in the Bar complaint were justified. The undisputed facts reveal that the Respondent had prevailed in the circuit court action with the exception of the remaining contract claim which had been transferred to county court and later dismissed administratively. (Suncoast v. Jones, 85-483CC.) The Respondent was left with only a hearing in order to claim thousands of dollars in attorneys fees and costs. (App A-5.) Even the Bar's witness Grover Freeman conceded this point. Given the circumstances of the original claim by Suncaost, (e.g., no permits, unlicensed contractors, no inspections and all of the

other dozen or so violations found existing by the circuit judge), (App A-2, A-2.), there was clearly a basis for the possibility of a slander of title or malicious prosecution action. The Bar has failed to show otherwise.

(Note: Does not the Bar now have an obligation to inform Florida attorneys that the contents of a settlement offer may be subject to prosecution? What "chilling effect" this would have on settlement negotiations is unknown.)

And thirdly, a most sensitive issue arises from the ashes. If such conduct is a breach of the Code, which is doubtful at best, the question must be asked as to the propriety of the investigating member of the grievance committee, bar counsel and the committee chariman acquiescing to such behavior after being duly informed that the settlement was pending with the alleged improper provision. (B Ex 1-a.) According to the Bar, even Ms. Rogriguez's new attorney, Grover Freeman, believed that including such a proviso in the proposed settlment was improper. That certainly didn't keep him from taking advantage of it in order to remove his client from the potential liability of the pending claim for substantial attorneys fees and costs. (R Ex 14, App A-6.)

Is it the position of the Bar that fellow attorneys, and especially grievance committee members and bar counsel, should sit like vultures on a fence waiting for the attorney to commit an improper act of which they have prior knowledge and then sweep down to feed on the carrion. Such thoughts are disgusting and rail against the bond which attorneys should have with each other and stand against the precepts long established by the Bar and endorsed by our Supreme Court.

POINT III

WHAT IS THE STANDARD BY WHICH ATTORNEY CONDUCT SHOULD ME MEASURED AND DISCIPLINARY ACTION IMPOSED AS PROVIDED FOR IN RULE 11.02(3)(a), INTEGRATION RULE OF THE FLORIDA BAR.

ARGUMENT

The Bar attempts to use Rule 11.02(3)(a), Integration Rule of the Florida Bar, as a catch-all when the alleged wrongdoing will not fit elsewhere. For example, The Bar suggests that failing to appear at a deposition, offering to settle the circuit court case for $2700.00, writing a settlement letter to opposing counsel and obtaining a rebate due him are somehow "contrary to honesty, justice or good morals."

In this regard, the Respondent would submit that, Rule 11.02 (3)(a) should not be used promiscuously as a convenient tool for lawyer discipline where the facts do not fit within the rubric of other specific ethical and disciplinary rules. Simply alleging bare facts is not enough. The facts must be proven as in any other legal proceeding. The quantum of proof necessary is more than the mere "preponderance of the evidence." It must be clear and convincing, The Florida Bar v. Quick, 279 So2d 4 (Fla. 1973), and free from doubt. Charlton v. F.T.C., 543 F.2d 903. Such is the touchstone of judicial decisions from across the nation. Id at 907. "Charges of unprofessional conduct are not intricate or difficult to fathom." The Florida Bar v. Murrell, 122 So2d 169 (Fla. 1960) Once a proceeding is instituted the lawyer's professional reputation is shadowed and is in danger of becoming permanently impaired. Therefore, if the charges are found to be without merit, the lawyer should be exonerated. Id. at 174.

The Bar offers several cases in support of its contention that the Respondent should be prosecuted for "conduct contrary to honesty, justice or good morals . . . whether or not the act is a felony or a misdemeanor. . . .", Integration Rule 11.02(3)(a).

Perhaps a beginning point in evaluating the standard by which attorney conduct should be measured is to review those cases submitted by the The Bar from the plethora of cases which have been handed down from our state Supreme Court. It may be presumed that since the Bar has a large staff of lawyers who specialize in the business of prosecuting other lawyers, the cases below represent the core of those which are most nearly on point in the present case. Taken in the same order as they are offered in the Bar's brief, we find:

> The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1973) The victim of his [Hefty's] evil desires was his step-daughter, member of his own household. In his orgy he was not satisfied just to violate her body but was at pains to have photographs taken of him and her in sexual embrace, normal and abnormal. . . .[H]e was still persuing his disgusting campaign with her when she reached the age of 17 years. . . .[S]he was first placed in a foster home and then in a home for unwed mothers, she having meanwhile become pregnant.

While the Respondent finds the action on the part of Hefty repugnant, as did the Court, the Respondent strongly resents the Bar's introduction of this case in support for its argument that the Respondent should be disciplined for conduct contrary to honesty, justice or good morals. Even in this case the Court appeared to moderate its position by stating that "This decision is not to be stretched so that any peccadillos of a member of the Bar may result in disciplining the member, but is reached because of the depravity of the man with whom we are dealing." Id. at 424.

The Bar offers next:

> The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) [A] suit by four [co-investors] against the attorney for 'fraudulent misrepresentation and breach of fiduciary duties' resulted in May 1970 in a final judgment in the Dade County Circuit Court against the attorney for $71,333. . . (Emphasis added.)

The Referee found (and the Court agreed) that Bennett had failed to diligently and promptly discharge his fiduciary duties toward his principals and that he was guilty of misrepresentation to his principals. Id. at 483. While the facts in Bennett are in no way similar to the present case against Respondent, it should nevertheless be noted that the Court stated that the results of a civil action are not conclusive of disciplinary action; "there must be proof of a breach of the Code of Professional Responsibility for Attorneys before discipline will result." Id. at 482. (Emphasis added.)

The Bar then cites:

> The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984) The referee found that [Adams] engaged in unethical conduct by failing to notify a business partner of the sale of some property by respondent as trustee . . . and failing to make a timely accounting of funds received from the sale. Adams at 818. (Emphasis added.)

There is a complete absence of any factual relationship between Adams and the present case. The purpose of the Bar including this per curiam decision is unknown.

Finally, the Bar throws in:

The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986)

This is another per curiam decision involving an attorney who borrowed $30,000 from each set of in-laws. The relationship of Jennings

to this case is unclear since the majority opinion simply affirms the findings of the referee. (Note: Of all the things which the Bar has accused the Respondent of, borrowing money from in-laws is not on the list.)

We now know that sexually abusing one's minor daughter may cause some difficulty with the Bar. Also, fradulent misrepresentaion and breach of fiduciary duty toward one's principal may offer a basis for disciplinary action. Even failing to properly account as a trustee or borrowing money from in-laws might cause problems. But as stated earlier, in all of the thousands of cases to choose from, the Bar has failed to offer even one remotely on point, i.e., where an attorney has been prosecuted for any of the acts alleged in this proceeding.

On another point, the Bar apparently sees nothing wrong with objecting strongly to replaying portions of the underlying circuit court case, (to the extent that one allegation was dismissed voluntarily from the Bar's complaint as reason for its action), and then offering two drug conviction cases to support the propostion that the Referee **may** inquire into the facts and circumstances of the related circuit court case. See The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) and The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). Nor does the Bar find any problem with gratutiously introducing issues for the first time in its brief. Thus, sayeth, the Bar, "[T]here is absolutely no reason that a Referee should be precluded from addressing ethical issues which may have been collaterally addressed by a court." Complainant's Brief at page 7 citing Florida Bar v Shimek, 284 So.2d 686 (Fla. 1973). Search

as one may, yet, there is absolutely no reference anywhere in the related circuit court proceeding addressing directly or otherwise an ethical issue. Again, the Respondent is confused as to what possible relevance this case which speaks of a "scurrilous attack upon members of the state judiciary" has to the matters before this Court.

POINT IV

WHETHER THE RESPONDENT'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY THE BAR IN THE PROSECUTION OF THIS CASE BY:
(1) THE BAR'S BREACH OF ITS OWN RULES OF PROCEDURE AND VIOLATIONS OF THE INTEGRATION RULE; AND
(2) THE USE OF BAR STAFF COUNSEL IN THE MULTIPLE ROLES OF INVESTIGATOR, PROSECUTOR, "GRAND JURY" ADVISOR, AND "GRAND JURY" MEMBER;
(3) THE BAR'S USE OF PERJURED TESTIMONY BEFORE THE GRIEVANCE COMMITTEE AND AT THE REFEREE HEARING; AND
(4) THE BAR'S REFUSAL TO ALLOW INQUIRY INTO A RELATED MATTER INVOLVING THE PROSECUTION OF ANDREW C. MIROBOLE?

ARGUMENT

Among those privileges long recognized at common law as essestial to the orderly pursuit of happiness is "the right to hold specific private employment and to follow a chosen profession," Greene v. McElroy, 360 U.S. 474; including, "the practice of law." Schware v. Board of Bar Examiners, 353 U.S. at 238. "The right to procedural due process . . . is conferred, not by legislative grace, but by constitutional guarantee. . . . As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms. Arnett v. Kennedy, 416 U.S. at 167.

Our Florida Supreme Court endorses essestially the same concepts of due process when it states that a license to practice law "should not be withdrawn by a governmental authority save by proper application of traditional concepts of due process." The Florida Bar v. William T. Fussell, 179 So.2d 852 (Fla. 1965). Our Supreme Court has stated that:

> "The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so." The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

However, the Bar's handling of this case does not comport with those cases cited above or with current notions of justice, equity, fair dealing and due process. On the one hand, the Bar states that the "Respondent is charged with notice of the [Intergration Rule] and is held to know their (sic) provisions and standards by Article XI, Rule 11.01(1)." Complaintant's Brief at page 11. Yet, on the other hand, the Bar perceives itself as being above the law as set out by our Supreme Courts, examples of which will be described more specifically below and in a separate motion for sanctions.

(1) THE BAR'S BREACH OF ITS OWN RULES OF PROCEDURE AND VIOLATIONS OF THE INTEGRATION RULE.

The Bar received a second complaint from Ms. Rogriguez alleging essentially the same facts and circumstances as a previous complaint which had been closed by The Bar after a short investigation. The Respondent received a copy of the second complaint and was given fifteen days within which to reply. Prior to the expiration of the designated period, the complaint was forwarded to a grievance commmittee (the Bar's "grand jury") and referred to Ms. Carolyn Fields, a committee member, for investigation. (R Ex 1-a & 1-b.) The matter was scheduled noticed for a hearing but in violation of Rule 11.03, i.e., the notice failed to list the grievance committee members. The matter was rescheduled

several times and the Respondent appeared for a scheduled hearing on May 31, 1985, which was cancelled by the Bar. The Respondent made a timely request to the committee investigator, Carolyn Fields, that the matter not be scheduled during the month of July during which time the Respondent would be unavailable. Although the testimony is unrefuted, and the Bar's own exhibits suppport the proposition that the hearing had been rescheduled on several occasions and that the Respondent had appeared on a prior occasion, the Bar, in a very cavilier fashion, summarizes this point in its brief by the statement: "After some delay the hearing was held on July 12, 1986." Complainant's Brief at page vi.

The essence of due process is that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 313. It is not only necessary that notice reach the Respondent but that it convey the required information, Id. at 314. One must surely question what was so pressing about this matter that even though the Respondent had voluntarily adjusted his schedule on several occasions to accomodate the Bar, that he was nevertheless preempted from being heard even after noticing the Committee investigator and liaison that he would be unavailable?

(2) THE USE OF BAR STAFF COUNSEL IN THE MULTIPLE ROLES OF INVESTIGATOR, PROSECUTOR, "GRAND JURY" ADVISOR, AND "GRAND JURY" MEMBER.

Why, one must ask, is there a need for a grievance committee? Might not the same result have been forthcoming in the case had Bar counsel interviewed Ms. Rodriguez and prepared the complaint therefrom. As will be shown later, the Committee, through its counsel, elected to adopt every statement Ms. Rodriguez made, (including those which the Bar counsel knew or should have known were perjury) and incorporated them into its complaint.

When the "grand jury" meets in secret, one should have a reasonable expectation that the evidence which it considers will be supported by the truthful testimony of the witnesses and the exhibits introduced into evidence. However, it would seem that the grievance committtee, in at least this matter, either allowed itself to be misled or intentionally considered evidence which was false. The problem appears to lie partially in the fact that the same Bar counsel fills many roles, i.e., investigator, prosecutor, "grand jury" advisor and "grand jury" member. This would tend to void any possiblity of objective due process. As will be shown below, much of Ms. Rodriguez's testimony were statements which she knew to be untrue. However, some of the blame belongs to the Bar counsel. For example, if Ms. Rogriguez did not recall what the prosecutor wanted the committee to hear, no problem, for Bar counsel was ready to assist by injecting the perjury into the mouth of the witness and make it sound original.

Question by Bar counsel:

> "At some time in April of 1984, you went before a judge in this matter who said that you and Mr. Hooper should settle this, and you offered him to settle for a certain amount of money. Is that correct?" Hearing of July 12, 1985 at page 23.

Ms. Rodriguez's lengthy response comes at no surprise. She not only confirms what Bar counsel has told her but goes on to state that "[the case] had been set up for trial many times and continued at Mr. Hooper's request." Id. A total fabrication as reflected by the court file. The obvious injustice which results from this casual quasi-judicial approach could easily be avoided and should not be tolerated by this Court.

(3) THE BAR'S USE OF PERJURED TESTIMONY BEFORE THE GRIEVANCE COMMITTEE AND AT THE REFEREE HEARING.

> Whoever makes a false statment, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree. . . . Chapter 837.02, Florida Statutes (1983).
>
> [A] lawyer shall not. . .Knowingly use perjured testimony or false evidence. DR 7-102(A)(4).
>
> A court has the inherent power to protect the integrity of its judicial processes against misrepresentations of fact and the "duty to protect the litigants before it from abuse harassment or exploitation." Diamond v. State, 270 So.2d 459 (4th DCA 1972), Green v. Wyrick, 462 F.Supp. 357.

Contrary to what she would have had the Committee and this Court believe, Ms. Rodriguez did not always "believe in doing things legally." Hearing of July 12, 1985 at page 12. The Bar was made aware of numerous violations of state statutes and local ordinances by Ms. Rogriguez in a hearing against Mr. Mirobole on April 5, 1985, wherein

the Committee was furnished a copy of the same memorandum utilized by the Circuit Court in its granting of the Motion for Summary Judgment and attached hereto as Appendex 1. While numerous examples of known perjury could be offered here, it will suffice to list examples of those which the Bar knew or should have known were false statements by Ms.Rodriguez:

Example #1: "The money [paid into the Court Registry to have the lien removed] did not go into the escrow account until January." Hearing of July 12, 1985 at page 19. (The Bar should have been aware of this false statment from the Circuit Court file.)

Example #2: "I had a permit on this job." Id. at page 21. (The Bar was aware since the date of the Mirobole hearing that a building permit was not obtained until after the job was completed.)

Example #3: To the question, "Were you ever red tagged or noticed of a violation as a result of the installation of that air conditioner?, Ms. Rodriguez responds: "No. I had a final from the electrical bureau. I had a final from the mechanical bureau." Id. (The Bar had previously been furnished evidence of the electrical violation -- otherwise, how would Bar counsel have known to ask the question?]

Example #4: To the question, "And did you remedy those problems [with the installation], to which Ms. Rodriguez responded: "I sure did." Id. at 14. (The Bar had been previously informed of the undisputed fact that neither Ms. Rodriguez nor her qualifying agent had ever visited the job site and that the problems had been set out in the reply to Mr. Mirobole's demand letter.)

Example #5: At the Referee hearing, Ms. Rodriguez testified, with the concurrence of Bar counsel, that the installation was not "red tagged" until months later and only then because the code had changed. (The testimony by licensed electrician Dan Mast and city electrical inspector Percy Plyn was that an employee of Suncoast had modified the electrical installation improperly by the use of a "wild splice" thereby causing a potentially hazardous situation -- that which the Bar would call "technical wiring defects.")

Example #6: Also, at the Referee hearing, Ms. Rogriguez testified that she was the sole officer and stockholder of Suncoast,

although she had filed affidavits with the City of Tampa which reflected that Mr. Mark Ellerbee was also an officer. (R Ex 7, 8, 9, 10 & 11.) (This was apparently to circumvent a city licensing requirement involving the qualifying agent, Mr. Ellerbee.)

It is wrong indeed to have lay witnesses to perjure themselves but far more serious, indeed, is to have those lawyers who are charged with prosecuting other lawyers to endorse such wrongful activity in violation of the Code of Professional Responsibility.

(5) THE BAR'S REFUSAL TO ALLOW INQUIRY INTO A RELATED MATTER INVOLVING THE PROSECUTION OF ANDREW C. MIROBOLE?

The Bar, in its prosecution of this matter, has been grossly inconsistent. As previously stated, it objected to delving into the underlying circuit court case but then cites several cases in its brief supporting the Referee's right to look beyond the four corners of the complaint and into the facts which gave rise to the original circuit court action.

Early on, the Bar refers this matter to a grievance committee before Respondent is allowed to respond, hears the matter when Respondent is out of the country after rescheduling the matter several times, prepares and files a complaint based solely upon the perjured testimony of Ms. Rodriguez, coordinates and schedules a three hour hearing over the objection of Respondent, commits numerous breaches of discipline in the process and then states, when the Court inquires regarding the Mirobole matter, that "It's a confidential matter by the Supreme Court, penalty of contempt." The Respondent is confounded by the Bar's inconsistency and circuitous argument which clearly

contravenes any semblance of due process in violation of numerous Supreme Court cases too numerous to mention. Even a criminal defendant is allowed more latitude and access to discovery. See Brady v. Maryland, 373 U.S. 83 (1963) and DR 7-103(B).

But for the failure of Mr. Mirobole to respond early on to Respondent's reply to his demand letter, and but for Mirobole's prompt filing of a lawsuit instead of attempting to resolve the dispute involving the substandard workmanship installed by his client, and but for his refusal to properly counsel his client regarding the Offer of Judgment filed by the Respondent and but for the exorbitant attorney fees which he charged his client, this matter would not now be pending. For the Bar to then suggest that the Mirobole matter should remain confidential is nonsense. This is the best example one is likely to find in support of bringing attorney discipline matters out of the closet and into the sunshine.

CONCLUSION

The Bar has failed far short of proving by "clear and convincing" evidence even one allegation against the Respondent. Why then, one must ask, given the circumstances under which these matters appeared before the Bar's "grand jury," was probable cause founded upon such weak evidence?

The answer can only be summarized in one word: Ego.

The Bar's enlarged self-image of itself is evident throughout the handling of this entire matter. The committee didn't need to review the circuit court file during its "investigation" but had only to hear the evidence of wrongdoing from the mounth of Ms. Rodriguez, whose testimony the Bar knew to be perjured and who had already been found to have violated numerous state statutes and local ordinances when she stated to the committee: "I believe in doing things legally." Yes, the same Ms. Rodriguez who had never inspected her own installation during all those months of litigation but told the committee all of the problems had been corrected. These undisputed facts mattered not to the committee.

Underlying all this, however, the real sin is evident. How dare an attorney not cancel his long planned vacation and show up at the Bar's "grand jury" meeting to grovel and plead for mercy because he had the audacity to prevail in a matter in which he represented himself. The suggestion that the Respondent's actions in defending the circuit court action against a dishonest contractor adversely reflect upon his fitness to practice law exceeds any bounds of common sense. Given the circumstances of the circuit court case, which the Bar has consistently refused to review, such allegations border on the bazaar.

How dare an attorney attempt to usurp the supreme authority of the committee by attempting to resolve the Bar complaint along with all other issues then pending. Again, no rule against such action and a complete absence of case law in support but a bruised ego is a dominant force.

This same giant ego, it would appear, absolves the Bar from abiding by some of the same disciplinary rules which it seeks to enforce against other attorneys and grants it the license to misstate other portions of the Code. An ego so large, in fact, that no wrong is seen in misrepresenting issues and improperly referencing case law. Cases which are offered are there for no apparent purpose except to imply precedence which is, in fact, non-existent. None of the cases which the Bar cites are remotely on point.

Since almost no investigation was done by the Bar prior to or subsequent to the grievance committee hearing, the perjured testimony of Ms. Rogriguez had to be accepted as the "gospel." The phrase "it is clear" and variations thereof are cast about in the Bar's brief as if the simple allegations were sufficient to convict. Yet, the allegations themselves bear no rational or reasonable relationship to a legitimate Bar interest; that of protecting the public from dishonest lawyers.

Even on issues which the Bar elects to dismiss for lack of evidence, the mammouth ego directs that the responsibility be placed on the referee while at the same time alleging that the Respondent "denies," "claims," or "justifies" a wrongdoing that never existed in the first place, much less proved.

This case has done a great disservice to a member of the Bar. The vigor with which this case has been prosecuted given the underlying facts is shameful. The Respondent would respectfully urge this Court to find for the Respondent on all issues and thereafter to recommend that the cost of this action be assessed against the Bar.

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I HEREBY CERTIFY that the original of the foregoing has been furnished by U. S. Mail to Gerald J. O'Brien, Circuit Judge, 315 Court Street, Clearwater, Florida 33516, with a copy by U. S. Mail to Jan K. Wichrowski, %The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801, and to Staff Counsel, %The Florida Bar, Tallahassee, Florida, 32301 this 15th day of May, 1986.

J. B. Hooper, Esq.
Post Office Box 1891
Tampa, Florida 33601
(813) 229-7438