IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 76,023

ALBERT C. SIMMONS,

Respondent.

RESPONDENT'S REPLY BRIEF

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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 issue in this appeal is not whether Respondent was guilty of misconduct. He has admitted his guilt and acknowledges wrongdoing. Simply stated, the controversy is over the discipline that Respondent should receive for an act that occurred almost spontaneously, on a single day, and which constitutes the only blemish on Respondent's 22 year superlative record as a lawyer.

Respondent submits that the Referee improperly rejected the plea arrangements reached between the parties below, i.e., a 91 day suspension with proof of rehabilitation before reinstatement.

The Florida Bar properly states in its brief that the Referee's initial role in disciplinary proceedings is to determine the weight and the sufficiency of the evidence and to make findings of fact. Those findings will be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v Scott, 566 So.2d 765 (Fla. 1990).

The conclusions, however, that the Referee draws from the evidence before him and the discipline recommended by a referee as a result of those conclusions, are subject to much broader review by this Court. The Florida Bar v McCain, 361 So.2d 700,

708 (Fla. 1978); The Florida Bar v Inglis, 471 So.2d 38, 40 (Fla. 1985). It is those conclusions and the resulting recommended discipline that Respondent asks this Court to reject.

The Referee has turned a reputable lawyer's one-time lapse of judgment into a wholesale conspiracy to thwart the administration of justice and the jury trial system in Florida. He has gone far beyond the evidence before him, which was uncontested and which required no evidentiary findings beyond the stipulated facts, to draw conclusions unwarranted by those facts and to impose a completely unwarranted sanction. For example, the Referee transformed Respondent's statement that

> you can tell them that you know who I am. But we ain't kin, ain't ever made love or nothing like that. Ex. 1

into the conclusions on pages two and five of his Report of Referee that the Respondent

> engaged in a discussion about what she (Ms. Barnes) should and should not say if questioned by the State during voir dire. RR 2.
>
> Then to engage in a conversation of what to say and what not to say if you were being questioned during voir dire....

While it is clear that Respondent should not have called a prospective member of the venire, a review of the transcript indicates a light-hearted conversation between two good friends. The irony of the situation is that had Respondent not telephoned Ms. Barnes, she might have appeared as a prospective juror anyway.

On page four of its brief, The Florida Bar relies on the Referee's opinion that Respondent was trying to prejudice the jury as a finding of fact. Respondent submits that such a subjective opinion is a conclusion and is subject to greater review by this Court. More importantly, however, is the fact that calling a prospective juror and asking her not to try to get off the panel should not be considered an attempt to "prejudice" the jury. Yes, Respondent was trying to insure that a friendly face would be in the panel. That, however, is a long way from an attempt to prejudice a jury and to launch a wholesale attack on the integrity of the judicial system.

As Respondent discussed in his initial brief, Respondent knew full well that local assistant state attorney Joseph E. Smith would be assisting the prosecutor in selecting the jury for the Adkins' trial. Ex. 2, p.3. That factor, coupled with the usual voir dire inquiring into the prospective juror's relationship with the lawyers involved made it extremely unlikely that Ms. Barnes relationship with Respondent would be a secret. Respondent appreciated that fact. He was not trying to cover up his relationship with Ms. Barnes when he called her. He was merely trying to insure that she not seek a flimsy excuse to try to get off the panel.

The purpose of Respondent's call to Ms. Barnes is set forth by the following statement:

> 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.

The Referee totally ignored the light-hearted nature of the telephone conversation, the fact that Respondent absolutely refused to discuss the details of the case with Ms. Barnes ("I ain't going to tell you nothing about it) and that he told her to tell the truth.

The Referee places great store, erroneously, on Respondent's response to Ms. Barnes' question that he was defense counsel. What other role could he have in a criminal trial? Even had Respondent not told Ms. Barnes that he was defense counsel, it would have been evident to her within moments after appearing on the stand that he was not the prosecutor.

Even more significant is the Referee's total disregard of the fact that Respondent had scheduled a hearing on behalf of Ms. Barnes' husband (Respondent's client in a domestic matter) before the very same judge that was presiding over the Adkin trial, prior to the date on which the trial was to be held. Because that matter involved custody, and because the home life of Mr. Barnes was crucial to the case at issue, it was Respondent's intention to present Ms. Adkins at that hearing.

If Respondent were trying to engage in subterfuge, he never would have scheduled a hearing involving the Barnes' custody matter before the trial judge prior to the Adkins trial.

The facts of this case are not consistent with the characterization that the Referee lends to it. This was a mistake by a responsible, reputable lawyer of 22 years good standing. While it warrants discipline, it does not warrant

destroying a legal career.

The Florida Bar argues on page eight of its Brief as support for the Referee's recommendation that Respondent's obtaining the venire list, coupled with his contacting Ms. Barnes, "leads to the implication" that Respondent obtained the venire list in the first place "for the furtherance of his own self-interests". In a literal analysis, the Referee seems to be saying that Respondent's merely obtaining the venire was improper. That is ridiculous.

All good criminal defense lawyers obtain venire lists prior to trial. Rule 3.281 of the Rules of Criminal Procedure specifically allows it. A defense attorney would be remiss if he did not do so.

The purpose of obtaining a venire list in advance is not to further the lawyers self-interest. It is to further the interest of the lawyer's client. The venire must be examined in advance to determine individuals with prejudices, or biases, towards the defendant. In the case at Bar, Respondent noted a good friend and the wife a client on the venire. He should have done nothing about that and let her appear before the court on the day of trial and let the state ferret out her relationship. Had Respondent done this, and assuming that she had been picked for the jury, (which the Referee assumed would happen throughout his report) Ms. Barnes would have been on the jury without any impropriety on Respondent's part.

Respondent, however, improperly contacted Ms. Barnes rather than remaining silent. For that lapse of judgment, which occurred on one day, he deserves to be disciplined. A 91 day suspension, coupled with proof of rehabilitation, will adequately punish him for his transgressions.

The Florida Bar argues that Respondent's conduct is more egregious than that found by the lawyers in The Florida Bar v Peterson, 418 So.2d 246 (Fla. 1982), a public reprimand for having lunch with jurors; In the Matter of Rivers, 332 SE 2d 331 (SC 1984), public reprimand for questioning venire members; In the Matter of Two Anonymous Members of the South Carolina Bar, 298 SE 2d 450 (SC 1982), private reprimands for contacting family members of prospective jurors. Respondent agrees. That is why Respondent agreed originally, and now argues the propriety of, a 91 day suspension.

Respondent disagrees with the Bar's characterization of his conduct as being more serious than the course of conduct, involving deliberate lies to the Court, engaged in by the accused lawyer in The Florida Bar v Fischer, 549 So.2d 1368 (Fla. 1989). Mr. Fischer was suspended for 91 days for having his secretary call up a police officer, impersonate a clerk of court, and falsely tell that officer that he need not appear at a hearing on respondent's own traffic violation. Mr. Fischer then attended the hearing, and allowed the court to dismiss the traffic violation because the police officer did not appear.

Mr. Fischer instructed an innocent party (his secretary) to lie to a police officer and then compounded the offense by allowing a judge to dismiss Mr. Fischer's speeding ticket for the officer's failure to appear. Mr. Fischer's actions were for his personal benefit. He had everything to gain. Yet, he received but a 91 day suspension.

Respondent's actions were not for his personal gain. And, it was not a course of conduct. He engaged in a single instance of misconduct.

The Referee's disregard for precedent and this Court's prior decisions was made evident by his remarks concerning The Florida Bar v Jackson, 490 So.2d 935 (Fla. 1986). The referee in the case at Bar thought that Mr. Jackson's three month suspension for attempting to sell testimony was too light. Therefore, he disregarded that case in evaluating the sanction to be imposed on Respondent. Whether Jackson got off "too light" is no longer subject to debate. In Jackson, this Court saw fit to suspend a lawyer for 90 days, for, on three separate occasions, trying to sell the testimony of his client to a New York lawyer for $50,000.00. Clearly, Mr. Jackson's misconduct was far worse than the Respondent's at Bar. Yet, the Referee would have Respondent suspended four times longer than Mr. Jackson.

As was true in Fischer and Jackson, the misconduct engaged in by the accused lawyers in The Florida Bar v Colclough, 561 So.2d 1147 (Fla. 1990) and The Florida Bar v Rood, 569 So.2d 750 (Fla. 1990) involved lawyers who repeatedly lied in judicial

proceedings. Mr. Colclough deliberately lied during a hearing to a judge and to adverse counsel. The purpose of his misrepresentations was to obtain an additional $4,600.00 judgment for costs. To compound his lies, Mr. Colclough even submitted a false judgment to the court.

Mr. Rood engaged in deception on numerous occasions. He gave false answers to interrogatories in two separate cases, removed damaging evidence from files and he tried to mislead a witness. After considering substantial mitigation, Mr. Rood was suspended for one year.

For lying to a judge and later submitting a false judgment to that judge, Mr. Colclough received a six month suspension. For lying on interrogatories, tampering with files and trying to subvert the testimony of a witness, Mr. Rood received a one year suspension. Both of those lawyers lied on more than one occasion, over a long period of time, in a deliberate attempt to subvert the judicial procedure. By way of contrast, Respondent engaged in a single act of misconduct which may have had no effect on judicial proceedings whatsoever, (in fact, the trial at which Ms. Barnes was to appear on the venire was canceled). Yet, despite compelling mitigation, the Referee would have Respondent receive the same discipline as Mr. Rood and twice as harsh a discipline as Mr. Colclough.

The Bar's references to The Florida Bar v Kickliter, 559 So.2d 1123 (Fla. 1990), in which a lawyer was disbarred for forging the signature of a client and The Florida Bar v Ryder,

540 So.2d 121 (Fla. 1989), in which a lawyer was disbarred for being convicted of numerous counts of perjury, are totally inapplicable to the case at Bar. Both of those lawyers, under oath, engaged in a long-standing course of conduct. Respondent lied to no one, engaged in a single act of misconduct, and told his friend to tell the truth.

Respondent submits that the discipline recommended by the Referee is improper because it:

> focuses upon retribution rather than the goal of effective discipline which is primarily to protect the public from incompetent and unethical practitioners and only secondarily to punish the offender and to act as a deterrent to others. The Florida Bar v Pincus, 300 So.2d 16, 19 (Fla. 1974).

The one year suspension recommended by the Referee is completely inconsistent with the above-quoted language from Pincus. It totally ignores the first two purposes of discipline as enunciated in The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970) (a discipline that is fair to society, in that it protects the public from unethical conduct, and at the same time one that is fair to the lawyer, punishing while encouraging reformation and rehabilitation) and focuses entirely on deterrence.

As argued in Respondent's initial brief, Respondent is not a threat to the public. His 22 year history of practicing without any blemishes is proof of that. A one year suspension is certainly not fair to the Respondent in that it will, for all practical purposes, destroy his career. A one year suspension for a lawyer 51 years old last October, coupled with the time

that reinstatement proceedings will take, and then added to the time that rebuilding a practice from scratch will take, will destroy this lawyer's career. It simply is not necessary.

A 91 day suspension, with proof of rehabilitation before reinstatement, will be a stern sanction. The proof of rehabilitation aspect will guarantee the public's protection because the lawyer must prove to the referee that he is rehabilitated before he will be able to practice again.

CONCLUSION

The Jackson, Colclough and Rood cases cited above all involved repeated instances of lawyers lying in an attempt to enhance the amount of money (and probably their fees) that their clients could obtain. They received a three month suspension (without proof of rehabilitation), a six month suspension and a one year suspension respectively. Respondent's misconduct, occurring on one occasion, for no personal gain whatsoever, and in which he specifically told an individual not to lie, does not warrant a suspension more severe than that given to Messrs. Jackson and Colclough and equal to that given to Mr. Rood. His misconduct is no more reprehensible than that involved in the Fischer case, in which a 91 day suspension was imposed. He should receive the same discipline that Mr. Fischer received.

Respondent asks this Court to reject the Referee's recommended discipline and to substitute as discipline a 91 day suspension with proof of rehabilitation before reinstatement.

Respectfully submitted,

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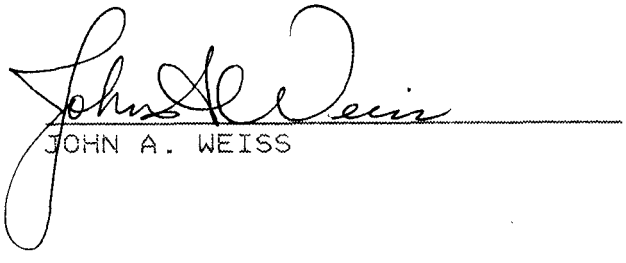
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed to John V. McCarthy, Esquire, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 20th day of February, 1991.



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