IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

HARRY WINDERMAN,

Respondent.
_____/

Supreme Court Case No. 78,226

ANSWER BRIEF OF THE FLORIDA BAR

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COUNTERSTATEMENT OF THE FACTS

Appellant (herein called "respondent") in his statement of facts, has so punctuated it with references to "Plds-Respondent's Finding of Fact", a document neither offered nor accepted into evidence or adopted by the referee, and has omitted references to so much relevant testimony and exhibits, so as, in the bar's view, to necessitate this counterstatement.

In the Spring or Summer of 1989, respondent undertook representation of Donald Wells, Betty and John Cooney, Olive Woodard and Vera Harrington in connection with such individuals' claims that they had lost mortgage investments (in some instances constituting life time savings) due to breach of contract and/or fraud on the part of an investment company and its principals (7, 11, 55-56, 114, 185, 236 *; bar's exhibit 26 in evidence and report of referee, paragraph 34). Respondent, professing to have the requisite skill and experience, agreed to pursue civil litigation against the corporation, its principals, accountant and attorney (16; admitted by respondent, paragraph 2 responses to request for admissions; report of referee, paragraph 4).

For the next year, respondent attempted, unsuccessfully, to plead a cause of action against the defendants, individually or collectively. He filed four (4) complaints, only to be met on each occasion with motions to dismiss resulting in dismissals of each complaint (13, 24, admitted by respondent, paragraph 2, responses to request for admissions; bar's exhibits 5, 11 and 12 in evidence and report of referee, paragraphs 5-16). In April, 1990, the last of the complaints was dismissed but respondent was afforded thirty (30) days within which to file an amended complaint. The last date under the order for

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* All numbers are page references to transcript of final hearing.

such filing was May 26, 1990 (21, bar's exhibits 5 and 10 in evidence; admitted by respondent, paragraph 2, responses to request for admissions; report of referee, paragraph 16).

Respondent did not report to his clients regarding the various dismissals (44, 58, 61-62, 70-71, 116-117, 127-128, 195, 197; bar's exhibit 26 in evidence; report of referee, paragraph 25). He wrote no correspondence and had but two (2) meetings with his clients. One occurred at the outset of the representation in August or September, 1989 (58, 114, 187). The other occurred in January, 1990 when respondent informed his clients that the defendant-accountant had been "let out" of the suit (117-118, 133). He assured his clients, however, that the action against the accountant would be refiled (118, 134).

Both Ms. Cooney and Mr. Wells wrote to respondent requesting status reports (116-117, 123; bar's exhibits 15-25; report of referee, paragraph 33). Respondent did not reply (195; report of referee, paragraph 32). His first communication to his clients was by letters dated May 24, 1990, two (2) days prior to the deadline for filing a fifth amended complaint (35, 135, 197; admitted by respondent, responses to request for admission, paragraph 2; bar's exhibits 1,3,4 and 6 in evidence). Even when his clients came to his office to pick up their files, respondent still failed to inform them that their cases had been dismissed, with prejudice (36-37, 44-45, 64, 66, 128; report of referee, paragraph 26).

Obviously frustrated at his inability to file a legally sufficient complaint, respondent attempted to withdraw from representation in the Wells case representing to the court that the application was made at the request of his client (12, 38; admitted by respondent, responses to

request for admissions, paragraph 2; report of referee, paragraph 29). No such request had been made and the statement constituted a misrepresentation to the court (70, 130, 197-198, 201-202; report of referee, paragraph 30).

Not only did respondent fail to inform his clients of the dismissal with prejudice, he exacerbated the situation by receiving papers seeking the assessment of attorney's fees and costs against Mr. Wells but did not inform Mr. Wells of the pendency of such application (16, 32-34, 37, 203; bar's exhibits 13 and 14 in evidence; report of referee, paragraphs 21 and 27). As a result, a judgment was entered against Mr. Wells in the approximate sum of $12,000.00 (34-35, 203; report of referee, paragraph 23).

As though his clients had not been victimized sufficiently, respondent continued the odyssey. Mr. Wells, faced with a ruinous judgment as a result of respondent's neglect and failure to communicate, engaged counsel to attempt to extricate himself from the judgment (205). After settling and paying the judgment for attorney's fees and costs, Mr. Wells looked to respondent for reimbursement (205-206). Respondent required, first, that Mr. Wells institute a law suit against him and then agreed to face his responsibility, but only if Mr. Wells agreed to write to the bar and withdraw his complaint (206-207).

Gripped by a seeming inability to accept responsibility, respondent continued with his lack of candor even in the cold glare of the bar disciplinary proceeding. In his opening statement to the referee, respondent represented that Brian Joslyn, Esq., counsel for the defendants in the civil action underlying the bar proceeding, had stated that he (Mr. Joslyn) would not seek to have fees and costs taxed

against respondent's clients (16). In stinging and forceful testimony, Mr. Joslyn explained that he and his clients had considered the civil litigation to be without merit and had always intended to pursue fees and costs; that he never suggested, intimated or represented to respondent to the contrary (225-226).

Respondent suggested that the dismissal of his many filings was due, not to his inability or lack of skill, but to the whim of a difficult trial judge (12, 243). This suggestion, however, seems to be belied in a twofold fashion. Firstly, the order dismissing the fourth amended complaint expressly reserved to respondent an opportunity to file a fifth amended complaint (bar's exhibit 5 in evidence). It may reasonably be inferred therefrom that the trial judge considered that a viable cause of action could, in fact, be articulated. Brian Joslyn, Esq., an attorney specializing in commercial and securities litigation, testified that respondent's representation was "woeful" (226-227). He opined that respondent had not articulated even a rudimentary cause of action alleging breach of contract on the part of the defendant corporation; that survivable causes of action could have been asserted against the various defendants (227-230).

SUMMARY OF THE ARGUMENT

While separate violations of the Rules of Professional Conduct may, in some instances, merit imposition of public reprimands or short term, automatic reinstatement length suspensions, in the case at bar, the cumulative demonstration of respondent's acts of misconduct, engaged in with such cavalier and willful abandon, with the resultant prejudicial impact on so many clients is indicative of an attorney who must be dealt with in the manner suggested by the referee.

The recommended sanction of a two (2) year suspension will assure the public and demonstrate to the bar that attorneys who treat their clients in such a manner as to demonstrate disdain for their interests will be administered substantial disciplinary measures commensurate with such cumulative misconduct.

ARGUMENT
POINT I
RESPONDENT'S CUMULATIVE MISCONDUCT WITH THE RESULTING CLIENT PREJUDICE WARRANTS IMPOSITION OF THE REFEREE'S RECOMMENDED SANCTION.

Respondent urges that he is innocent of the violations charged by the bar and found by the referee. In his sixty-seven findings of fact, however, the referee has carefully documented the evidence supporting each finding. It is respectfully submitted that such evidence is overwhelming and would survive any burden of proof. It is axiomatic that a referee's finding of fact is presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986); The Florida Bar v. Price, 478 So. 2d 812 (Fla. 1985).

If respondent had merely neglected his clients' cases, the bar would be seeking a public reprimand in this proceeding. The cases are legion that an isolated instance of neglect merits such sanction. The Florida Bar v. Welty, 382 So.2d 1220, 1223 (Fla. 1980). Respondent's misconduct, however, transcends simple neglect and requires a stiffer penalty.

First, respondent's failure to file a fifth amended complaint, or, to inform his clients so that they could attend thereto by retaining new counsel, resulted in the dismissal of the clients' cases, **WITH PREJUDICE**. In The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987) the Court suspended the respondent for a period of eight (8) months where respondent's neglect had resulted in the dismissal of his client's cause of action due to the running of the statute of limitations. In The Florida Bar v. Solomon, 409 So. 2d 1052 (Fla, 1982), the Court

approved a three (3) year suspension where the respondent had undertaken representation and failed to pursue the same with the result that the client's claim was dismissed for lack of prosecution. In The Florida v. Baron, 408 So. 2d 1050 (Fla. 1982), the Court upheld a one (1) year suspension where the respondent failed to answer a request for admissions. There was no indication of any client prejudice. The Court noted that the respondent had a prior disciplinary record.

The foregoing constitutes but one facet of the misconduct involved in this proceeding, It is the addition of the other violations indulged in by respondent that virtually mandates a more severe penalty,

After neglecting his clients' cases and failing to inform them of the May 26, 1990 deadline for filing an amended complaint, respondent compounded matters by neglecting to inform Mr. Wells that an application had been made seeking imposition of a judgment for costs and attorneys' fees. The resultant prejudice to Mr. Wells was devastating. Having invested the proceeds derived from the sale of his home and other assets to see the same lost through the machinations of Security and Investment Corporation, Mr. Wells now faced the disaster of a $12,000.00 judgment. This cumulative misconduct, alone, merits imposition of enhanced discipline. It is axiomatic that the Court deals more harshly with cumulative misconduct than it does with isolated misconduct. The Florida Bar v. Williams, 17 FLW S397 (Fla. June 25, 1992); The Florida Bar v. Golden, 561 So. 2d 1146 (Fla. 1990); The Florida Bar v. Mavrides, 442 So. 2d 220 (Fla. 1983). It cannot possibly be mitigating nor bring any semblance of honor to respondent's actions to suggest, as he does in his brief, that he failed to notify Mr. Wells of the pendency of the taxation of attorneys fees motion because

respondent had listed Mr. Wells as a recipient of his motion to withdraw. The motion to tax attorney's fees (bar's exhibit 13 in evidence) contains a certificate of service that makes no reference to Mr. Wells. Respondent's argument is indicative either of an attempt to mislead or ignorance regarding the plain import of the referenced certificate of service.

The foregoing, serious enough so as to warrant imposition of a substantial sanction, is compounded by additional and even more serious violations. In the hierarchy of bar offenses, few are regarded with more dire consequences than misrepresentations to a tribunal. "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process." Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960). Even where a misrepresentation was not crucial to the outcome of the case the Court disbarred a respondent for permitting a witness to testify under a false name. The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981). In The Florida Bar v. Lund, 410 So. 2d 922 (Fla. 1982), the Court suspended the respondent for untruthful testimony before a grievance committee. In the case at bar, respondent knowingly filed a pleading in the securities case upon his application for withdrawal stating that the motion was filed at the request of his client. That statement was false and respondent knew it was false when he made it. While the misrepresentation, perhaps, does not rise to the level of those in Dodd and Agar, such misconduct, when added to the neglect of and inadequate communications to his clients, constitutes sufficient and substantial cause for increasing the penalty.

Respondent compounded matters further by making a glaring misrepresentation to the referee in this disciplinary proceeding. In his opening, respondent represented that he had been told by Brian Joslyn, Esq., attorney for the defendants in the securities case, that Mr. Joslyn would not seek attorney's fees and costs against respondent's clients. Mr. Joslyn disabused the referee of such misrepresentation explaining that no such conversation ever transpired.

The net effect of the foregoing is the creation of a portrait, bit by bit, reflecting an attorney who has great difficulty discerning and reporting the truth.

In The Florida Bar v. Fitzgerald, 541 So. 2d 602 (Fla. 1989), the Court had an opportunity to comment regarding a respondent's attempt to extract an agreement from his victim regarding a bar complaint. The Court, in commenting on this type of "omerta" agreement stated: 'We caution the public and the Bar that any such agreement is not enforceable," In the case at bar, respondent, after causing his client to suffer the entry of a judgment for costs and attorney's fees against him, required the client to sue him before he would respond appropriately. Even then, respondent insisted that his client withdraw the bar grievance as a quid pro quo for receiving that to which he was entitled. Such action on respondent's part simply is not consistent with the mindset of an honest individual,

It is respectfully submitted that when all of the components of respondent's misconduct are weighed together, the inescapable conclusion must be drawn that respondent should be removed from the rolls of bar membership for a considerable period to permit him time to reflect regarding his ethical responsibilities, to dissuade others from

similar practices and to assure an ever concerned public that the legal profession will **brook** no such behavior in its ranks.

Florida Standards for Imposing Lawyer Sanctions reinforces the **bar's** recommendations. Standard **4.41** provides that disbarment is appropriate when a lawyer knowingly fails to perform services for **a** client and causes serious or potentially serious injury to **a** client. Standard 4.42 provides that suspension **is** appropriate when a lawyer engages in **a** pattern of neglect and causes injury or potential injury to a client. Certainly respondent's failure to respond timely by the filing of a fifth amended complaint and his subsequent failures to communicate the dismissal to his clients and to **inform** them of the application for attorney's fees and costs constitutes a pattern **of** neglect causing injury to a client,

Standard 5.11**(f)** provides for disbarment when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit or misrepresentatian that seriously adversely reflects on the lawyer's fitness to practice. It is respectfully submitted that respondent's misrepresentation to the trial court that he was requested to withdraw by his client, his misrepresentation to the referee that he was informed that no applications for attorney's fees would be directed against his clients and **his** forcing Mr. Wells to first sue him and then agree to withdraw the bar grievance in order to receive that which should voluntarily have been offered, constitutes the intentional conduct embraced by Standard 5.11(f).

Finally, Standard 7.2 provides that suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed **as** a professional and causes injury or potential injury to **a** client,

the public, or the legal system. The cumulative violations hereinabove recited, in the **bar's** view, bring respondent squarely within the the purview of Standard **7.2.**

The Court's attention **is** respectfully directed to Standard 9.22 which defines aggravating factors. It is submitted that several exist. Certainly, respondent was selfishly motivated when he forced his client to institute a lawsuit to recover what should have unhesitatingly been offered. The pattern of misconduct and the multiple offenses have been described in detail. Respondent submitted false evidence during the disciplinary process when he suggested to the referee that his adversary in the underlying civil litigation had promised not to seek attorneys' fees. Respondent hardly acknowledged the wrongful nature of his conduct conceding, at most, that he should have documented his file rather than relying upon alleged oral communications. The vulnerability of the victims in this proceeding is particularly compelling. The referee had an opportunity to assess several of the individuals **involved** and to read the depositions of others. The bar respectfully submits that respondent's clients, suffering from grievous losses, were certainly vulnerable under the circumstances. Nor can respondent suggest that his failures were due to inexperience. He was admitted to the bar in 1976. Finally, respondent's indifference to restitution was exemplified by his treatment of Mr. Wells. By his own admission, he, as of the final hearing, had yet to reimburse his other clients **for** expenses they incurred in defending against actions to impose attorney's fees.

It is of some considerable significance that respondent's shenanigans provoked judicial commentary **prior** to the institution of the

subject disciplinary proceedings, In the litigation underlying respondent's course of misconduct, Donald F, Wells v. Security and Investment Corporation of The Palm Beaches, et al, Case No. CL 89-2394 AE (Fla. 15th Cir. Ct. 1989), the trial judge, in entering the order of dismissal, with prejudice, above referenced, took pains to observe :

> 7. Neither the plaintiff Wells nor his counsel (who is also counsel for all five (5) other Plaintiffs) attended the hearing on the instant Motion to Dismiss.
>
> 8. The Court finds this is the third hearing within the last week at which neither Plaintiff Wells nor his counsel, Harry Winderman, Esq., has appeared.
>
> 9. The Court specifically finds that notwithstanding the fact that a Motion to Withdraw has been filed by Mr. Winderman, the Motion has not been heard by this Court and Mr. Winderman has not yet been permitted to withdraw as counsel for Mr. Wells or for any other Plaintiff.
>
> 10. The Court's patience has been taxed to the limit. (Bar's exhibit 5 in evidence, page 3).

Respondent would urge the Court to believe that he was in regular communication with his clients, fully informing them of all of the shades and nuances of the outstanding litigation. In fact, respondent not only was unable to produce a single piece of correspondence addressed to any of his clients, save for his letter of May 24, 1990 informing them of his intention to cease their representation, but offered no explanation at the final hearing and has ignored in his brief all of the communications (correspondence and court motions) addressed to him by various of his clients in which he is berated for not communicating with them (See bar's exhibits 15, 16, 17, 18, 19, 20, 21, 22, and 23).

These exhibits present a poignant picture of clients, totally in the dark, literally begging for information. It is most respectfully urged that respondent's failure to address even one of such inquiries demonstrates not only his callous disregard of his clients, but a willingness to permit the public records created by his clients' pro se filings to go unanswered. Would any attorney, anywhere, under any circumstances, permit such filings to remain unexplained if such attorney had even a modicum of a sense of propriety?

Respondent asserts that his representation to the court in his application for permission to withdraw that he did so with the consent of his client is corroborated by Mr. Wells' indication that Mr. Wells was not surprised by the fact of withdrawal. The fact was, is and remains that the representation simply was untrue. At the time the application was filed, Mr. Wells was confused concerning what was occurring. He testified :

> Q. On June 12th, 1990, did Mr. Winderman -- did you request of Mr. Winderman that he file a motion in your action to withdraw as attorney in that action?
>
> A. I did not.
>
> Q. After June 12 --
>
> A. Just let me clarify that. We asked Mr. Winderman if he would proceed because frankly at least my feeling, on June 12th I was lost. I felt kind of abandoned and I thought it would be -- we needed some sort of idea as to what was going on at this time, you know, did we need to do anything.
>
> I think Mrs. Cooney led us in that respect to the extent that did we need to protect ourselves relative to attorneys fees, what did we need to do if anything.
>
> She was concerned and we were all concerned about that. (201).

Respondent, in addressing the referee's findings regarding his unauthorized representation of Betty Phillips, totally avoids Ms. Phillips' repeated efforts to secure information from respondent regarding whether or not he had, in fact, commenced an action on her behalf. Ms. Phillips' July 13, 1990 letter to respondent (bar's exhibit 7 in evidence) specifically seeks confirmation that respondent will rectify the court records. Respondent's reply (bar's exhibit 8 in evidence) totally avoids his client's inquiry. Pressed for information by Ms. Phillips' July 21, 1990 letter (bar's exhibit 9 in evidence) respondent resorted to his favorite tactic, viz., total avoidance and silence.

It is difficult to understand why a judge's acceptance of one side's proposed judgment over the other's clouds a judge's findings and recommendations as charged by respondent in his brief. Certainly it is common practice for counsel to submit proposed findings and for courts either to adopt the same in whole or in part or to fashion their own. The implicit suggestion that the referee was biased is both insulting and belied by the abundance of evidence sustaining each of his findings and recommendations.

CONCLUSION

Harry Winderman undertook representation of a group of traumatized victims of a defunct mortgage company and rather than attempting to assuage his clients through diligence and a flow of information, added to their victimization through incompetence, neglect, lack of communications and intentional withholding of information vital to his clients' welfare. Coupled with respondent's misrepresentation to the trial court vis a vis his client's consent to withdrawal and his lack of candor to the referee vis a vis his adversary's alleged statement about recovering attorney's fees, a pattean of cumulative misconduct is presented warranting the two (2) year suspension recommended by the referee.

All of which is respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and complete copy of the foregoing answer brief of The Florida Bar has been furnished to Neil B. Jagolinzer and to James M. Tuthill, attorneys for respondent, by U.S. mail addressed to them c/o Christiansen, Jacknin & Tuthill, 1555 Palm Beach Lakes Boulevard, NCNB Building, Suite 1010, P.O. Box 3346, West Palm Beach, FL 33402 this 27th day of August, 1992.

DAVID M. BARNOVITZ, Bar Counsel