IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

SHANE L. STAFFORD,

Respondent-Appellee.

_____/

Supreme Court Case No. 71,697

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

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

From its inception, this disciplinary proceeding has involved but one issue, viz., the appropriate discipline for an attorney who violated two (2) felony statutes and a myriad of disciplinary rules in a solicitation/fee sharing scheme. Appellee waived probable cause and save for specific rule violations, admitted to every allegation of the bar's complaint.

In the Spring of 1984, appellee was employed by the firm of Stephens, Lynn, Chernay & Klien, a malpractice defense firm (22, 98)* and was in excellent standing (129). He had attained raises and bonuses and had an indication that, had he remained with the firm, he would someday have been considered for a partnership (129). He was one of the firm's top associates working directly with a partner and had been given his first case to try (130).

At the time, appellee was suffering from no afflictions or addictions and was experiencing no financial duress (130).

It was in such circumstances that appellee entered into an arrangement with one Roy Blevins, a uniformed police officer in the employ in the City of West Palm Beach, Florida for Blevins to solicit personal injury cases for handling by appellee in return for a split of attorney's fees generated thereby (131). Shortly after entering into such arrangement, appellee left his firm and associated with a plaintiffs' personal injury office, the firm of Dewey Varner, Esquire (105).

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* All page references are to transcript of final hearing unless otherwise specifically noted.

At the outset of the arrangement, appellee knew that the solicitation and fee sharing scheme was unethical (110, 137).

To disguise their arrangement, Blevins manufactured bogus invoices which represented 15% of the attorney's fees in each of the referral cases (108). Appellee, while conceding his appreciation of the unethical aspect of his arrangement, claimed to be ignorant of the felonious nature of the misconduct (110). Appellee terminated the arrangement only on the basis of its illegality, not because it was unethical (110, 137). As a matter of fact, appellee could not state with any degree of certainty, that had he not become aware of the felonious nature of his misconduct, he would ever have ceased his arrangement (139). He testified:

> Q. I cannot help but regard your testimony, Mr. Stafford, as leading to the conclusion, that but for the introduction to you of the criminal statute, you would have been content to continue to violate, at least, that which you knew to be a violation, the fee sharing arrangement with Mr. Blevins, to continue into the future - -
>
> A. That is a hard question to answer, honestly, it is a hard question to answer, and I cannot honestly give you an answer, I have to be faced with that information at that time --
>
> Q. But you do understand in listening to what you testified could easily lead to that conclusion?
>
> A. Correct (138, 139).

At the final hearing, upon stipulation of the parties (12-14), the bar's complaint was amended and the appellee admitted to the following facts:

Between Spring, 1984 and Autumn, 1985 respondent entered into an arrangement with one Roy Blevins (hereinafter called "Blevins"), a uniformed police officer in the employ of the City of West Palm Beach, Florida for the purpose of soliciting business on respondent's behalf relating to the representation of persons injured in motor vehicle accidents for the purpose of filing motor vehicle tort claims and/or claims for personal injury protection benefits.

During such period of time, in pursuance of the aforesaid arrangement, the said Blevins, in fact, solicited business on respondent's behalf relating to the representation of persons injured in motor vehicle accidents resulting in respondent's filing of motor vehicle tort claims and/or claims for personal injury protection benefits.

Section 817.234(9), Fla. Stat., in effect at all times hereinabove referenced, provided, as follows:

It is unlawful for any attorney to solicit any business relating to the representation of persons injured in a motor vehicle accident for the purpose of filing a motor vehicle tort claim or a claim for personal injury protection benefits required by s. 627.736. Any attorney who violates the provisions of this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775-083, or s. 775-084.

Respondent accepted the business solicited on his behalf by Blevins and proceeded to try the various claims to verdict or settle the same.

Upon collecting his fee in each of such cases respondent shared a portion thereof with Blevins, a nonlawyer.

By sharing fees with a nonlawyer respondent violated Disciplinary Rule 3-102 of the Code of Professional Responsibility which provides that a lawyer shall not share legal fees with a nonlawyer.

Blevins, with respondent's knowledge and consent, solicited the business hereinabove referred to on respondent's behalf such solicitation taking place in or about public places, public streets and public highways in violation of Section 817.234(8), Fla. Stat., a violation of which constitutes a felony. (See bar's amended complaint and respondent's admissions on the record, pages 13-17).

The bar had charged that by committing felonies defined in Sections 817.234(8) and 817.234(9), Fla. Stat., the commission of which was admitted by appellee, appellee had thereby violated, inter alia, Disciplinary Rules 1-102(A)(3) and 1-102(A)(4) of the Code of Professional Responsibility proscribing illegal conduct involving moral turpitude and conduct constituting dishonesty, deceit, fraud or misrepresentation. The referee rejected such charges on the basis of The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982) (See referee's report, page 3).

The referee made the following recommendations regarding appellee's guilt. He found that appellee had violated Section 817.234(9), Fla. Stat. and thereby violated Disciplinary Rule 2-103(C) of the Code of Professional Responsibility which prohibits an attorney from requesting a person or organization to recommend employment, as a private practitioner, of himself and also thereby violated Fla. Bar Integr. Rule, article XI, Rule 11.02(3) which provides that an attorney shall not engage in conduct contrary to good morals (See referee's report, page 3). He found that appellee had violated Disciplinary Rule 3-102 of the Code of Professional Responsibility by sharing legal fees with Blevins, a nonlawyer (See referee's report, page 3). He found that appellee had violated Section 817.234(8), Fla. Stat. and thereby violated Disciplinary Rule 2-103(C) of the Code of Professional Responsibility and Fla. Bar Integr. Rule, article XI, Rule 11.02(3) (See referee's report, page 3).

Finally, the referee made recommendations for finding two (2) violations not charged by the bar, viz., Disciplinary Rules 1-102(A)(1) and 1-102(A)(6) which provide that an attorney shall not violate a

Disciplinary Rule and shall not engage in other conduct which adversely reflects on his fitness to practice law.

For the violations by appellee of the two (2) felony statutes above enumerated and the various bar rule violations, the referee has recommended a public reprimand, a ninety (90) day suspension and a specified probation. Placing his finger firmly and directly upon the pulse beat of this proceeding, the referee identified the single issue to be determined. He observed:

> 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 (referee's report, page 4).

The Board of Governors of The Florida Bar, at its July, 1988 meeting, directed that an appeal be taken from the referee's recommendations and that the bar seek a disbarment.

SUMMARY OF ARGUMENT

This disciplinary proceeding is different from all prior solicitation/fee sharing cases previously addressed by this court. It, unlike all others, involves the commission by appellee of violations of two (2) criminal statutes which define, as felonies, the very acts constituting the basis of the bar's charges of ethical improprieties.

In discharging its constitutional mandate vis a vis lawyer regulation, the court has repeatedly articulated that its chief goal and paramount concern is the protection of the public. In 1983, the public, through its duly elected representatives, enacted Section 817.234(9), Fla. Stat., rendering it a felony for an attorney to solicit motor vehicle tort claims. In enacting such statute, the legislature took special pains to mandate that any grievance committee finding probable cause to believe that an attorney violated such statute "shall forward to the appropriate state attorney a copy of the finding of probable cause..."

While the court may previously have regarded solicitation and fee sharing as warranting discipline less than disbarment, it is respectfully submitted that the public perceives such conduct as far more serious, indeed, felonious. Having expressed its concern the public's perception should be afforded the weight to which it is entitled and, it is most respectfully submitted, a discipline in the instant proceeding less than disbarment would cast a serious reflection on the dignity of the court and on the reputation of the legal profession.

Appellee's misconduct was committed knowingly and stopped, not due to his appreciation of ethics violations, but solely due to fear of criminal sanction. Appellee's alleged rehabilitation is belied by his acknowledgement that but for the felony consequences of his misconduct, his scheme of ambulance chasing may well have continued.

ARGUMENT

I. AN ATTORNEY PARTICIPATING IN A SOLICITATION/ FEE SHARING SCHEME, THEREBY VIOLATING FELONY STATUTES AND ETHICAL PROSCRIPTIONS, SHOULD BE DISBARRED.

Thirty four years ago, this court determined that solicitation cannot be said to constitute an offense "that is the product of innate baseness or depravity like the embezzlement or misappropriation of funds entrusted to him, showing him to be one who cannot be properly trusted to advise and act for clients." The Florida Bar v. Murrell, 74 So.2d 221, 227 (Fla. 1954). It accordingly directed a two (2) year suspension. In its deliberations, however, the court recognized that there are non-client relationship considerations that can create cause for disbarment. One criterion established for imposition of disbarment was conduct that "would cast a serious reflection on the dignity of the court and on the reputation of the profession." (Ibid, page 224). The court recognized that the canons of ethics require "constant addition, modification and clarification" due to "changing circumstances and conditions." (Ibid, page 224).

The bar respectfully submits that changing circumstances and conditions have so impacted the area of attorney solicitation and fee sharing that discipline less than disbarment for breaches of the criminal statutes and ethical proscriptions pertaining to such misconduct will cast a serious reflection on the dignity of the court and on the reputation of the profession.

The novel aspect of this case is that the court is asked to consider, for the first time, what constitutes the appropriate discipline for an attorney who not only knowingly violated The Florida Bar Integration Rule and Disciplinary Rules of the Code of Professional Responsibility, but who also committed two (2) felonies in pursuing his misconduct. No such felonies were present in Murrell, supra, and no such felonies were present in any other previously determined solicitation case.

It is axiomatic that the primary goal of disciplinary proceedings is to effect a judgment just to the public with the court's duty to society the paramount concern. The Florida Bar v. Murrell, supra; The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). It is respectfully submitted that the public has articulated its view of attorney solicitation in a message both purposeful and resounding. In 1983, the legislature enacted section 817.234(9), Fla. Stat., which expressly prohibits attorney solicitation of motor vehicle tort cases rendering the violation of such statute a felony. Mindful of the bar's involvement in such matters, the legislature mandated that grievance committees forward all findings of probable cause to the appropriate state's attorney's office where the findings include a determination of a violation of the statute. If the public has seen fit to regard conduct such as indulged in by appellee to constitute felonious behavior, then its view and perception, it is respectfully submitted, should be taken into consideration by the court in fashioning a discipline.

Circumstances and conditions have indeed changed since Murrell, supra. The ranks of The Florida Bar membership have swelled to over 40,000.00. Population has increased by staggering proportions.

Highways have become nightmare portents of what seems inevitable gridlock. Accidents producing motor vehicle tort claims are ubiquitous. The public, traumatized by these various pressures, apparently viewed the additional indignity of attorney solicitation to be so burdensome and threatening as to require the condemnation thereof by enactment of a felony statute. If the court had doubt in 1954 that attorney solicitation did not seriously reflect on the reputation of the profession, its view must, of necessity, be altered in light of the public's expression of disdain for such conduct. It is most respectfully suggested that for the court to direct a suspension in light of the public's abhorrence of the misconduct in question, would indeed cast a serious reflection on the dignity of the court.

The referee was concerned with the case precedent and remarked:

> At the time these other cases that Mr. Barnovitz gave me were ruled on, there, apparently, was no statute making it a crime to solicit, and under the circumstances that we have in this case, the criminal aspect of the conduct was not present in these cases, I do not believe... (191).

He also discerned changed conditions and circumstances observing:

> I am impressed, I think, with the fact that the profession is under a great deal of scrutiny today, and these kinds of problems are perhaps seen in a brighter light in the public sector than back in the '50's and '60's so does that call for a more enhanced punishment, so to speak? (192).

It seems apparent to the bar that the referee, in making his discipline recommendations, felt constrained to apply a lighter standard in line with the court's position in the many solicitation cases it addressed over the years.* Notwithstanding his recommendation, the referee expressed his reservation by reciting:

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*A compendium of post Murrell cases involving solicitation is attached hereto as Appendix A.

> 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 (referee's report, page 4).

Florida's Standards for Imposing Lawyer Sanctions addresses misconduct not only involving the attorney-client relationship but non-client considerations meriting the sanction of disbarment. Rule 7-1 recites:

> Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

All of the criteria are met in this case. Appellee, by his own admission, intentionally engaged in the ambulance chasing scheme knowing his conduct to be unethical (110, 137). There can be no question that the sole purpose of the misconduct was to obtain a benefit for appellee and his police officer runner. There can be no question but that the misconduct caused serious injury to the clients involved, the public and the legal profession. It is hard to imagine individuals in more vulnerable positions than those, who finding themselves victims involved in the midst of auto accidents, suffering personal injuries and/or property damages, are preyed upon by a runner clothed with the uniform and badge of a guardian of the public trust and welfare.

II. THERE ARE INSUFFICIENT MITIGATING CIRCUMSTANCES TO WARRANT A REDUCTION OF SANCTION.

In his report, the referee noted a number of mitigating circumstances (referee's report, page 4). The bar respectfully submits that several do not constitute mitigating factors. For instance, the referee remarked upon appellee's cooperation with law enforcement authorities and the bar in the criminal and bar investigations. This so-called cooperation is illusory. Firstly, it should be understood that the only reason the misconduct came to light was because the police officer's wife, involved in a domestic relations dispute with him, determined to report the scheme to the criminal authorities (114, 115). Once the tale was told, there was an iron clad case established beyond a reasonable doubt based, among other things, upon a paper trail (59). Appellee had abandoned his scheme over a year prior to its revelation. The presumption is inescapable that but for a woman scorned, the misconduct would never have surfaced; certainly not from the mouth of appellee. The bar urges, as it has before, that the admission of wrongdoing by a respondent, faced with overwhelming and irrebuttable evidence of his misconduct, is simply not heroic or mitigating.

The referee considered as a mitigating circumstance that appellee has "voluntarily stopped his conduct before it ever came to light" (referee's report, page 4). The bar, again, most respectfully disagrees. Viewed in a light most favorable to appellee, his cessation of the misconduct in question was due solely and exclusively to the revelation that he was engaged in criminal conduct. The fact that he was violating his professional code of conduct played no role in his determination to abandon the scheme. He could not state, even at the

final hearing, that he would have abandoned the arrangement merely because it was unethical, a fact he knew at the outset of his misconduct (136-138).

Reference is made to the emotional trauma experienced by appellee and his family (referee's report, page 4). In the bar's view, this should not be a mitigating circumstance. It is a self fulfilling prophecy and tragedy that miscreants wreak havoc upon their families. This is true in every case where public sanctions are involved.

Ignorantia legis non excusat is a maxim based in antiquity as a protection against anarchy. It is particularly unbecoming for an attorney to suggest that his ignorance of the law should somehow mitigate his wrongdoing. This is especially true where the attorney has acknowledged his appreciation that his misconduct was committed in knowing breach of ethical proscriptions. Thus, the bar most respectfully takes exception to the referee's suggestion that appellee's failure to appreciate the criminality of his actions is a mitigating circumstance.

CONCLUSION

The public and the bar are disgusted by the specter of attorneys practicing base falconry, releasing taloned runners to fetch the carrion of highway disasters in order to quench their appetites for contingent fees. A disbarment order in this case will serve to assure the public that the bar is sensitive to its concern and, it is respectfully submitted, will deter others from similar misconduct.

All of which is respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief of The Florida Bar was served upon John A. Weiss, Esquire, attorney for respondent, Post Office Box 1167, Tallahassee, FL 32302 by regular mail on this 12th day of August, 1988.

DAVID M. BARNOVITZ