IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO: 72,070
TFB NO: 87-23,943 (10B)

V.

VAL R. PATARINI,

Respondent.



# RESPONDENT'S ANSWER BRIEF

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## FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY

## STATEMENT OF THE CASE

The Respondent is in agreement with the Complainant's Statement of the Case, except for the last sentence therein. Appellate Rule 9.210(B)(3) states:

"A statement of the case and of the facts which shall include the nature of the case, the cause of the proceedings and the disposition in the lower tribunal . . .

The last sentence of the Bar's case does not fall within the purview of the above referenced rule, It is an opinion which attempts to influence this Court's determination and should be stricken.

## STATEMENT OF THE FACTS

Abbreviations used in this brief are as follows:

R. = Transcript page of testimony taken at Referee Hearing, December 22, 1988

Initial Brief = Complainant's Initial Brief

A. = Appendix to Complainant's Initial Brief

Respondent agrees with Complainant's Statement of Facts except to the extent indicated below.

Respondent agrees with the first paragraph of the Bar's Statement of Facts, however, the following should be added for clarification.

Neither the lump sum alimony award of $50,000.00 nor the $20,000.00 in special equity were *so* much as mentioned between the Respondent and his ex-wife, Kay while they were seeing each other after the dissolution. Similarly, the alimony arrearage was never discussed between them in light of the Respondent paying the majority of the expenses for Kay and their son. It was not until Respondent refused to give Kay $10,000.00 to **pay** her attorney fees did the problem exist, Kay insisted that he pay the fees, and the Respondent refused.

On page three of the Complainant's Statement of Facts the Complainant alleges "[T]he Respondent advised Max that he did not want anything done at the present time and that he would call him when he did".

Special Agent Dey known to the Respondent as Max, contacted the Respondent a week or two after their initial conversation, and attempted to solicit from the Respondent, a time and date when he intended to carry out his threat.

At that time the Respondent advised Max that if he wanted something done he would contact him. The Respondent stated that after his communication with Special Agent Dey he never gave it anymore thought. (R. 26, 27).

No further communication to anyone regarding any threat was made thereafter.

## SUMMARY OF ARGUMENT

The Board of Governors of the Florida Bar seeks to overturn the Referee's recommendation as to discipline but has voted to approve the Referee's findings of fact and recommendations as to guilt.

The Respondent would show that the Referee had sufficient evidence, the majority of which was unchallenged by the Bar, to make his findings and recommendations to this Court. Moreover, the Referee's recommendation of guilt, when viewed in conjunction with the Florida Standards for Imposing Lawyer Sanctions cannot be said to be too lenient. The report and recommendations must be upheld unless clearly erroneous or lacking in evidentiary support.

## ARGUMENT

**THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF DISCIPLINE ARE AMPLY SUPPORTED BY THE RECORD AND MUST NOT BE OVERTURNED.**

The Florida Bar has the burden of proving its case by clear and convincing evidence. case law is voluminous regarding the proposition that a Referee's findings of fact and recommendations in attorney discipline proceedings come to the Supreme Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. (emphasis added). See, The Florida Bar vs. Wagner, 212 So.2d 770 (Fla. 1968); The Florida Bar vs. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar vs. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar vs. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar vs. Hirsh, 359 So.2d 856 (Fla. 1978); The Florida Bar vs. Fields, 482 So.2d 1354 (Fla. 1986).

At trial, the Complainant did not offer any evidence except stipulated evidence and did not rebut the testimony or report of Dr. Sidney Merin. Likewise, the Complainant did not challenge the testimony of Attorney C. Ray McDaniel. In fact, the Complainant did not challenge or refute the testimony before the Referee of the Respondent, Val R. Patarini.

Moreover, the Complainant has not challenged the Referee's findings of fact or recommendation as to guilt, but only challenges his recommendation as to discipline,

Despite the Complainant's inability or refusal to rebut the testimony presented by Respondent, and despite the Complainant's agreement to the findings of fact, the Complainant seeks to have Respondent suspended from the practice of law for a period of ninety-one days and thereafter until such time as he shall prove his rehabilitation.

The Complainant attempts to buttress its position by attacking the testimony of Dr. Merin. This is, indeed, a curious approach given the referee's finding that the Complainant did not challenge Dr. Merin's findings at trial. (Report of Referee at P. 4). In fact, the Complainant refers to Dr. Merin's findings as "garbage". This vitriolic attack on Dr. Merin's testimony is palpably improper given the Bar's acquiescence to his findings at trial.

In any event, the Referee accepted Dr. Merin's findings and of course, his findings are entitled to the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. (Rules Regulating The Florida Bar 3-7.5(k)(1)).

Moreover, the Referee found the Respondent guilty of a violation of Rule 1-102(A)(6) of the Code of Professional Responsibility for engaging in any other conduct adversely reflecting on his fitness to practice law. Additionally, he found Respondent guilty of a violation Rule 11.02(3) of the Integration Rule of The Florida Bar in so far as it applies to

"good morals". (A. 7). He specifically failed to find Respondent guilty of Rule 1-102(A)(3), engaging in illegal conduct involving moral turpitude; Rule 1-102(A)(4), engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 1-102(A)(5), engaging in conduct that is prejudicial to the administration of justice.

The Complainant apparently agrees with the Referee's findings with respect to these not guilty findings as referenced above. However, based upon the case law cited in Complainant's Initial Brief, The Florida Bar is seeking a ninety-one day suspension.

In ostensible support of its position, Complainant cites several disciplinary decisions of this Court. The Complainant likens this case to the case of The Florida Bar V. Collee, 533 So.2d 767 (Fla. 1988). In Collee, the accused attorney received a ninety day suspension as opposed to the ninety-one day suspension claimed by the Complainant in his brief. (emphasis added). In any event, the respondent in that case learned of fraud in a personal injury case which resulted in a one million dollar verdict. Armed with this knowledge, Collee contacted the lawyer for the defense and indicated that he could possibly prove a fraud on the court in return for payment in the amount of $200,000.00. The court in Collee indicated that the respondent's attempt to benefit financially from furthering the truth seeking process, was "incomprehensible". Nevertheless, Collee received a suspension which did not require proof of rehabilitation as the Bar seeks here.

The case at Bar is clearly distinguishable. Respondent's conduct was based upon a "fantasy" which was the product of an emotionally charged post-dissolution matter. Moreover, the Respondent here immediately abandoned his idea and although goaded by the undercover detective to carry out this fantasy, declined to do *so.* (R. 27).

The Complainant also cites The Florida Bar vs. Martell, 446 So.2d 1058 (Fla. 1984), for the proposition that a suspension requiring a showing of rehabilitation prior to reinstatement is appropriate, In Martell, the respondent actually paid $1,000.00 to an undercover detective to threaten a debtor and injure the debtor's dog.

The Respondent respectfully suggests that the Complainant's reliance on Martell is badly misguided. In Martell, the respondent did, in fact, actually hire someone to cause physical injury, and thereafter paid the individual for causing the injury. In essence, Martell carried out his plan as opposed to thinking and talking about it. Additionally, the Respondent would respectfully suggest that Martell's situation was aggravated by the fact that he was attempting to collect $50,000.00 from a person to whom he had loaned $10,000.00 three and a half months earlier. Obviously, the court considered this usurious loan to be further evidence of the poor character of the respondent in that cause. The court further noted that Martell was under temporary suspension for the preceding year and a half, ostensibly, for some other acts of misconduct.

In the case at Bar, Respondent has no prior disciplinary problems in twenty-six years of practicing law. In further contrast, Respondent did not hire anyone to cause physical injury, did not pay anyone to cause physical injury, and in the words of the Referee, no one was "even inconvenienced" by Respondent's conduct. (A. 6). Accordingly, the Complainant's reliance on the Martell case is clearly unjustified.

The Complainant also cites the case of The Florida Bar vs. Johnson, 511 So.2d 295 (Fla. 1987). This case involved an attorney who had a dispute with his client over a fee and wrote several letters to the client as well as filed a public document knowing that it contained false representations. The court found that the attorney's conduct in writing letters constituted unprofessional conduct but that it did not constitute the necessity for a public reprimand. However, the fact that there was a blatant misrepresentation in that document did constitute the necessity of a public reprimand. In contrast, in the case below, the Referee specifically found Respondent not guilty of 1-102(A)(4) concerning fraud, deceit and misrepresentation. Moreover, Respondent admitted his communications with the special agent and the confidential informant however, contrary to the Johnson case there was no threat, but only discussion.

The Complainant would also have this court rely upon The Florida Bar vs. Goldin, 240 So.2d 300 (Fla. 1970). The

comparison the Complainant attempts to make between the Goldin case and the instant case is wholly untenable. In Goldin, the respondent suffered from a neurotic condition which contributed to his stealing trust funds from clients and later writing worthless checks to cover those debts.

In the instant case, there is an absolute absence of any psychiatric testimony to indicate Respondent suffers from a neurotic condition or any other mental infirmity. On the contrary, from questioning by the Referee of Dr. Sidney Merin regarding the Respondent's fitness to practice law the following was asked:

> Q. Do you think that Mr. Patarini has any type of personality disorder or problem, psychiatric problem what ever label you want to put on it which would adversely effect his ability to practice law in the future. (emphasis added).
>
> A. Not at all Sir. (R. 89)

In further distinction from the Goldin case Respondent's conduct in this matter had no relationship to the practice of law, any of Respondent's clients, or the loss of client money.

Respondent's research has revealed no case of a similar fact pattern with which to guide this court in its determination of the appropriate discipline. However, in November, 1986, The Florida Bar's Board of Governors approved the Florida Standards Imposing Lawyers Sanctions. The Board acknowledged that it will be using these standards as established Board guidelines for discipline pursuant to Rule

3-7.8, Rules of Discipline, as well as in its recommendations to the Florida Supreme Court for discipline to be imposed. It seems odd the Complainant did not mention these guidelines in arguing the appropriate discipline to the court in its Initial Brief.

These Standards 3.0 reads in pertinent part:

> C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS
>
> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> a. The duty violated;
> b. The lawyer's mental state;
> c. The potential or actual injury caused by the lawyer's misconduct; and
> d. The existence of aggravating or mitigating factors;

Standard 5.1, Failure to Maintain Personal Integrity is applicable to Respondent's conduct in this cause. This Rule reads in pertinent part:

> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0 the following sanctions are generally appropriate in cases involving . . . fitness as a lawyer in other respects.

In addition, Standard 5.14 addresses a violation of Rule 1-102(A)(6) of the Code of Professional Responsibility and states:

> 5.14 Private reprimand is appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Respondent respectfully suggests that this Standard is the only applicable rule with respect to the findings of guilt of the Referee in this cause. Accordingly, this court must now assess the general considerations listed above as well as aggravating and mitigating circumstances in determining the appropriate discipline in this cause.

First, with respect to Standard 3.0(a), it is respectfully submitted that Respondent violated no duty as the subject conduct of Respondent was totally unrelated to the practice of law.

With respect to the Respondent's mental state under subsection (b), the following is offered. Although Dr. Merin stated that Respondent has no mental illness or disorder which would adversely effect his ability to practice law, he did find that Mr. Patarini was very depressed at the time of his conversations with the undercover officer and felt he was losing or had lost control over his life. (A. 3). Clearly, Respondent's mental state contributed to his rash conduct and should be considered in mitigation.

Subsection (c) addresses the potential or actual injury caused by Respondent's conduct. In this respect, as the Referee noted, no one was harmed, and given the Respondent's early abandonment of his fantasy, the potential for injury was remote at best.

Having considered the first three criteria the court should now address its attention to the existence of aggravating or mitigating factors as mandated by these rules.

Section 9.22 of the Florida Standards for Imposing Lawyer Sanctions list the following factors to be considered in aggravation.

a. prior disciplinary offenses.
b. dishonest or selfish motives.
c. a pattern of misconduct.
d. multiple offenses.
e. bad faith obstruction of disciplinary proceedings by intentionally failing to comply with the Rules or orders of the disciplinary agency.
f. submission of false evidence, false statements or other deceptive practices during the disciplinary process.
g. refusal to acknowledge wrongful nature of conduct.
h. vulnerability to victim.
i. substantial experience in the practice of law.

Applying these standards to the facts of the instant case, it is obvious that only one aggravating factor can be said to exist. The Respondent has no prior disciplinary offense in twenty-six years of practicing law. There was neither a pattern of misconduct nor multiple offenses present here. Moreover, the Respondent waived probable cause, stipulated to the facts at referee level and was contrite about his conduct in this matter. Finally, there was no victim injury and although the Respondent has substantial experience in the practice of law, that experience is irrelevant to the type of misconduct the court is addressing here.

Accordingly, the only aggravating factor arguably present is dishonest or selfish motive. However, Respondent would show that he offered to buy his ex-wife a diamond ring or pay $10,000.00 on her automobile in lieu of paying her attorneys fees. (R. 16). Furthermore, Respondent continued to pay for his son's college education, and was willing to convey his undivided one-half interest in the $182,000.00 marital home in lieu of the $70.000.00 debt to his ex-wife. (R. 34, 26). In light of these facts and Respondent's testimony that he felt his wife was overcharged by her attorney, it appears that Respondent's motives were not selfish but an expression of his disagreement with the amount of attorney's fees charged by counsel for his ex-wife.

While only one aggravating factor, at most, is present, there are many mitigating considerations which militate towards upholding the recommendation of the Referee. Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions reads in pertinent part:

> Mitigating factors include:
>
> a. absence of prior disciplinary record;
> b. absence of a dishonest or selfish motive;
> c. personal or emotional problem;
> d. timely good faith effort to make restitution or to rectify consequences of misconduct;
> e. full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
> f. inexperience in the practice of law;
> g. character or reputation;
> h. physical or mental disability or impairment;

i. unreasonable delay in disciplinary proceedings, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
j. interim rehabilitation;
k. imposition of other penalties or sanctions;
l. remorse;
m. remoteness of prior offenses;

Again, Respondent has enjoyed twenty-six discipline free years as a member in good standing in The Florida Bar. Also, as Dr. Merin testified, Respondent was depressed during the time in question and felt that he was losing or had lost control over his life, and thus, was experiencing personal and/or emotional problems.

Additionally, Respondent immediately rectified his misconduct by, in his words, giving no more thought *to* his conversation with Agent Dey even though the undercover officer prodded him to commit to him. (R. 26, 27).

The Referee also believed the testimony of Respondent as stated in his report, "assuming Respondent was serious at the time he talked with Agent Dey, he had clearly and completely and voluntarily abandoned any plan he may have formed." (A. 4). It is manifest that the Referee has serious doubts as to whether Respondent ever really contemplated the action discussed with the undercover officer.

Respondent cooperated in the disciplinary process in every respect. He both agreed to probable cause at the first stage and stipulated to the evidence submitted by the Complainant at trial level.

With respect to Respondent's character and reputation, C. Ray McDaniel, Esquire, testified that he has known Respondent for twenty-three years. It was Mr. McDaniel's opinion that Respondent's professional ability, integrity and ethics, were all above reproach. (R. 99). Moreover, the Referee specifically found Respondent "has very high ethics". (A. 4).

Although Respondent is not claiming prejudice due to the thirty-two months between the subject conduct and present, there can be no question that he has demonstrated interim rehabilitation insofar as no other disciplinary problems have arisen and Respondent has undertaken that supportive therapy recommended by Dr. Merin.

Moreover, Respondent's remorse is evident from the testimony of Dr. Merin as well as his own testimony. Dr. Merin stated that "the whole thing has had a very sobering effect on him. No question he would not have acted upon his threats but what he has learned now is, you don't even talk about threats of that nature . . .". (R. 70).

"As I've indicated he . . . this entire matter has had a sobering effect on him despite the fact that he would not have done anything against the law and so on." (R. 72).

"It's had a positive effect on him. He's grown up a great deal. The nature of his personality is such that the type of fantasies he engaged in, the flight of ideas that he engaged in, I think he pretty much recognizes is - is just that and doesn't constitute the real world." (R. 73).

"So for the past couple of years he's been beating himself internally. The punishment is – his punishment is what he imposes on himself." (R. 84).

If a private reprimand is generally appropriate as set forth in Standard 5.14 dealing with conduct of this nature, and given the overwhelming mitigation, as well as the favorable considerations under Standard 3.0, it is inconceivable that Complainant can make a good faith request for a suspension requiring proof of rehabilitation prior to reinstatement. The fact that the Complaint was not filed as one of minor misconduct, appears to be the only reason this court should not impose a private reprimand. Rule 3-7.5(K).

That the Complainant's Board of Governors can callously ignore the rules it created for guidance in arriving at consistent and appropriate discipline is, with all due respect, shameful.

Respondent has candidly admitted his actions were ill-advised and "stupid". He has been cooperative with complainant and acknowledges the violation of Rule 1-102(A)(6) and Rule 11.02(3)(a). However, the Complainant's request for discipline is clearly not mandated by the Florida Standards for Imposing Lawyer Sanctions and not justified under the Referee's findings of the fact with which the Complainant agrees.

As Complainant points out in its Initial Brief, the purpose of discipline is protection of society; fairness to the attorney; and deterrence of other attorneys who may be tempted to engage in similar misconduct. The Florida Bar V. Pahules, 223 So.2d 130 (Fla. 1970).

Given its nature, this case involves neither protection of the public nor deterrence of other attorneys. Respondent respectfully suggests that it would not be fair to destroy an unblemished 26 year law practice, and the Florida Standards for Imposing Lawyer Sanctions are supportive of this position.

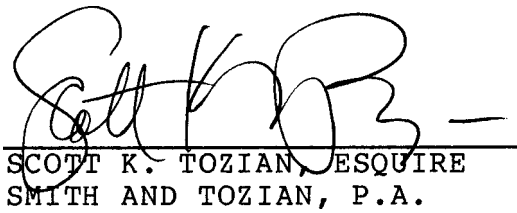
## CONCLUSION

The Complainant's position in its Petition for Review and Initial Brief, is unsupported by the stipulated evidence, the case law, and the applicable rules.

The Referee's below questions, "if Respondent was ever serious in the first place". (A. 5). The Referee further found that Respondent has more than "paid" for his admittedly stupid conduct , . .". Respondent respectfully requests that this Honorable Court reject the illogical and punitive request of Complainant and uphold the Referee's recommendation of discipline imposing a public reprimand and probation.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Answer Brief has been furnished by U. S. Mail delivery this 8 day of May, 1989, to: John B. Root, Jr., Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801.



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