IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 72,070
[TFB #87-23,943 (10B)]

v.

VAL R. PATARINI,

Respondent.
_____/

THE FLORIDA BAR'S REPLY BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286
Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 222-5286
Attorney No. 217395

and

JOHN B. ROOT, JR.
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
Attorney No. 068153

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SYMBOLS AND REFERENCES

The complainant, The Florida Bar, shall be referred to as The Bar.

The transcript of the final hearing on December 22, 1988, shall be referred to as T.

Bar exhibits shall be referred to as App, B-Ex.

SUMMARY OF THE ARGUMENT

The Florida Bar reiterates that it does not contest the referee's findings of fact and recommendations as to guilt, but rather contests the referee's recommended discipline.

In his Answer Brief, the respondent attempts to excuse his behavior on one hand by arguing that he was depressed and was reacting to an emotionally charged post-dissolution action involving his former wife Kay. On the other hand, the respondent also argues that he does not suffer from any type of neurotic condition or other mental infirmity. It is difficult to understand how both positions could be true given that depression is defined by the Webster's New World Dictionary (2d College ed. 1976) as an emotional condition, either neurotic or psychotic, that is characterized by feelings of inadequacy and hopelessness.

The main concern with Dr. Merin's findings is that some of the facts provided to him by the respondent, and on which his report was based, were inaccurate. (T. pp 77-81) Dr. Merin admitted that he did not check on the accuracy of any of the facts. (T. pp. 77-78)

Finally, the respondent states that he has demonstrated rehabilitation and has undertaken the supportive therapy recommended by Dr. Merin, but the record is bare of the slightest scintilla of evidence of such therapy. In fact, Dr. Merin testified just the opposite, "...[h]e's not about to start thinking clearly in terms of getting into any counseling until all of this is over". (T. p 81)

Therefore, it is submitted that the only appropriate discipline for this respondent would extend to suspension for a minimum of ninety-one days to ensure that he seeks and completes the supportive treatment recommended by his former psychologist, Dr. Merin.

ARGUMENT

WHETHER A PERIOD OF SUSPENSION OF AT LEAST NINETY-ONE DAYS RATHER THAN A PUBLIC REPRIMAND AND A ONE YEAR PERIOD OF PROBATION IS THE APPROPRIATE LEVEL OF DISCIPLINE IN THIS CASE GIVEN THE SERIOUS NATURE OF THE RESPONDENT'S CONDUCT.

The real issue in this case is with referee's recommended discipline. Respondent is correct in that a referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986). This Court, however, enjoys a broader scope of review with respect to a referee's legal conclusions and recommendations. The Florida Bar In re Ingles, 471 So.2d 38 (Fla. 1985).

The respondent would have this Court to believe that the subject of lump sum and periodic alimony was never discussed between the respondent and his former wife while they were living together after the divorce. The record does not entirely support this thesis. The respondent replied to a question that "...basically nothing was ever said to the $70,000 and nothing was ever said to the $1,000 a month..." (Emphasis supplied) (T. pp 15 and 37)

Whether or not the subject was discussed between them is immaterial because the fact is that the respondent failed to obey the court order concerning the payment of alimony. The respondent became upset when Kay wanted him to pay her remaining

$10,000 attorney's fees. During his conversation with Sal Cimino, the confidential informant, the respondent testified that he felt as if Mr. Frost was attempting to collect his fee from him rather than from Kay. (T p.20) This apparently upset the respondent and things escalated even further after Kay, through her attorney, attempted to enforce the court's order and collect the alimony due her. This apparently angered the respondent and he met with "Max" only two days after the Motion for Contempt was filed. (T p.44) Although he took no further action toward hiring "Max", it is questionable whether it can accurately be stated that he abandoned the idea early on. He had two conversations with the confidential informant and two with "Max". He never told "Max" that he had changed his mind and would not require his services. What he told him was "I don't want done anything (sic) at [this] time; and if and when I ever want something I'll let you know." (T. p. 22)

The respondent owed Kay $70,000 and was willing to consider hiring a man to scare her attorney out of collecting it. He was also willing to go to jail, despite the best efforts of his friend, C. Ray McDaniel, to talk him out of it, in order to not pay Kay the money she was entitled to. (T. pp 96-98) For whatever personal reasons, Kay did not want a one-half interest in the house which was allegedly offered by the respondent. She was entitled to request that the respondent abide by the terms of the court's previous order. If she accepted his offer of an

interest in the house, she would, most likely, either wind up living in the house with her former husband or suing to partition the property.

With respect to Dr. Merin's report, the concern is with the doctor's conclusions, which appear to have been based on flawed information supplied to him by the respondent. (T. pp 77-81) Dr. Merin admitted that he did not check on the accuracy of any of the facts. This came to light in the cross-examination of the doctor. (T pp 77-81) Furthermore, exception is taken to the respondent's statement that, in its Initial Brief, the Bar referred to Dr. Merin's testimony as "garbage". A review of the brief clearly shows that the Bar quoted a commonly used modern expression, "Garbage in; garbage out" to illustrate the fact that if Dr. Merin was provided with inaccurate facts, his report, based upon these facts, would likewise contain certain inaccuracies. In no way does this reflect "a vitriolic attack" on Dr. Merin's qualifications or testimony.

Respondent presents a somewhat confusing argument in his Answer Brief. In his discussion of The Florida Bar v. Goldin, 240 So.2d 300 (Fla. 1970), he argues that he does not suffer from any type of neurotic condition or any other mental infirmity. Respondent attempts to distinguish the case at Bar from Goldin, supra, but because the attorney in Goldin, supra, suffered from a neurotic condition, his discipline was less severe than it might

otherwise have been. Mental or emotional problems are considered in mitigation. It is reasonable to argue, therefore, that if in fact the respondent does not suffer from any type of mental infirmity or neurotic condition, then it makes the nature of his misconduct much more serious.

Respondent then attempts to argue (Respondent's Answer Brief, p.12) that he does suffer from personal and/or emotional problems (e.g. depression) and this should operate to mitigate his discipline. Depression is defined by the Webster's New World Dictionary (2d College ed. 1976) at page 379 as an emotional condition, either neurotic or psychotic, that is characterized by feelings of hopelessness and inadequacy. Aside from the differences between subparagraphs (c) and (h), Rule 9.32 of the Florida Standards for Imposing Lawyer Sanctions makes no attempt to subdivide emotional problems into specific psychological illnesses. The respondent either suffers from some type of emotional problem that has clouded his judgment or he doesn't. The respondent's position in his Answer Brief on this point is confusing.

Respondent spends a number of pages in his Answer Brief discussing the Florida Standards for Imposing Lawyer Sanctions. Presumably, the Board of Governors consulted these guidelines when it considered the respondent's case at its January, 1989, meeting. Respondent asserts that Rule 5.14 is the only rule

applicable to the referee's findings in this case. He fails to mention the other Rules under Rule 5.1 that call for more severe forms of discipline than Rule 5.14 which calls for a private reprimand. Not only is the referee without the power to recommend a private reprimand, but clearly the serious nature of the respondent's misconduct does not warrant a private reprimand.

It is submitted that Rule 5.12 would be a more appropriate Standard in this case. It calls for a suspension when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on his fitness to practice law. Although the State Attorney's office declined to prosecute the respondent, the Rule does not state that an attorney must formally be charged with or convicted of a crime. Clearly, contacting a man for the purpose of hiring him to intimidate another by violence is not a legal act.

Aggravating and mitigating factors must also be taken into consideration in arriving at the appropriate level of discipline. In mitigation, the respondent may be suffering from emotional and/or personal problems, has no prior disciplinary history and undoubtedly is remorseful for what has happened. The respondent notes in passing that this matter has taken some thirty-two months to process but he does not claim any prejudice, and rightly so. Bar Counsel was prepared to set this matter for final hearing as early as April, 1988. (See Appendix to the

Reply Brief) The delay in setting this matter for final hearing was in large part due to scheduling problems between respondent's counsel, Bar counsel and the referee, and because of the heavy trial case load of respondent's counsel. This is the first time the respondent has mentioned anything concerning the delay in this matter. Furthermore, the record is totally devoid of any evidence he has demonstrated any rehabilitation or has undertaken any supportive therapy in the interim as he states in his Answer Brief. Therefore, his unsupported assertion that he has sought rehabilitation during the pendency of this proceeding should not be considered in mitigation.

In aggravation, the respondent has practiced law for some twenty-six years. The Florida Bar stands on its argument in its Initial Brief that he knew what he was doing when he spoke to "Max" and he fully understood the consequences with respect to his career if his misconduct was discovered. (Bar Ex. 1, taped conversation of October 30, 1986, p. A26) It is well settled that an attorney may be disciplined for engaging in improper personal behavior that is not related to the practice of law. The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1968). It can also be argued that his motive was a selfish one in that he did not want to pay his ex-wife the money that was due her pursuant to the court's order. He even let himself be found in contempt of court and went to jail where he stayed until he begged his friend, Mr. McDaniel, to come and get him out. Regardless of

what material goods he offered her, the fact remains that he was under court order to pay her a certain sum of alimony. He admittedly was financially able to meet said payments but he refused to do so and offered an unacceptable substitute. (T. p 24) He also felt that Mr. Frost was attempting to collect his fee from him rather than Kay and he simply did not want to pay it. (T. p 20)

The Florida Bar stands upon the case law cited in its Initial Brief but must draw this Court's attention to a typographical error on page fifteen of its Initial Brief. The respondent is correct in pointing out that the attorney in The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1988) received a ninety day suspension and not a ninety-one day suspension. The Florida Bar cited the case not so much for the period of suspension received as for the fact that the attorney was found guilty of misconduct even though his actions were not directly prohibited by the Rules Regulating The Florida Bar.

Respondent is incorrect in his brief in attempting to distinguish The Florida Bar v. Johnson, 511 So.2d 295 (Fla. 1987) where he states that, contrary to Johnson, supra, the respondent made no threats. The court in Johnson, supra, agreed with the referee that the attorney's letters to his client did not constitute any threat that he would personally harm his client. Likewise, the respondent did not actually threaten Mr. Frost

although his behavior was clearly conduct unbecoming a lawyer. Undoubtedly Mr. Frost felt threatened when he learned of the respondent's intentions.

The respondent, in his Answer Brief, attempts to minimize the fact that he met with a "muscle man". However, not only did the respondent think about hiring someone like "Max" to either physically harm or frighten opposing counsel in order to alter his ex-wife's demands, but he actually arranged to contact "Max" and met with him face-to-face to discuss the situation. He even went so far as to state that there was another person, a client who owed him money, that he would like to frighten. (Bar Ex. 1, Taped conversation of October 30, 1986, P. A23) Respondent appears to believe that a public reprimand will suffice. Such reprimands, however, should be reserved for misconduct such as isolated instances of neglect; unintentional technical violations of trust accounting rules; or lapses of judgment. The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). Perhaps the respondent's actions could be termed a mere lapse in judgment had he only gone so far as to discuss hiring or inquire as to how to contact "Max", but he did not stop there. He met with him. Furthermore, he clearly knew what he was doing would have serious consequences to his status as an attorney if he was discovered. (Bar Ex. 1, Taped conversation of October 30, 1986, p. A26)

The record is absolutely devoid of any evidence the respondent has overcome his emotional problems or has sought the appropriate supportive therapy. In fact, Dr. Merin testified that therapy would not be effective until the Bar proceedings are behind him. (T. p 81) The respondent admittedly suffers from depression, post-traumatic stress disorder and engages in "magical thinking". (T. pp 62, 66) The respondent appears to be an emotionally disturbed, though intelligent, individual. The record does clearly show that he knew what he was doing was wrong and he appreciated the potential consequences. Both dissolution actions and post-dissolution actions are often emotionally charged events. It is submitted that a response such as the respondent's is so grossly inappropriate that it deserves nothing less than a ninety-one day suspension. Not only should such misconduct be sternly punished to deter others who might consider engaging in similar actions, but an attorney who represents an opposing party in any matter should not have to fear for his personal safety for properly protecting his client's rights and interests.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to affirm the referee's findings of fact and recommendations of guilt, but review his recommended discipline of a public reprimand, one year period of probation and payment of costs and instead impose a period of suspension of at least ninety-one days requiring proof of rehabilitation, probation, and payment of costs now totaling $1,241.71.

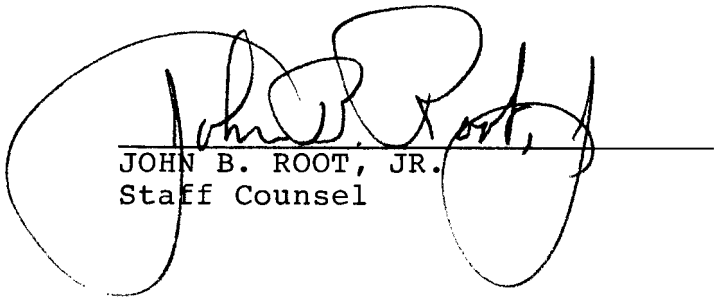
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB No. 217395

and

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
TFB No. 068153



JOHN B. ROOT, JR.
Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing The Florida Bar's Reply Brief have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1925; a copy of the foregoing has been furnished by certified mail, return receipt requested no. P-034 463 657 to Jack T. Edmund, counsel for respondent, at 423 Pool Branch Road, Ft. Meade, Florida 33841; a copy of the foregoing has been furnished by certified mail, return receipt requested no P-034 463 658 to Scott K. Tozian, counsel for the respondent, at Smith and Tozian, P.A., 109 North Brush Street, Suite 150, Tampa, Florida 33602; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 17th day of May, 1989.

JOHN B. ROOT, JR.
Bar Counsel