IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

Supreme Court Case
No. 71,697

v.

SHANE L. STAFFORD,

Respondent-Appellee.

The Florida Bar File Nos.
87-26,201 (15A) and
87-26,347 (15A).

ANSWER BRIEF OF THE RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent has no quarrel with the accuracy of the Bar's statement of the case and the facts. However, there was testimony before the Referee attesting to Respondent's good character and in mitigation of his offense which the Bar did not discuss.

At final hearing Respondent presented six witnesses to testify on his behalf. They included a client, a chiropractor with whom Respondent has a professional and a social relationship, and four lawyers. Among those lawyers giving testimony was the Assistant State Attorney that originally prosecuted Respondent in the criminal case brought against him.

The first witness on the Respondent's behalf was Susan Woods, a former client of Respondent's and the mother of a present client. Ms. Woods first met Respondent about two and one-half years ago. At that time, upon the advice of a friend and a former client of Respondent's, Ms. Woods retained Respondent to represent her and her two daughters in legal proceedings arising out of an automobile accident.

Ms. Woods testified that she was very pleased with Respondent's representation and "felt he did everything in the most appropriate way" (TR 25).

Ms. Woods did not discharge Respondent from her case when she learned of his criminal charges because he had always treated her family "honestly and with a great deal of integrity" (TR 26). She continues to recommend clients to him.

The second individual who testified on Respondent's behalf was James Morgan Munsey, a West Palm Beach lawyer admitted to the Bar in October, 1984.

Mr. Munsey's primary field of practice is insurance defense work. In December, 1985, he met Respondent while defending a claim brought by a client of Respondent's named Arthur Nowak. During the course of the litigation, Respondent advised Mr. Munsey that he had observed Mr. Nowak, who allegedly had severe lower back injuries, changing without difficulty a large truck tire in a public restaurant parking lot. Respondent advised Mr. Munsey that he had no choice but to withdraw from the representation because of Mr. Nowak's fraudulent claims of injuries (TR 36).

Mr. Munsey testified that he believes that ninety percent of the Plaintiff's lawyers with whom he deals would have tried to settle Mr. Nowak's case without informing Defense counsel of the client's fraudulent conduct (TR 48).

Mr. Munsey testified that Respondent has a very good reputation as to legal ability (TR 34) and that Respondent "has always been above board" in all of his dealings with Mr. Munsey (TR 35). Respondent's reputation in the legal

community for trust and voracity is "good" and "positive" (TR 38).

Mr. Munsey would not hesitate to refer a case to Respondent and would not feel awkward sitting at the same counsel table with him at trial (TR 39).

When asked if Respondent is capable of rehabilitation, Mr. Munsey emphatically replied "Sure" (TR 47).

Joseph A. Vassallo, a member of The Florida Bar since October, 1974 (Pages 61 and 62 of the transcript erroneously indicates that Mr. Vassallo has only been a member of The Bar since 1984) also testified for Respondent. Mr. Vassallo, who has a civil practice, has known Respondent approximately three years. He attested to Respondent's "wealth of knowledge" in the area of personal injury litigation (TR 63).

As did Mr. Munsey, Mr. Vassallo testified about Respondent's good character by relating an incident involving several Haitian clients that had been referred to Mr. Vassallo by Respondent. Apparently, while investigating his own Haitian clients' cases, Respondent discovered that they were engaged in insurance fraud. He immediately conveyed his suspicions to Mr. Vassallo to warn him of that possibility. (TR 65).

Mr. Vassallo testified that he had no apprehension about Respondent working on cases that were referred to

Respondent's firm, that he would not have any problem appearing with Respondent as co-counsel in litigation and that he "absolutely" trusted Respondent (TR 68, 69).

Mr. Vassallo further testified that he believed Respondent is "already rehabilitated" (TR 70).

Leslie H. Cohen, a chiropractic physician , also testified on Respondent's behalf. Dr. Cohen has been practicing in West Palm Beach approximately seven years and has known Respondent for about four years. He met Respondent in a professional capacity and their relationship evolved into friendship. Dr. Cohen testified that his patients are "incredibly happy" with Respondent (TR 78). Despite the adverse publicity that Respondent received as a result of his criminal charges, Dr. Cohen continues to refer patients to him (and simultaneously to three other lawyers) (TR 82).

Dr. Cohen also related an incident wherein Respondent had called him, prior to the publicity about his arrest to alert Dr. Cohen to the adverse publicity about to occur. During that conversation, Respondent admitted his wrongdoing (TR 80).

Jeffrey Pheterson, a lawyer since 1976, and currently chairman of the Labor Employment Law section of The Florida Bar, also attested as to Respondent's good character. Mr. Pheterson has known Respondent since 1984, and has been associated with him since that time in various personal injury cases (TR 89). Among those cases is a neighbor that

Mr. Pheterson referred to Respondent and on whose case Mr. Pheterson has remained as co-counsel. Mr. Pheterson testified that despite the adverse publicity that Respondent received, the client has not discharged Respondent and Mr. Pheterson continues to act as co-counsel (TR 90, 91).

Mr. Pheterson "implicitly" trusts Respondent and has no aversion to sitting at counsel table with him at trial (TR 92). He also testified that Respondent has never denied his culpability as to the criminal charges to Mr. Pheterson, and that he was very up front about his wrongdoing (TR 94).

According to Mr. Pheterson, Respondent's reputation in the legal community for character and integrity "is very good" and Mr. Pheterson considers him an honest lawyer (TR 94, 95).

Mark Ewart, the Assistant State Attorney that prosecuted Respondent, also testified on his behalf.

At the time of the final hearing, Mr. Ewart was the chief Assistant State Attorney for the County Court Division in the State Attorneys office. He has been a lawyer since 1985 and has worked as a prosecutor throughout his career.

Mr. Ewart first met Respondent while investigating the allegations that Respondent solicited insurance claims (TR 51).

Mr. Ewart testified that the source of the criminal allegations that were brought against Respondent was another

lawyer who was representing Roy Blevin's wife in divorce proceedings (TR 51).

Respondent was ultimately charged with criminal wrongdoing and the matter was resolved with his being placed in a pre-trial intervention program. That program does not involve a court determination of guilt and resulted in the charges against Respondent being nolle prossed (TR 53).

During their investigation of Respondent, the State Attorney's office looked into the possibility of grand theft. The basis for any such allegations would have been Respondent's paying Mr. Blevin's referral fee out of client's funds. The State Attorney's investigation into that aspect of the case revealed unequivocally that there was no such grand theft (TR 54, 55).

Mr. Ewart testified that from the very beginning of his investigation, Respondent was "very cooperative and in no way inhibited the investigation". Respondent opened up his files and got waivers from his clients. Mr. Ewart characterized his cooperation as wholehearted and sincere (TR 55). In fact, Respondent invited a Bar representative to attend the sworn statement that he gave to Mr. Ewart during the course of the State's investigation (TR 56).

Mr. Ewart also observed that Respondent was very remorseful about his misconduct (TR5 55).

Respondent also brought to Mr. Ewart's attention, and cooperated, in an insurance fraud scheme brought against a

local physician (TR 57).

Before accepting a pre-trial Intervention Program, the State Attorney's Office considers rehabilitation and the probability that the misconduct will reoccur. Mr. Ewart testified that he thinks that Respondent is already rehabilitated from his wrongdoing (TR 58).

Respondent also testified on his behalf. He has been married for eight years and has three children. Twins, aged 3 years and a five year old. He has been a member of The Florida Bar since 1980 and has never been disciplined.

Respondent's initial relationship with Mr. Blevin began in late 1983 or early 1984, when they were introduced by Respondent's secretary. Mr. Blevin was seeking investigative work at the time of the introduction. During their initial conversation, which lasted five or ten minutes, Mr. Blevins asked Respondent if he would be interested in representing a friend who had a personal injury claim. The Respondent accepted the case and acknowledged that he would "take care of" Mr. Blevins as a result of the referral (TR 99, 100).

Respondent's relationship with Mr. Blevins ended voluntarily in December 1985. During that time, Blevins referred either ten or eleven cases to Respondent, three of which were automobile accidents that Mr. Blevins investigated. Respondent paid Mr. Blevins a referral fee in nine or ten of the cases. Among those cases were Mr.

Blevins' nephew, several friends and co-workers, and a case referred to Respondent by Mr. Blevins' wife (TR 102, 104).

Mr. Blevins received approximately $10,000 to $11,000 dollars in referral fees among which was $6,000 from Mr. Blevins' cousin's case (TR 104, 105). Respondent testified that none of Mr. Blevins' fees were paid out of client's funds and that audits by The Florida Bar and the State of Florida have not indicated to the contrary (TR 109).

Respondent acknowledged that the time he entered into his relationship with Mr. Blevins that he knew it was improper. He did not know that it was illegal. His initial impression was that the cases that would be referred to him were friends and relatives of Mr. Blevins, not accidents that the officer was working (TR 110, 112). He also believed that his name would be one of several lawyers' names mentioned (TR 138).

The relationship was terminated in December 1985, long before there was any hint of an investigation by The Florida Bar or the State Attorney's office (TR 112).

Subsequent to terminating his referral arrangement with Mr. Belvins, Respondent was invited into partnership by his current partner. Prior to accepting the offer, he disclosed completely his arrangement with Mr. Blevins and, subsequent to that disclosure, the cost for buying into the firm was determined (TR 114).

The press coverage and embarrassment that Respondent

suffered as a result of his highly publicized arrest and booking was "devastating" (TR 116). As to the press coverage, Respondent stated that

> It has been devastating, thank God for good clients and a strong Wife.
>
> This really tore me up, it has been devastating and humiliating. (TR 116).

Respondent also testified that although his Pre-trial Intervention Program was originally to be eighteen months long, it was dropped at the end of six months (TR 118). He further acknowledged that he requested that the Bar Counsel be present at the time he made his sworn statement to Mr. Ewart. Ultimately he waived probable cause hearing in his bar case (TR 119, 125).

Respondent received approximately eleven referrals from Mr. Blevins during a time period in which he had a pending caseload at any one point in time of 350 files and during a period in which he was opening up approximately one hundred (100) new cases per year (TR 106).

Respondent acknowledged his wrong doing to the Referee in these disciplinary proceedings. He acknowledged that his conduct has reflected on The Bar and that it has "embarrassed lawyers, humiliated them" and has done nothing to help The

Bar's esteem in the public eye (TR 126). He further acknowledged that all of the things that have happened to him as a result of his criminal charges, including the humiliation and embarrassment that he has had to suffer before The Bar, is entirely his fault (TR 127).

During cross-examination, Respondent elaborated somewhat on the accident cases that were referred to him by Mr. Blevins. He testified that he was under the impression that three other lawyer's names were given besides his own and that if the client chose him, then the referral fee would be paid to Mr. Blevins (TR 138).

After the final hearing, the Referee issued the report that is before this court on appeal. The Referee recommended that Respondent receive a public reprimand and a suspension for three months with automatic reinstatement to be followed by probation for three years. As a condition of probation, the Referee recommended that Respondent be required to speak at least four times each year during the probation to local Bar Associations or law school classes about his own misconduct or other ethical concerns of The Florida Bar.

The Referee listed on page four of his report seven mitigating factors that he considered in recommending this discipline. They were:

A. No prior disciplinary record.

B. Respondent has an excellent reputation for ability

and integrity in the legal community in spite of this series of events.

C. Respondent cooperated with law enforcement authorities and The Florida Bar in their investigation into his conduct.

D. Respondent voluntarily stopped his misconduct before it ever came to light.

E. Respondent freely admits his wrongdoing and impressed the Referee with his sincerity in recognizing the wrongness of his acts; he appeared genuinely remorseful. It appears he has wreaked a substantial amount of emotional trauma to himself and his family as a result of his misconduct.

F. While it does not excuse his conduct, I do not believe the Respondent appreciated the criminality of what he was doing although he did appreciate its ethical impropriety at the time he was doing it.

G. The testimony of the Prosecutor who handled the criminal prosecution of Respondent was persuasive as to Mr. Stafford's acknowledgment of wrongdoing, cooperation and rehabilitation.

SUMMARY OF ARGUMENT

The Board's demand that Respondent be disbarred is totally unwarranted. There is no basis in fact or in prior case law for such a Draconian penalty.

This Court's Referee, who considered the same cases cited in the Bar's brief, and after considering virtually the same argument put forth by the Bar in its brief, determined that a ninety day suspension with automatic reinstatement, coupled with three years probation and at least twelve personal appearances before law students or Bar Associations was sufficient punishment for Respondent's offense.

While Respondent was charged with a felony, ultimately all charges against him were dismissed. He has not been found guilty of a crime. His not guilty plea to the crime was never changed. The State Attorney determined that there was no likelihood that his misconduct would be repeated. No client was harmed as a result of Respondent's misconduct and audits of his trust account records have indicated no impropriety as to client's funds.

Respondent's misconduct did not involve an " ambulance chasing" scheme. It evolved out of a casual conversation with a police officer who referred one of his friends to the Respondent. In fact, of the approximately eleven cases referred to Respondent over a less than two year period, only

two or three of them were traffic cases that the officer investigated. It was not Respondent's intent that the officer would solicit accident victims, but rather, that the officer would refer friends, relatives or acquaintances who were injured and needed a lawyer. All of the referral fees that were paid to the officer came out of Respondent's fees.

The Referee, after consulting with The Florida Bar's standards for imposing sanctions, specifically found substantial mitigation in the case before him. That mitigation included no prior disciplinary record, Respondent's excellent reputation for honesty and ability in the legal community (including at least two instances where Respondent's conduct has been in accord with the highest standards of professionalism by preventing insurance fraud), Respondent's whole hearted cooperation with law enforcement authorities and with The Florida Bar in their investigation into his conduct, Respondent's inexperience at the time his misconduct began, his voluntary cessation of the misconduct and, most importantly, Respondent's acknowledgment of his wrongdoing and his genuine remorse for his actions.

The mitigation cited by the Referee is substantial, is specifically endorsed by The Bar's standard for imposing sanctions, and are most relevant in determining any discipline to be imposed. The Board's argument that mitigation in this case should be ignored is as irresponsible as their demand that Respondent be disbarred.

This Court's Referee made his recommendation after reviewing the same cases, the same facts and after hearing the same arguments presented by the Bar at final hearing. This recommendation is sound and should not be disturbed absent compelling reasons. The Bar, in rehashing the same arguments made at final hearing, when they only sought a three year suspension, should not now be allowed to override the Referee's recommendation by seeking disbarment.

ARGUMENT

I. DISBARMENT IS COMPLETELY INAPPROPRIATE FOR RESPONDENT'S CONDUCT DESPITE THE FACT THAT IT INVOLVED A SOLICITATION/FEE SHARING SCHEME.

At final hearing in this cause, The Board of Governors asked for a three year suspension. Now that the Referee after hearing the facts, considering the case law and observing Respondent's demeanor and attitude, has recommended a ninety day suspension, The Board has demanded disbarment. That demand borders is unjustified.

The Board has demanded disbarment despite this Court's Referee's recommendation that Respondent receive a ninety day suspension. The Board has demanded disbarment despite the State Attorney's position that Respondent's offense warranted pretrial intervention without the requirement that Respondent change his not guilty plea, and despite the fact that the State nolle prossed its charges. The Board has asked for disbarment in total disregard of this court's prior sanctions for similar misconduct. Finally, The Board demands disbarment despite substantial mitigating factors, including Respondent's voluntary termination of his improper conduct

over one year before it was discovered, despite the fact that there was no financial harm to any party involved, and despite the fact that Respondent sincerely regrets his actions.

The Board demands a harsher penalty in this case than that meted out to lawyers who engage in drug dealing, **The Florida Bar v. Carbonaro** 464 So.2nd 549 (Fla. 1985)(three year suspension for dealing in cocaine); who posses cocaine, a felony, and who are guilty of DUI, **The Florida Bar v. Finkelstein**, 522 So.2d 372 (Fla. 1988) (a one year suspension); who embezzle money from a bank in which they are an officer, **The Florida Bar v. Kennedy** 439 So.2nd 215 (Fla. 1983); and who steal their clients' trust funds, **The Florida Bar v. Tunsil**, 503 So. 2nd 1230 (Fla. 1987) (a one year suspension.) Disbarment is simply totally inappropriate for the misconduct before this Court.

Disbarment should be reserved for those who will never be fit to be before the Bar, and who are totally incapable of rehabilitation. **The Florida Bar v. Hirsch** 342 So.2nd 970 (Fla. 1977) (at 971). Obviously Respondent fits into neither category.

The Bar seems to argue that penalties for misconduct, as the cost of food due to inflation, must increase as years go by. Perhaps something akin to the Consumer Price Index. This untenable argument seems to be what The Bar is arguing when

they refer to **The Florida Bar v. Murrell**, 74 So. 2d 221 (Fla. 1954), as being a 34 year old decision and in arguing that cases more than 20 years old and contrary to the Bar's position should be disregarded.

In **Murrell**, the Respondent received a one year suspension after being found guilty of seven counts of solicitation of business. (Respondent's suspension was cut to one year from two years if he paid costs within ninety days. While the record is silent, the writer suspects that it is safe to assume that Mr. Murrell promptly retired costs to knock one year off of his suspension. Regardless, the significance is that the Supreme Court felt that a suspension of one year was appropriate for this misconduct.)

This Court, admittedly 34 years ago, determined that Mr. Murrell should be suspended for one year despite their finding that

> There is no showing of penance on his part but on the contrary a showing of persistence until the institution of this case.

Unlike the Respondent in the instant case, Mr. Murrell evinced no attitude of remorse, did not acknowledge his wrongdoing, and most significantly, persisted in his improper course of conduct until The Florida Bar brought disciplinary proceedings against him. Respondent, on the other hand, voluntarily stopped his improper conduct at a time when he had no reason to believe that anyone would ever find out

about it and impressed the Referee with his sincere attitude of remorse.

Respondent does not deserve as stern a discipline as that meted out to Mr. Murrell. The passage of 34 years certainly does not warrant increasing the penalty five fold, i.e., to disbarment for a minimum of five years.

The Board does not and cannot, point to any cases in which conduct similar to Respondent's has resulted in any sanction greater than six months.

In the comprehensive list of solicitation cases cited by The Florida Bar in its appendix, there is but one in which disbarment was imposed, **The Florida Bar v. Dodd** 195 So. 2d 204 (Fla. 1967). Mr. Dodd had previously been disbarred and reinstated. Clearly, this court having disbarred Mr. Dodd once and giving him the benefit of the doubt, through reinstatement, dealt harshly with his second offense and struck his name from the bar. Having once been disbarred, disbarment was appropriate for subsequent misconduct.

In **The Florida Bar v. Pace**, 426 So. 2d 553 (Fla. 1982), the accused was allowed to resign. Mr. Pace's resignation was voluntary and under the rules in existence at that time he was allowed to seek reinstatement (not readmission through the Board of Governors as is now required) after the lapse of three years. His resignation followed on the heels of his conviction for one count of solicitation. He was also guilty

of perjury, having testified falsely regarding the time certain time slips were written.

The Bar lists in its Appendix nine cases in which lawyers have been suspended and four cases in which lawyers have received reprimands for solicitation. Among the suspension cases is **The Florida Bar v. Murrell,supra**, which has been previously discussed. The most serious of the other suspensions was **The Florida Bar v. Meserve** 372 So. 2d 1373 (Fla. 1979), where this Court suspended Mr. Meserve for two years retroactive to 1977, the beginning of his temporary suspension.

Mr. Meserve's misconduct did not involve just solicitation. It involved his permitting a non-lawyer to draft pleadings which were signed by Meserve's secretary, collecting fees and rendering no services, permitting false pleadings to be filed and attempting to block police officers from executing under a capias. By no stretch of the imagination can the misconduct in the case at bar be considered as serious as that in **Meserve.**. Yet, the Board demands that the Respondent receives a far harsher penalty than that meted out only nine years ago.

The notorious Billy Dawson was the accused in another suspension case cited by the Bar. **The Florida Bar v. Dawson** 111 So. 2d 427 (Fla. 1959). Mr. Dawson used a photographer with a police radio as a runner. Based upon information received from the photographer, Mr. Dawson would sign up

clients at hospitals. There were numerous instances of personal injury contracts being written on scraps of paper, scratch pads, filing cards and bits of stationery. Some of the contracts were signed in hospitals. Mr. Dawson also improperly advanced hospital costs and funeral expenses and costs were contingent upon success. Clearly, Mr. Dawson was engaged in a widespread and extensive solicitation scheme. There is nothing in the records that indicate he voluntarily stopped his misconduct and, certainly, it lasted far longer than the approximately twenty months that Respondent's misconduct lasted and involved far more accounts than the ten or eleven instances in the instant case.

Mr. Dawson received but an 18 month suspension for misconduct far worse than that at bar.

In **The Florida Bar v. Abrams** 402 So.2d 1150 (Fla. 1981) the accused received a one-year suspension. Mr. Abrams solicited the representation of witnesses in criminal cases then pending against one of his clients. Clearly, there was a blatant conflict of interest involved in this case. Respondent's misconduct was exacerbated by the fact that he falsely told the immunized witnesses that their immunity was not binding and he directed them not to testify. As a result of his actions, at least one of the witnesses who had been previously immunized was prosecuted.

Mr. Abrams' misconduct was far worse than that involved in the case at bar. Yet, Mr. Abrams received but a one year suspension. It should be noted that the Abrams came down in 1981.

Six month suspensions were handed out in **The Florida Bar v. Perry**, 377 So.2d 712 (Fla.1979), **The Florida Bar v. Curry**, 211 So.2d 169 (Fla. 1968), **The Florida Bar v. Scott**, 197 So.2d 518 (Fla. 1967) and **The Florida Bar v. Bieley**, 120 So.2d 587 (Fla. 1960). Notable among the misconduct involved in these cases was that in **Scott,**, in which the accused lawyer used a clergyman to solicit four widows whose husbands had died in an accident. **Scott** is another one of those old cases that the Bar argues should be disregarded. Yet, a close reading of the decision indicates Mr. Scott's six months suspension was handed down in the same atmosphere as exists today. On page 520 of the opinion, Justice Drew stated:

> In this eara of high verdicts in negligence cases, the temptation is great to cut corners to get business but such actions on the part of the Bar cannot and must not be tolerated.

The Respondent in the instant case acknowledges the sentiment expressed by Justice Drew 21 years ago and accepts the necessity of his being disciplined. But, he rejects the Bar's assertion that he should be disbarred.

In **The Florida Bar v. Britton**, 181 So.2d 161 (Fla. 1965), the accused lawyer received a three month suspension for solicitation plus additional misconduct.

Even as recently as 1986, this court has only ordered public reprimands for misconduct involving solicitation. In **The Florida Bar v. Schulman**, 484 So.2d 1247 (Fla. 1986), a lawyer received a public reprimand for purchasing confidential hospital records and soliciting personal injury cases from them.

In **The Florida Bar v. Swidler**, 159 So.2d. 865 (Fla. 1964) (Respondent notes that in the Bar's Appendix this case is referred to as **The Florida Bar v. Swindler**; perhaps a Freudian slip?) the accused received but a public reprimand for a solicitation scheme that lasted over three years and which may have resulted in as many as two hundred new cases. Mr. Swidler used his non-lawyer brother as a runner and even placed the brother's name on his law office shingle.

Certainly, the misconduct in the case at bar is no worse than that engaged in by Mr. Swidler. The Referee in these proceedings, however, recommended that Respondent receive a 90 day suspension instead of the public reprimand given Mr. Swidler. Respondent, consistent with the penitent attitude expressed throughout these proceedings, admits and acknowledges that the range of discretion available to the Referee permits a recommendation of the 90 day suspension

rather than a public reprimand.

In **The Florida Bar v. Gaer**, 380 So.2d. 429 (Fla. 1980), the Respondent received a public reprimand for using a bail bondsman to solicit cases. Mr. Gaer was convicted of five misdemeanor counts of solicitation.

In **Gaer,** the Board of Governors only sought a six month suspension. Respondent's misconduct is no worse than Mr. Gaer's. Yet, now, eight years later the Board is seeking disbarment. Their position is inappropriately inconsistent.

Finally, in **The Florida Bar v. Abramson**, 199 So.2d. 457 (Fla. 1967), a public reprimand was handed out for one instance of solicitation at a hospital.

None of the cases cited above justify The Bar's position that Respondent should be disbarred. Their arguments as to discipline should be disregarded and the Referee's wise decision should be upheld.

In fact, the cases cited by the Bar support Respondent's argument that a 90 day suspension with three years probation is an appropriate sanction for his offense.

The Bar argues that the passage of time since the bulk of this court's decisions on solicitation should result in a harsher discipline. Yet, the Referee specifically considered exactly that factor when making his recommendation as to discipline. As quoted by The Bar in its brief, the Referee stated on page 4 of his report that

> The most difficult aspect of this for the Referee is in fashioning a recommendation as to punishment, given some of the older cases involving similar conduct. The difficult issue is whether the climate of today, vis-a-vis lawyer misconduct, demands more rigorous punishment than has been meted out for similar offenses in the past.

The Referee specifically considered the passage of time element in recommending a 90 day suspension. The Bar had argued for a three (3) year suspension before the Referee, now it argues for disbarment before this Court. Neither position is tenable.

Contrary to The Board's argument, Respondent did not intentionally enter into an ambulance chasing scheme. Respondent admits his misconduct and acknowledges the propriety of discipline. However, He would point out that the situation that he found himself in, not long after being admitted to The Bar, involved paying a referral fee to an individual who was referring his <u>friends</u> to Respondent for personal injury work.

While Respondent does not want to give the appearance to this Court that he is minimizing his misconduct, and while recognizing that it was improper, Respondent would emphasize to the court that the deliberate solicitation of accident victims investigated by the policeman was not the intent of

the parties. In fact, it was not the result. Of the eleven cases referred to Respondent, at most three were accident victims. The other eight were friends or relatives of the police officer.

Respondent takes issue with The Bar's assertion on page 11 of his brief that Respondent's actions "caused serious injury to the clients involved". There is no basis for such assertion. All of the clients had legitimate serious injuries. Eight of them were friends or relatives of officer Blevins. All of the clients were ably represented and none lost a single dime as a result of misconduct by Respondent. Officer Blevins' fees were paid out of Respondent's proper fee. The State Attorney's office deliberately investigated this facet of Respondent's referral fees and determined that no client lost anything.

II. THE REFEREE PROPERLY CONSIDERED NUMEROUS MITIGATING CIRCUMSTANCES IN DETERMINING THE SANCTION TO BE IMPOSED

On page four of his report, the Referee specifically stated that he considered The Florida Bar's standards for imposing lawyer sanctions in making his determination as to discipline. Rule 9.32 of those sanctions specifically lists various factors that shall be considered in mitigation of discipline. The Referee obviously considered those factors

when making his recommendations. They included:

1. Respondent has no prior disciplinary record (Rule 9.32 (a));

2. Respondent has an excellent reputation for ability and integrity in the legal community despite his misconduct (Rule 9.32 (g));

3. Respondent cooperated with law enforcement authorities and the Florida Bar in their investigations (Rule 9.32 (e));

4. Respondent voluntarily stopped his misconduct before it came to light;

5. Respondent freely admits his wrongdoing and appeared genuinely remorseful (Rule 9.32 (l));.

6. Respondent did not appreciate the criminality of his conduct; and

7. The testimony of the Prosecutor was persuasive as to Respondent's acknowledgment of wrongdoing, cooperation, and rehabilitation (Rules 9.32 (e), (j) and (l)).

Five of the Referee's seven mitigating factors are specifically set forth in the Standards as mitigation.

Respondent submits that absent mitigation his offense would warrant six months to one year's suspension. However, the significant mitigation involved, particularly his voluntary cessation of the misconduct and his remorse and recognition of wrongdoing, and his interim rehabilitation, proves the Referees recommendation is appropriate for the

misconduct found.

In determining discipline, the Referee was aware of the three purposes of disciplinary proceedings as set forth in **The Florida Bar v. Pahules**, 233 So.2d. 130 (Fla. 1970). First and foremost among those purposes is protection of the public. Inherent within his recommendation that Respondent be reinstated without proof of rehabilitation was the Referee's recommendation that he is not a danger to the public. His misconduct had stopped before it was discovered and no member of the public was harmed.

It is important to note the fact that Respondent and Mr. Blevins voluntarily stopped their arrangement. Admittedly, Respondent recognized his wrongdoing from the outset of his arrangement with Mr. Blevins. However, his recognition was that referral fees to a non-lawyer were improper. When it became apparent that not only was officer Blevins referring to him accident victims, but that his conduct might be illegal, Respondent stopped the arrangement in December 1985.

It must be emphasized that was no pressure upon Respondent to stop his arrangement. It was his recognition of the impropriety of his conduct, which perhaps was enhanced by the fact that he had matured somewhat since the start of his practice, that led to his termination of his misconduct. The threat of criminal investigation or investigation by the

Bar was not the genesis for Respondent's cessation of improper activities.

Stopping misconduct before discovery, and without sanctions, is virtual proof that it will not reoccur. Clearly, there is no need to protect the public from Respondent.

The referral fee arrangement between Respondent and Mr. Blevins came to light approximately fifteen months after it was stopped. As testified to by Assistant State Attorney Ewart, he learned of the referral fee arrangement when the lawyer for Mr. Blevins' wife in dissolution of marriage proceedings brought the fact to the fact to the State's attention.

Respondent testified that prior to going to the State Attorney, Mr. Blevins' wife called him and advised him of her intention. To Respondent's credit, he did not try to persuade her from reporting the arrangement despite the fact that he knew it would be devastating to him.

Interim rehabilitation is specifically listed as a mitigating factor in the Standards. (Rule 9.32 (j)).

Respondent respectfully submits that the primary indicia of rehabilitation is a recognition of wrongdoing. Respondent's voluntary cessation of his misconduct, before it came to light, shows that recognition.

That he is rehabilitated is beyond doubt. Prosecutor Ewart so stated (TR 58) as did attorneys Munsey and Vassallo.

Because he is already rehabilitated, the proof of rehabilitation required by a suspension in excess of 90 days is not necessary. In recommending the maximum suspension short of that requiring proof of rehabilitation, it is obvious that the Referee believed this to be true.

Among the factors that the Referee listed in mitigation was Respondent's "excellent reputation for ability and integrity in the legal community in spite of this series of events". Two of the witnesses before the Referee, lawyers Munsey and Vassallo, related incidents to the Referee which certainly buttressed his findings as to Respondents reputation for integrity in the legal community. In the first of these incidents Mr. Munsey, a defense lawyer, described an incident in which Respondent reported to Mr. Munsey an incident observed outside the attorney client relationship in which Respondent saw one of his clients changing a truck tire in a restaurant parking lot. The client had claimed severe back injuries for which he was claiming damages. Recognizing that the client was trying to perpetrate a fraud upon the courts, Respondent reported the incident to the Defense counsel and withdrew from the case.

Respondent's actions with Mr. Munsey occurred long before he was charged with his crimes. It bespeaks conduct in accordance with the highest precepts of the Code of Professional Responsibility.

In a second incident, Joe Vassallo related to Referee an incident, once again that occurred before criminal charges were brought, in which Respondent alerted Mr. Vassallo to the fact that a group of Haitians were engaged in a scheme to defraud insurance companies by staging faked accidents. Apparently, Respondent was representing several of these Haitians and referred several others to Mr. Vassallo. Once again, upon learning of the fraudulent scheme by clients, Respondent took the appropriate steps to stop the fraud.

Obviously, the two incidents related above warrant no significant kudos. Respondent acted as he should have acted. However, these two occurrences show that in general Respondent conducted his practice in a perfectly ethical fashion. He is not an ambulance chaser; he is not a "win at all costs and damn the consequences" type of lawyer.

It also bespeaks well of Respondent's honesty that he told his employer of his misconduct, long before it came to light, when he was offered a partnership in the firm (TR 113).

The Referee's finding that Respondent's cooperation with law enforcement authorities and The Bar in their investigation into his conduct was a mitigating factor is appropriate. Respondent could have fought the criminal charges brought against him. Instead he opened his books to the State and obtained waivers from his clients (TR 55).

While the State Attorney may have felt he had an

"ironclad" case against Respondent, no prosecutor ever obtains a guilty verdict in a contested case until the jury hands down a verdict. Until that point, the accused is innocent. The possibility of a jury pardon always exists. There is always a possibility that the statute in question is unconstitutional. Finally, particularly in Respondent's case, the requisite mens rea, i.e., appreciation that the conduct is illegal, was not present. Respondent did not intend to engage in any criminal conduct. Respondent acknowledges that his conduct was improper. He has never acknowledged that he would have been convicted of a crime had he been tried. He had the constitutional right to resist such charges. He chose not to do so.

Furthermore, Respondent clearly invited a Florida Bar representative to attend the session in which he was going to give a sworn statement to the State Attorney's office admitting his misconduct. That statement virtually guaranteed his being disciplined by The Bar. Yet, Respondent invited The Bar to attend the hearing in an effort to bring these matters to a head.

The Referee correctly observed that the Respondent did not appreciate the criminality of his conduct. While, as the Referee correctly observed, this does not excuse his conduct, it is however, a factor in mitigation to be considered in imposing discipline.

Also significant is the testimony of the Assistant State Attorney that prosecuted Respondent's case. The Referee observed in paragraph V. G. of his report that the testimony of the prosecutor who handled Respondent's criminal case "was persuasive as to Mr. Stafford's acknowledgment of wrongdoing, cooperation, and rehabilitation". The Bar makes much of the fact that the people of the State of Florida, through their legislators (the undersigned submits that it was perhaps more insurance company pressure than the will of the people) has chosen to increase the criminal penalties for conduct similar to Respondent's from a misdemeanor to a felony. It should be noted, however, that the peoples representative in bringing these charges not only determined that no adjudication of guilt for <u>any</u> crime was necessary, but that he agreed to a program in which Respondent did not have to recede from his not guilty plea and in which the State of Florida <u>nolle prossed</u> its charges.

Lest anyone argue that the assistant State Attorney was a friend of the Respondent, it should be pointed out that he did not know Respondent until criminal charges were brought (TR 51).

That same prosecutor testified that Respondent's cooperation was whole hearted and sincere and, most significantly, that Respondent is already rehabilitated from his wrongdoing (TR 55, 58).

Finally, and most importantly, the Referee observed that Respondent freely admitted his wrong doing and "impressed the Referee with his sincerity in recognizing the wrongness of his acts; he appeared genuinely remorseful". Such a recognition obviates the need to prove rehabilitation as required in a suspension of over 90 days.

Respondent is a bright, young lawyer who, during the initial stages of his career, entered into an improper relationship. He made a terrible mistake and he admits that he deserves to be punished. His referral arrangement with Mr. Blevins was an aberration in Respondent's normal scrupulous conduct. His revelations to lawyers Munsey and Vassallo, his admission of wrongdoing to his partner, and his immediate admission to misconduct when his wrong doing was discovered all attest to this young man's good character.

Respondent asks this Court to reject the Bar's argument that disbarment is the appropriate punishment for misconduct that, until now, warranted a public reprimand to a three month or one year suspension simply because the legislature recently changed the criminal penalty from a misdemeanor to a felony. These proceedings are not criminal proceedings. These proceedings are designed to protect the public from lawyer's misconduct. **The Florida Bar v. Pahules, supra.** To suddenly arbitrarily determine that the sanction for ethical

misconduct should result in a five fold increase in the penalty imposed because the legislature has reclassified the penalty for similarly misconduct shows The Florida Bar's Board of Governors has lost sight of the purpose of disciplinary proceedings, i.e., protection of the public.

It was true in **Hirsch, supra**, P. 971, the record in the instant case does not establish that:

> this respondent is one that has been demonstrated to fall within that class of lawyers "unworthy to practice law in this state"....It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in dicsciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part (e.s.)

A 90 day suspension, coupled with three years' probation with at least four speeches per year on ethics, will reclaim Respondent as a valued and contributing member of the Bar. Such a sanction, as expressed in **Pahules, supra** p. 132, will be:

> sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.

A suspension of 90 days will have a material impact on Respondent's practice. In addition to even more humiliating publicity, he will have to send a copy of his order of suspension to all of his clients. His firm will have to materially alter its manner of operation, e.g., changing its stationery, during the entire period of suspension. These are justified penalties and Respondent accepts them.

It is not an insignificant penalty that Respondent, during his three years of probation, upon reinstatement, must appear before Bar Associations or law school classes on twelve occasions to speak on the subject of ethics. Such a recommendation will behoove both Respondent and The Bar.

Respondent is not unmindful of the Board's concern over the public's perception that lawyers are partially responsible for the "insurance crisis" and its concomitant "amendment ten" proposal. He suspects the Board's decision to seek an unprecedented disbarment was influenced by this atmosphere. An analogous atmosphere existed during the pendency of **The Florida Bar v. Hirsch, supra**, due to Watergate. The circumstances between **Hirsch** and the case at Bar are amazingly similar.

In **Hirsch**, the Bar appealed a Referee's recommendation of a 90 day suspension and asked this Court to impose disbarment instead. While completely rejecting the Bar's position and adopting the Referee's recommendation, this

Court stated on page 971 the following:

> We have found no better guideline in this troublesome area [of imposing discipline] than those set forth with such clarity by Mr. Drinker. They are just as pertinent in times where the bar sails on placid seas as when it is caught up in the storms of criticism of public servants and all those in positions of trust, such as we are now experiencing in the aftermath of Watergate. We are cognizant of the difficulty of the bar, or this Court, being completely objective in disciplinary cases where the whole profession, including those charged with enforcing its moral codes and concepts, are affected by whatever judgment is rendered. For this reason great care should be exercised to the end that the ultimate judgment does not become an expression of frustration.

CONCLUSION

The Referee's recommendation that Respondent receive a ninety day suspension, to be followed by three years probation with various conditions, is an appropriate discipline in light of his misconduct, the prior decisions of this Court and the substantial and overwhelming mitigation that appeared on the record. His decision should be upheld.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to DAVID M. BARNOVITZ, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309, this 7th day of October, 1988.

JOHN A. WEISS