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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 76,023

ALBERT C. SIMMONS,

Respondent.

_____/

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

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).

STATEMENT OF THE CASE

The Supreme Court of Florida has jurisdiction over these proceedings pursuant to Article V, Section 15 of the Florida Constitution.

After a finding of probable cause on October 31, 1989, The Florida Bar filed its formal complaint charging Respondent with misconduct on May 17, 1990. On June 12, 1990, Respondent filed his answer to the Bar's complaint in which he either admitted or did not deny all of the Bar's allegations.

After the complaint was filed, The Florida Bar and Respondent entered into an agreement for a discipline of 91 days, to be followed by proof of rehabilitation before reinstatement and payment of costs. At a hearing on August 20, 1990, the referee refused to accept the recommended discipline. At a second hearing on September 26, 1990, the referee rejected the recommended discipline. Subsequently, on October 10, 1990, final hearing in this matter was held.

On October 31, 1990, the referee issued his Report of the Referee and recommended that Respondent be suspended from the practice of law for one year.

On December 13, 1990, Respondent timely filed his Petition for Review asking this Court to impose a 91 day suspension rather than the one year suspension recommended by the referee.

STATEMENT OF FACTS

Some time prior to March, 1989, Respondent was retained as defense counsel in criminal proceedings brought against C. P. Adkins and his wife. Mr. Adkins' case was set for trial for the week of April 10, 1989. EX 2, p. 1.

Docket sounding for the Adkins trial was held on Monday, March 20, 1989. Within the next two days, Respondent learned that one Linda Barnes was on the venire for the April 10, 1989 Adkins trial.

Linda Barnes has been a long standing friend of Respondent's. Her sister is one of Respondent's best friends. Ms. Barnes' family and Respondent's family both come from the Kissimmee area and they refer to each other as "cousin". EX 2, p. 2. Respondent had previously represented Ms. Barnes in a workers compensation case and he was currently representing her husband in a change of custody matter. EX 2, p. 1.

Respondent's relationship with Ms. Barnes' family was well known to Assistant State Attorney Joseph E. Smith, whom Respondent understood was to assist in the selection of the jury for the Adkins trial. EX 2, p. 3.

On either March 21 or March 22, 1989, Respondent telephoned Ms. Barnes. The contents of that telephone conversation constitutes the entire basis for the disciplinary proceedings brought against Respondent. According to the evidence submitted at trial in the form of Exhibit 1, that conversation consisted

entirely of the following dialogue:

This is the Barnes' residence. We are unable to answer your call right now but if you will leave your name, number and a short message we will return your call as soon as possible. Thank you.

...they have replaced him for tonight and he can go ahead and take tonight off as well. Thanks. See you later.

(Beep) Hello.

-- Yes, Mrs. Barnes?

LB Yes.

-- This is Becky from Dr. Paul's office.

LB Yea.

-- Hi, I'm calling in reference to the recall letter that you received in the mail.

LB Say what?

-- A recall letter saying that you need to make an appointment for the first part of April.

LB I don't remember getting one.

-- Can I go ahead and make that appointment?

LB Sure, go ahead.

-- Okay. I can have you come in on April 13th.

(Beep) Okay, Al, are you here?

AS I'm here.

LB Okay.

AS Is this my Aunt Linda?

LB Well I don't know.

AS Well this is Al Simmons.

LB Well Hello Uncle Al.

AS I have got a message for you.

LB Okay.

AS You don't know it yet but tomorrow you're going to get a jury summons.

LB Uh huh.

AS For my C. P. Atkins (sic) trial. I want you on the jury. (Laughter)

LB Okay.

AS I want you on that jury. (Laughter) You know the case I'm talking about?

LB No.

AS C.P. Atkins (sic), the Deputy Sheriff?

LB No, what's going on?

AS Well I ain't going to tell you what's going on. I just want you...I just don't want you to call up there and get off that damn jury.

LB Okay. Are we defending or prosecuting?

AS We're defending.

LB Okay. (Laughter)

AS We're defending.

LB Okay.

AS They're going to ask you if you know me.

LB Yea.

AS You know, you can tell them that you know who I am. But we

ain't kin, ain't ever made love or nothing like that.

LB Oh come on baby. We can't tell them the truth? (Laughter) C.P. Atkins (sic)?

(Laughter)

LB Are you serious?

AS I'm serious..as a heart attack.

LB When have I got to go report for jury duty?

AS It's April the 10th. They have got a whole venire just for this one case.

LB They what?

AS Well they call 'em a venire up there. They're calling a hundred people up there...

LB Yea.

AS ...just to try this one case. Half of them will get off one way or the other.

LB They may not seat me.

AS Well they may not but I'm damn sure ain't going to throw you off.

LB The last time I got there I didn't get called up. I just had to sit there.

AS Well, you may not. That may be the case. You never know.

LB Well who is this you're defending?

AS C.P. Atkins (sic), Deputy Sheriff.

LB I didn't even know nothing about this.

AS Well good. I'm glad you don't. I'm glad you don't know anything about it. And I ain't going to tell you nothing about

it.

LB (unintelligible) curious.

AS Well you will find out April 10th.

LB Alright.

AS Alright...I'll be talking at you. See ya.

Subsequent to the aforementioned telephone conversation, an employee of the Department of Health and Rehabilitative Services (hereafter HRS) telephoned Ms. Barnes. Through mechanical error, Ms. Barnes' answer machine, instead of taking a message, played back to the HRS employee the entire conversation between Ms. Barnes and Respondent (which had been taped inadvertently by the machine). On March 28, 1989, HRS contacted the State Attorney's office to advise them of the conversation. Representatives of the State Attorney's office then called the Barnes' telephone number and listened to the same recording. Those representatives taped the answer machine recording by telephone and then went to Ms. Barnes' mobile home and confiscated both the tape and her answer machine.

While confiscating her equipment, law enforcement officials questioned Ms. Barnes about her conversation with Respondent and she acknowledged the conversation took place.

During the approximately one week that the aforementioned events took place, there were material developments on both the Adkins criminal trial and the Barnes change of custody matter that bear on these disciplinary proceedings.

On Monday, March 27, 1989, the presiding judge in the Adkins

trial, Osee Fagan, dismissed some of the counts against Mr. Adkins and his wife. The State of Florida announced that it would appeal Judge Fagan's decision, and accordingly, the Court dismissed the April 10th venire (which included Ms. Barnes).

On March 24, 1990, Respondent had filed a petition for modification of Mr. Barnes' judgment of dissolution of his prior marriage. An emergency hearing asking the Court to temporarily change the custody of Mr. Barnes' children to Mr. Barnes was scheduled before Judge Fagan for March 31, 1989.

No criminal charges were ever brought against Respondent or Ms. Barnes.

On approximately March 29, 1989, Respondent learned that the State Attorney was investigating the events surrounding the telephone conversation with Ms. Barnes. On that same day, Respondent reported the investigation to The Florida Bar. EX 2, page 3.

SUMMARY OF ARGUMENT

Respondent asks this Court to impose as discipline for his misconduct the 91 day suspension, with proof of rehabilitation, that The Florida Bar and Respondent jointly recommended to the referee in these proceedings. He asks this Court to reject the referee's recommended discipline.

As grounds for not accepting the referee's recommendation as to discipline, Respondent points to the referee's failure to follow the case law presented to him, to the referee's misapprehension as to the significance of Respondent's obtaining

a venire list prior to trial and to the referee's failure to give proper weight to the mitigating circumstances that exist in this case.

The three purposes of discipline, as set forth in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) at 132 require that any discipline imposed be fair to the public, fair to the Respondent and be sufficiently severe enough to deter others. Respondent argues that his 22 year history of practicing without prior discipline, when viewed in light of the fact that his offense involved actions that occurred on a single day, show that he is no threat to the public. A suspension of 91 days with proof of rehabilitation before reinstatement will guarantee to the public that they will not be harmed by Respondent in the future.

A one year suspension from the practice of law, is not fair to Respondent. It punishes rather than encourages reformation and rehabilitation.

Finally, any suspension requiring proof of rehabilitation, be it for 91 days or for one year, will serve as a sufficient deterrent to prevent other lawyers from engaging in similar misconduct.

The case law presented to the referee completely supports a 91 day suspension. Two South Carolina cases were cited to the referee as support for the discipline recommended by the parties. In The Matter of Rivers, 331 SE 2d 332 (SC 1984) and In The Matter of Two Anonymous Members of The South Carolina Bar, 298 SE

2d 450 (SC 1982). There, lawyers received a public reprimand and private reprimands, respectively, for communicating, before trial, with potential venire members. The 91 day suspension recommended to this Court far exceeds the sanctions imposed in these two cases. In The Florida Bar v Peterson, 418 So.2d 246 (Fla. 1982) a lawyer was given a public reprimand for having lunch with two jurors during the pendency of a trial.

Respondent cited numerous cases to the referee involving conduct that was prejudicial to the administration of justice but which did not involve contact with jurors. In The Florida Bar v Jackson, 490 So.2d 935 (Fla. 1986) a lawyer received a three month suspension with automatic reinstatement for attempting to sell the testimony of Respondent's clients for $50,000.00. In The Florida Bar v Fischer, 549 So.2d 1368 (Fla. 1989) the Respondent received a 91 day suspension for having his secretary impersonate a court clerk with the purpose of calling up a state trooper to advise him that a hearing on Mr. Fischer's traffic citation had been canceled. Mr. Fischer then attended the hearing and, because there was no testimony from the State Trooper, his ticket was dismissed.

Respondent's conduct was certainly no more egregious than that of Mr. Jackson and Mr. Fischer. The discipline that he receives should comport with that meted out in these two cases.

Respondent argues that the referee may very well have failed to appreciate that it is common practice for lawyers to obtain venire lists prior to trial. While Respondent does not argue

that it was improper for him to contact a friend of his that was on the potential venire, he does argue that it was not improper for him to obtain the venire in advance. Rule 3.281 of the Florida Rules of Criminal Procedure specifically authorize the advance procurement of a venire list to facilitate Voir Dire.

Respondent argues that the referee improperly misconstrued Respondent's misguided conversation with Ms. Barnes as being one in which Respondent told her what to say and what not to say. In fact, no such instructions incurred.

Finally, there was very significant mitigation involved in this case. Respondent has practiced law for 22 years without any blemish on his record. His motives were not selfish but were the result of personal and emotional problems he was experiencing at the time. Specifically, Respondent was burned out from practicing law without a break over the preceding years and he was extremely frustrated over the prosecution's tactics in the case at issue in this matter.

As additional mitigation, Respondent would point out that he immediately notified The Florida Bar of pending criminal charges when he learned that the State Attorney's office was investigating him. When The Florida Bar brought disciplinary charges, Respondent denied none of the factual allegations. He has cooperated whole heartedly with the Bar throughout these proceedings.

During the two years since his misconduct occurred, Respondent has twice wound down his practice in anticipation of

what he thought was impending discipline. In both instances, after approximately six months, Respondent was forced to renew his practice because of the length of time that disciplinary proceedings were taking. During this two year period, Respondent has rehabilitated himself. Finally, Respondent has apologized to the presiding Judge in these proceedings, to The Florida Bar and acknowledged to the referee that he was "dead wrong" in his conduct.

A 91 day suspension from the practice of law, with proof of rehabilitation, is sufficient discipline for Respondent's misconduct.

ARGUMENT

THE REFEREE ERRONEOUSLY REJECTED THE RECOMMENDATION OF THE FLORIDA BAR THAT RESPONDENT BE SUSPENDED FOR 91 DAYS, IGNORED APPLICABLE CASE LAW, MISCONSTRUED THE FACTS, AND GAVE LITTLE OR NO CONSIDERATION TO THE SUBSTANTIAL MITIGATION IN THE RECORD IN HIS RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR ONE YEAR.

The Florida Bar, after a consensus by Bar Counsel, Staff Counsel and the Designated Reviewer, (the Board of Governors member with oversight authority over Bar Counsel's actions) recommended to the referee that Respondent be suspended for 91 days for his misconduct. As is true with all suspensions lasting over 90 days, Respondent can not be reinstated to the practice of law until he proved his rehabilitation. See The Florida Bar v Dawson, 131 So.2d 472, 474 (Fla. 1961). In recommending a 91 day suspension, both the Bar and Respondent supplied the referee with numerous cases supporting their position.

The referee, after disregarding the law presented to him by the parties, rejected the agreement between the parties and, ultimately, imposed a one year suspension. Incredibly, the referee said that were it not for the mitigation appearing on the record, he would have disbarred Respondent.

Respondent urges this Court to reject the referee's recommended discipline. He asks that a suspension of 91 days, with proof of rehabilitation, be substituted as the discipline to be imposed in this case.

As grounds for rejecting the referee's recommendation, Respondent argues that: (1) the referee improperly ignored the law as presented to him by the parties; (2) that the referee was under the erroneous impression that it was improper for Respondent to even have possession of the names on a future venire and that he misconstrued the contents of Respondent's conversation with Ms. Barnes; and (3) that the referee ignored the substantial mitigation that existed in this case.

The discipline recommended by the referee is not given the same presumption of correctness as are his factual findings. As was stated by Justice Sundberg in his concurring opinion in The Florida Bar v McCain, 361 So.2d 700 (Fla. 1978) at page 708:

> In the first instance, it should be observed that the discipline appropriate to ethical misconduct is the sole province and responsibility of this Court. While the findings of fact by the Referee in a disciplinary proceeding "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding," (citations omitted) no similar presumption

> accompanies his recommendation of disciplinary measures to be applied.

Respondent submits that the referee's recommended discipline in the case at Bar is completely out of line with the misconduct that Respondent has, admittedly, committed.

The purpose of discipline was set out by this Court in The Florida v Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There, the Court stated that:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. 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.

Respondent submits that a 91 day suspension, with proof of rehabilitation before reinstatement, will meet all three purposes enunciated in Pahules. First, Respondent argues that he is no threat to the public. He has been practicing law for 22 years without any blemish on his record. It is likely that he will practice law for the rest of his days without any further mishap. Simply stated, Respondent's misconduct was a one-time incident that resulted from a lapse of judgment. A long term suspension is not necessary for the protection of the public.

Respondent submits that the one year suspension recommended by the referee is not only unduly harsh but it is totally unfair to the Respondent. Suspending Respondent from the practice of law for one year goes far beyond "being sufficient to punish a breach of ethics" and it certainly does not encourage reformation and rehabilitation. A 91-day suspension, particularly when it is coupled with Respondent's two previous periods of voluntary suspension (which will be discussed below) as set out at the bottom of page three and the top of page four of Exhibit 2 is more than sufficient discipline to "punish" Respondent for his misconduct.

Finally, Respondent submits that suspension from the practice of law for 91 days will certainly "be severe enough to deter others" who might engage in similar misconduct. Any suspension of 91 days or longer requires proof of rehabilitation before reinstatement. Reinstatement proceedings, as set out in Rule 3-7.10 of the Rules Regulating The Florida Bar are not pro forma proceedings. They are extensive and time consuming and require a new trial before the lawyer can resume the practice of law. See, also, Dawson, supra.

This Court has observed that reinstatement proceedings normally take six to nine months. The Florida Bar, in re Roth, 500 So.2d 117 (Fla. 1986) at 118. The fact that Respondent has undergone disciplinary proceedings for his misconduct, which will be reported in The Florida Bar News and, presumably in the local press and which will result in deprivation of his means of income

for three months is certainly a material deterrent to others. When that factor is coupled with the requirement of reinstatement proceedings, which is a second trial and which takes up to nine months, the deterrent factor is extremely significant.

Respondent submits that the referee's recommended discipline is so Draconian as to convert this case into penal proceedings, i.e., one designed to punish the Respondent. In so doing, the referee ignored the fact that

> Bar disciplinary proceedings are remedial and are designed for the protection of the public and the integrity of the Courts. DeBock v State, 512 So.2d 164 (Fla. 1987) at 166.

Respondent does not come before this Court denying culpability. He admits his wrongdoing. Most specifically, in his September 5, 1990 letter to Bar counsel, Exhibit 2, Respondent acknowledges that

> I let the system down. For having done this I am truely (sic) sorry and ashamed of myself. And I can say without hesitation that having been through this ordeal, the necessity of constant vigilance is indelibly etched in my mind.

Respondent pointed out in his letter to Bar counsel that he "personally apologized to Judge Fagan" for his actions and that he has similarly apologized by letter to The Florida Bar.

Respondent did not deny any of the factual allegations made by The Florida Bar in its complaint. By no stretch of the imagination can it be argued that Respondent does not appreciate both his wrongdoing and the magnitude of his offense.

In light of the fact that Respondent has practiced law for 22 years without mishap, it is fair to say that the conduct that occurred on that single day in March, 1989 can only be considered a lapse of judgment and a one time event that will never happen again.

Both The Florida Bar and Respondent cited numerous cases which, while not on point, supported the 91 day suspension recommended by the parties. Two of the cases are from South Carolina. The first, In The Matter of Two Anonymous Members of The South Carolina Bar, 298 SE 2d 450 (SC 1982) the Supreme Court of South Carolina imposed two private reprimands due to the novelty of the question before the Court. There, the accused lawyers talked to the sister of a potential juror about the juror's views on capital punishment. The sister was the client of one of the respondents and, in fairness to the accused lawyers, they asked the sister not to communicate the gist of their conversation to the juror.

In the case styled In the Matter of Rivers, 331 SE 2d 332 (SC 1984) a lawyer was given a public reprimand for causing a private investigator to communicate, before trial, with persons he knew were on the jury venire.

Obviously, neither Rivers nor Two Anonymous Members are on point. Respondent acknowledges that his misconduct is more egregious than the South Carolina lawyer. However, he argues that his misconduct is not so far removed from the South Carolina lawyers as to justify his suspension from the practice of law for

one year and the additional time that reinstatement proceedings will take.

Respondent asserts that his misconduct is not significantly more reprehensible than that involved in The Florida Bar v Peterson, 418 So.2d 246 (Fla. 1982), where a public reprimand was imposed. Mr. Peterson, during the luncheon recess of a case in which he was trial counsel, sat at the table of two of the jurors serving on his case, together with one of his expert witnesses, and ate lunch with them. Mr. Peterson's actions resulted in a mistrial.

While Respondent has engaged in conduct that is a violation of Rule 4-3.5(d)(1), prohibiting contact with a member of the venire from which the jury is to be selected, his conduct also falls under the general rubric of conduct contrary to the administration of justice. There are numerous cases that fall within this category of offenses which can be looked at to determine the appropriate discipline to be imposed in the case at bar. Such a case is The Florida Bar v Jackson, 490 So.2d 935 (Fla. 1986).

In Jackson, a lawyer received a three month suspension (with automatic reinstatement) for attempting to sell for $50,000.00 the testimony of Respondent's clients. In that case, the referee observed that

> Justice must not be bought or sold. Attorneys have a solemn responsibility to assure that not even the taint of impropriety exists as to the procurement of the testimony before courts of justice. It is clear that the actions of the Respondent in attempting to

> obtain compensation for the testimony of his clients, Michael Bollo and Edward Shepard violates the very essence of the integrity of the judicial system....

Despite his serious transgressions, Mr. Jackson received but a three month suspension with automatic reinstatement. Even the dissent would have required a suspension of but 91 days.

Respondent and The Florida Bar argued to the referee that Respondent's offense warranted the same discipline that the dissent in Jackson requested.

The referee would have Respondent receive a discipline twice as long as the six month suspension meted out in The Florida Bar v Colclough, 561 So.2d 1147 (Fla. 1990). There, the accused lawyer deliberately lied, during a hearing, to a judge and to adverse counsel. The purpose of the deception was to obtain an additional $4,666.50 judgment for costs. Mr. Colclough even submitted a false judgment to the Court.

Respondent submits that Mr. Colclough's lying to a judge and adverse counsel, during a hearing, and thereby obtaining a judgment over $4,600.00 too high, is more egregious conduct than that in the instant case. To suspend Respondent twice as long as Mr. Colclough, for conduct that involved no lying, is simply unfair.

The one year suspension recommended by the referee for Respondent is the same as that given in The Florida Bar v Rood, 569 So.2d 750 (Fla. 1990) for far more serious misconduct.

In Rood, the accused lawyer was found to have knowingly given false answers to interrogatories in two separate cases and

to have removed damaging evidence from copies of the files of an expert witness. He then tried to cover up his misconduct by later removing original evidence from the expert's files. For his misconduct, Mr. Rood justifiably received a one year suspension.

Respondent should not be removed from practice for the same length of time as Mr. Rood. The latter individual, on at least four separate occasions, falsified evidence. His continued course of conduct was one of six aggravating factors. Other factors included selfish motive, causing clients to commit perjury and refusal to acknowledge wrongdoing.

A case more closely akin to Respondent's is The Florida Bar v Fischer, 549 So.2d 1368 (Fla. 1989). There, the accused lawyer received a 91 day suspension (which required proof of rehabilitation) for causing a secretary, posing as a court clerk, to telephone a state trooper to falsely tell him that the non-jury trial on Mr. Fischer's speeding ticker was canceled. Because the state trooper did not appear, Mr. Fischer's case was dismissed.

Mr. Fischer's actions involved deliberate deception for selfish purposes. He, quite properly received a 91 day suspension. Respondent, in the case at bar, should receive no harsher a discipline than did Mr. Fischer.

It is obvious upon reading the report of the referee and the referee's remarks from the bench, that the referee was offended by Respondent's even obtaining a venire list prior to trial. One

wonders if the referee is even aware that Rule 3.281 of the Rules of Criminal Procedure specifically authorizes a lawyer's receipt of the venire list prior to trial. That Rule states in its entirety the following:

> Upon request of any party, he shall be furnished by the clerk of the court with a list containing names and addresses of prospective jurors summoned to try the case together with copies of all jury questionnaires returned by such prospective jurors.

The committee note to Rule 3.281 states that:

> The furnishing of such a list should result in considerable time being saved at Voir Dire.

Perhaps the referee's overreaction to Respondent's conduct was due to the fact that the referee did not believe it was appropriate to pull venire lists. In fact, the referee himself stated that

> I've tried lots of cases, and I've never pulled out the venire list to see if I knew anybody on it. TR II, 10.

Earlier in that same hearing, the referee asked "why would you read the list of names on the venires?" TR II, 9.

Obviously, the referee did not think it was appropriate for anybody to get a future venire list. For that reason, he may have overreacted to the offense and rejected the reasonable recommendation that Respondent be suspended for 91 days for his offense.

Another instance of the referee's overreaction to Respondent's misconduct can be found on page six of the referee's

report. There, the referee imagined a very unlikely scenario and then used it as support for his recommended punishment.

> I certainly wouldn't want to be the attorney on the other side, not knowing all that, trying the case. I certainly wouldn't want to lose a case, a good case, and go home, after all my hard efforts, scratching my head, trying to figure out why I lost a real good case, not knowing that it was because a good friend and client of the opposing attorney had been tipped off, before the trial, to be on the jury, and be in the defense corner. I would hate to be in that position. RR 6.

The problem with the referee's hypothetical is that he ignores the most fundamental question to be asked at Voir Dire; the first question pounded into law students' heads by trial advocacy teachers. One always asks:

> Do any of you know the lawyers in the case?

The referee's imaginary lawyer, scratching his head and wondering why he lost a case due to an undisclosed relationship between a lawyer and a client, forgot to ask that most fundamental and simple question. Do any of you know the lawyers involved in the case? Ms. Barnes, upon being asked that most fundamental question, would have answered yes. Respondent told Ms. Barnes that they were going to ask her if she knew him and he advised her to tell them that she knew who he was. EX 1, page 2.

The other problem with the referee's hypothetical lawyer, wondering why he lost a case, is that the referee is assuming that the tainted juror would first, automatically side with the party being represented by her friend and, secondly, would be able to influence all the other jurors. That is an entirely

unlikely scenario. Particularly, when, as here, the lawyer was very careful to emphasize that he was not going to tell her anything at all about the case. EX 1, page 3.

That the referee had to strain to reach his harsh punishment can be seen on page five of his report where he characterizes Respondent's conversation with Ms. Barnes as being one in which he tells her "what to say and what not to say....". In fact, that is an exaggeration. The only conceivable place where it could be argued that Respondent told Ms. Barnes what to say or what not to say occurred on page two of the transcript constituting Exhibit 1. There, the following dialogue took place:

> AS They're going to ask you if you know me.
> LB Yea.
> AS You know, you can tell them that you know who I am. But we ain't kin, ain't ever made love or nothing like that.

That is the dialogue that the referee characterizes as Respondent telling Ms. Barnes what to say and what not to say.

Respondent does not minimize his misconduct. Respondent admitted to the referee that

> I was wrong. I was dead wrong in contacting Ms. Barnes. TR III, page 14.

Respondent acknowledges that stern discipline is appropriate. Respondent acknowledges that a suspension requiring proof of rehabilitation is not unreasonable. Respondent submits that a 91 day suspension with proof of rehabilitation, a discipline that may keep him away from the practice of law for a total of six months to one year, is the appropriate sanction for

his one time, lapse of judgment.

The referee, in recommending a discipline, either ignored or gave too little weight to the significant mitigation involved in this case.

The Florida Standards for imposing lawyer sanctions (hereinafter referred to as the Standards) specifically lists in Standard 9.32 those factors which may be considered in mitigation. The following sub paragraphs apply to the case at Bar:

(a) Absence of a prior disciplinary record;

(b) Absence of a dishonest or selfish motive;

(c) Personal or emotional problems;

(e) Full and free disclosure to disciplinary board of cooperative attitude toward proceedings;

(j) Interim rehabilitation; and

(l) Remorse.

Respondent has practiced law since June 20, 1969 without prior discipline. RR 7. This factor alone shows that Respondent is no threat to the public or to the administration of justice. During his 22 years of practice, Respondent has done many, many good things. He has probably represented thousands of clients without mishap or improper conduct. To take in excess of a year out of his practice over this one incident is a total disregard for this lawyer's superlative track record.

Respondent urges this Court to find that his conduct was not done with a dishonest or selfish motive. Obviously, Respondent

acted in a misguided fashion. But as he pointed out in his September 5, 1990 letter to Bar Counsel, his lapse of judgment was not for personal gain, but was a result of "burn-out" and frustration from the State's tactics in the Adkins case. As Respondent put it:

> Many people have asked me why I did what I did. No one has asked the question more than I have asked it. The only answer I can give is that at the time of the incident I was suffering from a bad case of lawyer "burn-out". I had not had a break in the practice of law for several years. In addition thereto, I was terribly frustrated over the Adkins case. The prosecuting attorney had brought six felony charges against C. P. Adkins. I could understand this because the State had a witness to these allegations. However, the State also brought four felony charges against C. P. Adkins' wife without one iota of evidence against her. It was primarily the dismissal of several of these charges against her that precipitated the appeal. I will go to my grave believing that the only reason these charges were brought against Mrs. Adkins was to bring pressure to bare (sic) on C. P. Adkins. My feelings and beliefs are bolstered by the fact that the Court granted a Judgment of Acquittal on the one charge that she finally went to trial on.
>
> My frustration surrounded what I considered to be an abuse of the criminal justice system and the "arm-twisting" tactics of the State in bringing the charges against Mrs. Adkins. The only thing I can surmise is that subconsciously I felt my contact with Linda Barnes was a way to "get even" with the State--a way to call it a name behind its back. EX 2, p.2.

Respondent had nothing to gain (except perhaps an acquittal of his client), for his misconduct. That is not to say it was proper. But, Respondent was not contacting Ms. Barnes for selfish reasons.

Standard 9.32(c), personal or emotional problems, is tangentially applicable to this case because of the "burn-out" alluded to above.

If ever full and free disclosure and cooperation with the Bar is to be a factor in mitigation, as set forth in Standard 9.32(e), this is the case. Upon learning that the State Attorney was investigating him, Respondent immediately reported the matter to The Florida Bar. EX 2, p. 3. When the Bar filed its formal complaint, Respondent filed an answer in which he either admitted or did not deny every factual allegation in the complaint. Respondent immediately attempted to resolve the dispute by submitting a consent judgment to the Bar. Respondent has done all that he could to make the Bar's job as easy as it could be. He should receive at least significant measure of mitigation for his superlative attitude.

Respondent's misconduct occurred in March, 1989, almost two years ago. In the interim, Respondent has made material steps toward rehabilitating himself. Such interim rehabilitation is a very significant mitigating factor (Standard 9.32(j)) and, if nothing else, should reduce Respondent's sanction from a one year to a 91 day suspension.

Recognition of wrongdoing is one of the most important facets of rehabilitation. It cannot be gainsaid that Respondent recognizes his misconduct and has taken steps to rehabilitate himself. For example, in Respondent's own words:

> Finally, in late April, 1989, after determining in my own mind that the "burn-

> out" and frustration was the cause of the incident, I "suspended" myself by taking a sabbatical leave from the practice of law. I figured that it was the medicine that I needed to cure the problem. EX 2, page 3.

Unfortunately, after six months, and having heard nothing from The Florida Bar, Respondent resumed the practice of law, only to be informed that the grievance committee was finally taking action on his case. EX 2, p. 3.

After the grievance committee found probable cause, Respondent again took steps to wind down his practice in anticipation of the suspension that he knew was forthcoming. Once again, in Respondent's words:

> Fairly shortly thereafter, I received notice that the committee recommended further action. Thinking that matters would proceed in due course, I again all but quit the practice of law so as not have a large clientele if I was suspended. But again, nothing happened. After five or six months had gone by without hearing anything I was forced by financial circumstances to again start practicing law. EX 2, p. 4.

Respondent, while recognizing that discipline was appropriate, has twice during the almost two years that this case has been pending, voluntarily removed himself from the practice of law. While Respondent does not argue that his voluntary "suspensions" should be a substitute for discipline, he does urge this Court to consider them material mitigation in determining the sanction to be imposed.

Finally, remorse, (Standard 9.32(l)) should be considered as a material mitigating factor. Respondent regrets his misconduct. Throughout the record in this case, Respondent has made that

abundantly clear. He "personally apologized to Judge Fagan" for his actions and he did the same by letter to The Florida Bar. EX 2, page 3. He has never given any excuses for his actions. He acknowledged to the referee at final hearing that he was "dead wrong in contacting Ms. Barnes" TR III, 14.

A 91 day suspension plus the time it takes to be reinstated, is the appropriate discipline to be imposed in this case. Such a sanction meets the three goals of discipline as set forth in Pahules, supra. The public will be protected by requiring Respondent to prove rehabilitation before he is reinstated to practice. The discipline will be fair to the lawyer in that it will encourage rehabilitation without being unduly harsh and punitive. Finally, such a suspension will be severe enough to deter other lawyers who might be prompted to contact a member of the venire in advance.

Respondent is a good lawyer. He has practiced law for almost 22 years without mishap. He has conducted himself in a professional manner throughout his career to the benefit of his clients and to the legal system. Respondent, on one day, on what was probably a spur of the moment decision, engaged in conduct that will forever be a black mark on his good reputation. Just as importantly, Respondent engaged in conduct that could have cast doubt on the integrity of our legal system. Respondent recognizes this, is truly sorry for his actions, and recognizes that discipline is appropriate. However, suspending Respondent from the practice of law for one year and thereafter until he

proves rehabilitation is simply too harsh a sanction to be imposed. It goes beyond a remedial sanction, as required by DeBock v State, supra, and enters the realm of a punitive measure.

Neither The Florida Bar, nor the public, nor the legal system will gain anything more by suspending Respondent for one year rather than the 91 days that the parties below felt was appropriate. Respondent urges this Court to suspend him for no longer than 91 days.

CONCLUSION

Respondent urges this Court to reject the referee's recommendation that he be suspended for one year. This Court should substitute a suspension of 91 days, with proof of rehabilitation before reinstatement, and payment of costs, as the appropriate discipline to be imposed in this matter.

Respectfully submitted,

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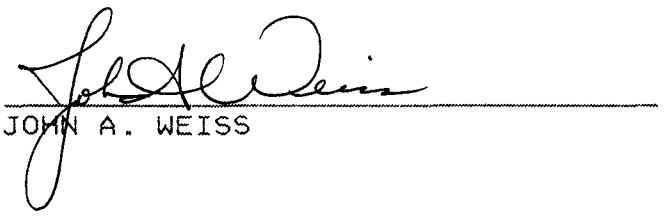
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was mailed to John V. McCarthy, Esquire, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 14th day of January, 1991.



JOHN A. WEISS