IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALBERT C. SIMMONS,

Respondent.
_____/

Case No. 76,023

TFB File No. 89-00705-08

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, Albert C. Simmons, will be referred to as Respondent or as Mr. Simmons throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as The Bar.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to the hearings before the Referee on August 20, 1990, September 26, 1990, and October 10, 1990 shall be by the symbol TR I, TR II, and TR III, respectively, followed by the appropriate page number.

References to the exhibits submitted into evidence at final hearing shall be as follows: EX 1, the tape recorded conversation between Respondent and Ms. Barnes, (Exhibit 1 in evidence); EX 2, Respondent's September 5, 1990 letter (Exhibit 2 in evidence).

References to Respondent's brief shall be as follows: RB followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar would augment Respondent's statement of the case and statement of the facts by the following:

On August 20, 1990, the pretrial conference was held in regard to this case. On September 26, 1990, a hearing was held on the proposed Conditional Guilty Plea for Consent Judgment. The Referee disagreed with the proposed 91 day suspension. On October 10, 1990, the Final Hearing was held in which the referee, upon reviewing the evidence and case law, recommended a one year suspension and payment of costs.

SUMMARY OF ARGUMENT

The function of the Referee in a disciplinary matter is to determine the weight and sufficiency of the evidence and based on it, make a recommendation as to discipline to be imposed which is exactly what took place in this case. The Referee was not offended by Respondent acquiring the venire list but by what he did with it. The case law presented to the Referee was not on point and does not support a 91 day suspension in light of the Referee's findings. The recommended discipline meets the criteria established by the Court while at the same time giving great weight to the mitigation presented in this case. A one year suspension is the appropriate discipline in this case based upon the Referee's findings.

ARGUMENT

The Referee having considered the case law presented to him, the recommendations of the parties as to appropriate discipline, the mitigation present in this case, and having determined the weight and sufficiency of the evidence recommended a one year suspension from the practice of law plus payment of the costs of the proceedings. This recommendation should be upheld in light of the Referee's findings in this case.

The Respondent is requesting through his brief that this Court reweigh the evidence in this case and relitigate the question of whether Respondent intended to subvert the judicial system. The Referee's examination of the evidence led him to the conclusion that the Respondent was actively trying to influence the makeup of the jury for the then pending criminal matter. RR 5. The Referee heard Respondent's explanation for the telephone call between the Respondent and Ms. Barnes and listened to the taped conversation and made a finding of fact that Respondent's statements that he did not intend to prejudice the juror were unbelievable. RR 5.

In The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990), the Respondent challenged the Referee's finding of fact and recommendation as to discipline. The Florida Supreme

Court, in upholding the Referee's conclusion that Respondent's testimony was not entirely truthful, said "This Court cannot reweigh the evidence or substitute its judgment for that of the trier of fact." Id. at page 767. "A Referee's finding of fact will be upheld unless it is clearly erroneous or lacking evidentiary support." Id. at page 767.

In the Referee's report, the Referee describes the taped conversation as one where the Respondent was telling Ms. Barnes what to say and what not to say. RR 5. Respondent calls this characterization of the conversation an exaggeration. However, in the light of the conversation as a whole, it is clear that Respondent was communicating to Ms. Barnes what her response to questioning should be.

Respondent makes clear the fact that the reason he wants her to respond a particular way to the venire questioning is so that she is not dismissed from the venire. He states, "I just don't want you to call up there and get off that damn jury." Exhibit 1. When Ms. Barnes suggests that they might not seat her, Respondent replies, "Well they may not but I'm damn sure ain't going to throw you off." Exhibit 1.

Respondent told Ms. Barnes that he wanted her on the jury. Exhibit 1. Respondent argued at the hearing that he really meant that he wanted her on the venire, not the jury. TR III-14. However, the Referee believed that the clear

implication of his statement was that Respondent wanted a friend on the jury, not just the venire. TR III-25, RR 5.

Respondent argues that he did not tell Ms. Barnes to deny their friendship. The Referee made the following observation regarding this when he paraphrased Respondent's conversation with Linda Barnes: "Then also to engage in a conversation of what to say and what not to say, if you were being questioned during voir dire, tell them you know me, but don't tell them--in a joking way said, we make love or whatever--but the implication is clear, don't tell them--don't disclose how good of friends we are. You can say you know me, and then, be as quiet as possible." TR III-25. Additionally, the Referee focused on the statement Respondent made to Ms. Barnes that "We're defending." Exhibit 1. Respondent used the word "we're" thus creating the impression that he and Ms. Barnes are on the same side. It is clear that his goal was to put her on his side and have an ally at the trial. Respondent put Ms. Barnes in a defense related posture and identified to her the case so that she would know that she was supposed to be in a defense oriented posture. Respondent argues that it is merely an assumption that a juror would side with an attorney who had spoken to her, but it is the only reasonable assumption, especially in light of the already established relationship between Respondent and Ms. Barnes.

In Respondent's brief, Respondent argues that every attorney's first question during Voir Dire is "Do you know the lawyers in the case?" and that simple question would have revealed the relationship between Ms. Barnes and Respondent. RB 21. However, Respondent ignores the fact that this question can be answered "yes" without divulging the contact between the attorney and the potential juror or the extent of the relationship. The Respondent also presupposes that an answer of yes will lead the attorney to ask more questions. In a small town where all the citizens are acquainted with one another, it is probable that a potential juror could answer all the questions truthfully and yet not prod the attorney to inquire more deeply as to the relationship or disclose inappropriate contact with opposing counsel. The whole thrust of Respondent's conversation with Ms. Barnes was to get her to answer this very question without giving away the extent of their relationship.

The Referee states, "I don't think Respondent can get much worse than calling up a potential venire member and using his friendship to attempt to make sure she doesn't get off the venire, and that if she did get on the venire that she's with him on the defense and to make sure not to say too much to cause her to be excused." RR 6. The Referee found that "...while Respondent says he's sorry he did it, his statements that he didn't mean to prejudice the juror are unbelievable." RR 5. If the Respondent's statements are found to be

unbelievable, as the Referee explicitly found, then the only remaining conclusion is that he attempted to subvert the judicial system.

Respondent suggests that the reason for the Referee's rejection of the 91 day suspension was because he was offended that the Respondent had pulled the venire list. This contention is unsupported in the record.

At the second hearing of September 26, 1990, the Referee questioned Respondent as to the reason he had obtained the venire list. TR II-9. Respondent answered that he wanted to see who the prospective jurors were, and pointed out that acquisition of venire lists is not an unheralded practice. TR II-11. Respondent was unable to give convincing reasons and admitted that obtaining one does not do much good anymore "because you used to know people." TR II-9.

Standing alone, the act of obtaining the venire list is innocuous, but when an attorney begins contacting people on that list prior to trial, it begins to look suspicious. This is the reason for the Referee's questions regarding the matter; he was not offended by the Respondent's acquisition of the list, but the use to which the list was put.

Respondent's obtaining the venire list, when combined with his further action of contacting Ms. Barnes, and his

conversation with her, leads to the implication that Respondent had obtained the venire list for the furtherance of his own self-interests. This interpretation led the Referee to conclude that Respondent had engaged in a very egregious violation of the Rules of Professional Conduct. The Referee held: "There is no reason to get a venire list, to research it, identify those people who are clients and friends, make a telephone call to one of them, disclose to that individual the style of the case, which Respondent is involved in, and then, tell them not to get off the venire list." RR 5.

Respondent argues in his brief that the Referee failed to follow the applicable case law presented to him. However, the Referee addressed each case presented to him, found none on point and the violations in those cases less serious and more readily detectable than the violations in the present case. RR 5. An analysis of some of the case law presented at the hearings and relied on by Respondent in his brief follows:

In The Florida Bar v. Peterson, 418 So. 2d 246 (Fla. 1982), an attorney was publicly reprimanded and given one year probation for sitting at a table with jurors. The Respondent's actions were much more serious than this; he was not merely seen with a prospective juror in a situation that could be interpreted as improper, he actually engaged the prospective juror in a prohibited communication to serve his own objectives.

In The Florida Bar v. Fischer, 549 So. 2d 1368 (Fla. 1989), an attorney was suspended for 91 days for having his secretary mislead a police officer as to the status of an infraction hearing, thereby causing the case against him to be dismissed. A traffic infraction hearing cannot be equated with a criminal felony trial in regard to seriousness. Additionally, it is easy for the judge to get in touch with a police officer and find out why he is not present. Therefore, the attorney misconduct is more readily apparent in such a situation.

In The Matter of Rivers, 332 SE 2d 331 (SC 1984), an attorney was publicly reprimanded for authorizing an investigator to question members of the venire. However, there was no indication that anything beyond simply questioning was attempted. The attorney was not coaching the prospective jurors to stay on the venire.

In The Matter of Two Anonymous Members of The South Carolina Bar, 298 SE 2d 450 (SC 1982), an attorney was reprimanded for contacting family members of a prospective juror. However, nothing indicates more than an attempt to find information about the potential juror's viewpoints. Again, the attorney was not trying to influence the potential juror to stay on the venire.

Finally, in The Florida Bar v. Jackson, 490 So 2d 935 (Fla. 1986), an attorney received a three month suspension for attempting to sell the testimony of Respondent's clients. The Referee in the present case thought that the attorney got off too lightly. TR III-24.

Additionally, Respondent set forth the following two cases: In The Florida Bar v. Colclough, 561 So. 2d 1147 (Fla. 1990), an attorney received a six month suspension for making a misrepresentation in a lawsuit to a judge and opposing counsel.

In The Florida Bar v. Rood, 569 So. 2d 750 (Fla. 1990), an attorney who knowingly gave false answers to interrogatories, removed damaging evidence from copies of files, and then tried to cover his misconduct received a one year suspension.

Respondent claims that the conduct in the cases of Rood and Colclough is more serious than his. Respondent's conduct is however equally culpable because he tried to manipulate the judicial system in a more insidious manner that is harder to detect. In both cases cited by Respondent, the violations are more easily detected. As the Referee pointed out in discussing Respondent's actions, he didn't believe "this would have ever been known if this happenstances of this answering machine not working did not occur." TR II-12.

It is the nature of Respondent's conduct that disturbs the Referee--an attorney trying to manipulate the judicial system through deception for the purpose of furthering his own self-interests. The Referee distinguishes between those situations where the judge or opposing counsel has the opportunity to observe the conduct of the attorney and situations where the misconduct is never seen, except through happenstance. TR III-23

None of the cited cases are on point, and in the view of the Referee, Respondent's violation was much more serious than those cited. The Referee observed that "It was much more active participation in this case in an attempt to influence the decisions of a person on the venire, as opposed to gathering information and views." TR II-12. In each of the cases presented to the Referee, the conduct was more readily detectable and easier to correct through the adversary process than Respondent's action. The Referee found Respondent's communication to be particularly egregious because of the difficulty in detecting these kinds of violations. It was happenstance and coincidence that the answering machine malfunctioned, the message intercepted, and the violation brought to light.

The following two cases set forth the Court's position with respect to attorneys who interfere with the judicial system in a serious manner as was done in this case. In The

Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990), an attorney was disbarred for forging the signature of a client on a will. The court recognized that the Referee found substantial mitigation, including absence of a selfish motive, a cooperative attitude, good character and reputation, and remorse and the imposition of criminal penalties. However, the Court stated that it could not overlook the magnitude of the misconduct and disbarred the attorney based on the general rule of strict discipline against attorneys who deliberately perpetrate fraud on the court.

In The Florida Bar v. Ryder, 540 So. 2d 121 (Fla. 1989), an attorney was disbarred for committing perjury before a grand jury. The court concurred with the Referee that this was the appropriate sanction because the attorney's conduct involved "an intentional interference with the very system and process we at the Bar are sworn to serve and uphold." Id. at 122.

The Referee's finding of Respondent's intent to have a friend on the jury by way of his conversation with Ms. Barnes shows the insidious danger of the communication and the need for appropriate discipline. The Referee stated that "I believe that this a case where the very heart of the judicial system, its integrity by the participants, has been seriously damaged and is a very egregious violation of the Rules of Professional Conduct." RR 6.

The often cited The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), sets forth the purpose of discipline for professional misconduct:

> In cases such as these, three purposes must be kept in mind in reaching our conclusion. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id. at 132. A one year suspension in the instant case, as opposed to a 91 day suspension, will meet all three of the enunciated purposes.

Respondent argues that a one year suspension is unduly harsh and unfair to the Respondent and that the Referee ignored the mitigating factors in recommending this discipline. The Referee not only considered the mitigating factors, but said that in their absence, he would have recommended that the Respondent be disbarred. RR 7. The Referee states "...the mitigating factors I think weigh against outright disbarring you." TR II-3. "...the only reason I don't think you should be disbarred for it is because you have gone 20 years without

ever receiving a discipline, and I am impressed by that." TR II-14.

Respondent's brief points to the following as mitigating factors: Respondent's two previous periods of voluntary suspension, his coming forth and admitting to The Florida Bar his action, his remorse, his 22 years of practice without any prior discipline, his burn-out, and his self-rehabilitation.

Respondent expresses his remorse for his actions throughout the brief, hearings, and in a letter to the Bar. The Referee makes note of it. RR 4. However, the apology is inconsistent with the substance of the taped conversation and the implications that it leads to. The Referee commented that in light of all the evidence presented to him, that Respondent's expressions of remorse should be taken with a grain of salt. RR 5.

Respondent offers as an explanation for his behavior his frustration with the State Attorney's method of handling the prosecution in the criminal case and burn-out. Regardless, this is not a license for him to engage in behavior so contrary to professional and legal standards.

As to Respondent's lack of prior disciplinary record, the Referee weighed this very heavily in favor of the Respondent. The Referee described the Respondent's conduct as egregious and

was so disturbed by it, that he would have recommended disbarment had the Respondent's record not have been so good. A reduction from a five year disbarment to a one year suspension clearly shows consideration and application of the mitigating factors. RR 4, 5, 7.

The discipline must be severe enough to deter other attorneys from engaging in similar behavior. Again, the Referee considered the conduct in question so serious that he believed a one year suspension was necessary to prevent it from occurring again. Respondent argues that based on the comparative discipline in the cases he cites, a 91 day suspension is appropriate. However, the Referee makes clear that he finds Respondent's conduct much more egregious than that in the cited cases and did not wish to follow them.

Respondent states that due to his burnout, he twice imposed on himself a suspension from practice. If such action helped him with his problem it is good, but it has nothing to do with the Bar's disciplinary proceedings. The self-imposed suspensions are not applicable in this matter because they were private and not public. They were not attached to any official discipline and therefore there was no way for the public and other attorneys to receive notice of it. One of the reasons for imposing a public discipline is so that other attorneys are aware of the conduct expected of them and the penalty for violating those standards. It should also be noted that the

Referee considered Respondent's self-imposed suspension in reaching his decision. TR II-14, 15.

The discipline must be severe enough to protect the public. The Referee was very concerned with the seriousness of the violations and his concern that the public and the legal profession realize how bad it is. The nature of Respondent's actions undermines the judicial system and the public's faith in it. This is not only a violation of an attorney's duty to his profession and client, but a fundamental breach of the public trust that goes with the office of attorney. A one year suspension rises to this level of public protection for two reasons. First, it will deter other attorneys from committing similar violations. Additionally, it will assure the public that such violation will not be tolerated, and help increase the faith in the legal system. The Referee states "It is to protect our judicial system from this kind of conduct that I believe a one-year suspension is appropriate." RR 7.

CONCLUSION

The Referee has reviewed the evidence in this case determining its weight and sufficiency and has made his recommendation to this court that respondent be suspended from the practice of law for the period of one year and that he be required to pay the costs of these proceedings. The Referee did not completely believe Respondent's statement of remorse and made a finding of fact that Respondent's statements that he did not mean to prejudice the juror were unbelievable. The Referee specifically stated on the record that he had taken into account the mitigating circumstances and in particular Respondent's practice of law for an extended period of time without any discipline. The Referee reviewed the case law presented to him and considered it before recommending discipline.

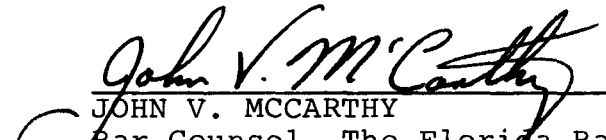
The assertion by Respondent that it was an overreaction on the Referee's part as to his concerns about Respondent obtaining the venire list in the criminal case must be viewed in light of what Respondent did with the venire list and the determination of Respondent's credibility by the Referee.

The self-imposed slow down of Respondent's law practice to recover from "burn-out" should not be equated with discipline. Respondent's need to recover from being "burned out", however

helpful to him, simply cannot and should not be viewed as any form of discipline. It should also be noted that the Referee considered Respondent's self-imposed suspensions in reaching his recommendation.

Based upon the findings of fact by the Referee and the analysis of the case law presented, it is The Florida Bar's position that the Referee's recommendations should be accepted by this court.

Respectfully submitted,



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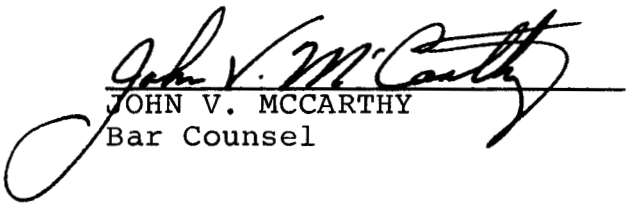
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief regarding Supreme Court Case No. 76,023, TFB File No. 89-00705-08 has been forwarded by regular U.S. mail to JOHN A. WEISS, Counsel for Respondent, at his record bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, on this 5th day of February, 1991.



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