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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

vs.

LOUIS J. WEINSTEIN,

Respondent/Appellee.

Supreme Court Case
No. 78,966

The Florida Bar File
Nos. 91-50,583(17A) and
91-51,095(17A)

ANSWER BRIEF OF RESPONDENT LOUIS J. WEINSTEIN

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PRELIMINARY STATEMENT

To facilitate this Honorable Court's consideration of this brief through the utilization of uniform reference terms, Respondent hereby adopts the nomenclature employed throughout its Initial Brief by the Florida Bar.

STATEMENT OF THE CASE AND THE FACTS

I. STATEMENT OF THE CASE

Respondent is in almost complete concurrence with the Bar's recitation of the case, in its Statement of the Case, except for a singular assertion. The Bar contends that the Respondent's execution of the Joint Stipulation of September 24, 1992, constitutes an admission that the Respondent lied to the Referee at final hearing. However, Respondent did not in fact lie to the Referee and, paragraph 4 of said Stipulation is a specific, detailed, forthright clarification of his continuing involvement in the Ellis case, after September 9, 1998, in addition to prior thereto, and an explanation and a description of his participation in the conclusion of said case. This description demonstrates an active role in the resolution of said case.

STATEMENT OF THE FACTS

The Florida Bar repeatedly castigates Respondent for asserted misrepresentations of facts, which are strenuously denied. It is the Bar that exhibits a complete paucity of candor to this tribunal, by engaging in a multitude of liberties with factual matters exaggerating the facts, furnishing incomplete factual statements and otherwise displaying a "loose and easy" attitude regarding facts in the record. There is not even a scintilla of evidence of record regarding discussions preliminary to the September 24, 1992 hearing and any statements by Respondent, which are vigorously opposed. The Bar's appellate counsel was not even a party to the subject Joint Stipulation, and her statements relative to said Stipulation are mere speculation, conjecture and rank, unsubstantiated hearsay.

On page 14 of the Florida Bar's brief, the Bar attributes the few questions posed by the Respondent to Mortilla to the motivation of an appraisal of the value of his case, with citations in the record purportedly establishing that fact. However, a perusal of the Bar's references is devoid of any support whatsoever for the Bar's putative factual statements. Yet another prime glaring example of the Florida Bar's liberties with the truth, and its overzealous, perhaps fanatical attempt to "tar and feather" Respondent.

SUMMARY OF THE ARGUMENT

The singular issue in this request for review by the Florida Bar is the propriety of the discipline recommended by the Referee. It is manifest in this case that the sole function of this Honorable Court is to ascertain the appropriate discipline for Respondent, after consideration of all of the facts present herein. It is a long standing, well-settled legal proposition recently reiterated in the Florida Bar vs. Ariel Poplack, (Fla. Case No. 76,823, April 30, 1992), that a Referee's recommendation of discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. In the case sub judice the Bar engages in a litany, which borders on an absence of candor towards this forum, by its reiteration that the Referee's discipline is a suspension of 90 days. However, even this Court's cursory review of page 24 of the Amended Report of Referee, discloses blatant proof that the Referee has imposed a sufficient proper discipline, comprising suspension, probation, community service, CLE ethics credits and costs.

The sanctions of the Referee are supported by the relevant Florida case law and the factual circumstances as evidenced in the record, including a myriad of mitigating factors, which must be considered in fashioning an appropriate discipline, under the controlling Florida Standards for Imposing Lawyer Sanctions.

The decisional law advanced in support of the Bar's request for disbarment

evinces a misguided reliance upon existing case law, because these decisions undermine the Bar's premise and clearly establish that disbarment is an inappropriate punishment.

In formulating a proper discipline, the Florida Standards for Imposing Lawyer Sanctions posits a trio of purposes to be promoted by the application of the standards:

(1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case;

(2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline;

(3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Vengeance or retribution is inimical to these stated purposes.

ARGUMENTS

I. Both applicable Florida case law, comprising cases relied on by the Bar, and the mandatory Florida Standards for Imposing Lawyer Sanctions dictate that disbarment is an excessive, inappropriate discipline.

Respondent received from the Referee the following sanctions for his conduct:

1) 90 days suspension; 2) 100 hours of community service (excluding provision of legal advice) for the victims of Hurricane Andrew in the southern part of Dade County; 3) probation up to 1 year (with the period of probation to end upon completion of 10 CLE ethics credits); 4) attainment of 10 CLE credits in ethics; 5) costs. [Amended Report of Referee, page 24.] These numerous penalties are sufficient to protect the public and the administration of justice. [2]Disbarment would be an excessively harsh penalty in light of the Florida Standards for Imposing Lawyer Sanctions and Florida case law.

Standard 3.0 provides that a court <u>should</u> consider the following factors in imposing sanctions:

1. the duty violated;

2. the lawyer's mental state:

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[2]See standard 1.1

3. the potential or actual injury caused by the lawyer's misconduct; and

4. the existence of aggravating or mitigating factors.[3]

The Referee noted the following: "All of the Respondent's conduct was of a nature to bring the entire profession into disrepute, rather than of a type to cause actual harm to the recipients of the Respondent's attempted or actual solicitation." [Amended Report of the Referee page 25.] As the referee found, Louis Weinstein did violate his professional duty, but the effect of the misconduct does not warrant disbarment. Respondent was never employed as a result of his efforts, nor did pecuniary gain accrue. Further, poor health and the sporadic practice of the law produced overwhelming, simultaneous financial difficulties, engendering extreme mental turmoil. This impaired mental state precluded proper judgment and clear thinking, precipitating Respondent's act of desperation in attempting to solicit a person in a hospital. While not condoning this behavior, the underlying circumstances are mitigating factors requiring consideration in the determination of proper punishment, in accordance with Florida Standard 9.32(c) and (h).

> "Respondent has had a continuing history of kidney disease. He underwent surgery in January of 1990. His physical problems evidently affected his earning capacity and impelled him to violate the Rules of Discipline in an effort to rejuvenate a lagging practice and income." (Amended Report of Referee, at page 26).

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[3]Mitigating factors discussed infra

An analysis of the leading Florida case law illustrates that disbarment is overly draconian and is not warranted under the facts of this case. The case law covers a broad gamut of unethical activities. It is clear that Respondent's behavior is not in line with misconduct that has warranted disbarment. In The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991), an attorney was disbarred for a criminal act, attempting to bribe an assistant state attorney. The subject action does not approach criminal activity.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) an attorney failed to file income tax returns for 22 years. This Court ascertained that a 6 month suspension was sufficient discipline for this prolonged misconduct. Factually, this attorney's actions were much more egregious and outrageous than Respondent's, which were committed in an isolated period of 5 months during a legal career spanning 15 years. The Attorney Lord purloined money from the federal government and violated federal laws, a crime. This Court found:

> While personal difficulties should not be relied upon to excuse Lord's misconduct, the Referee should not be restrained from considering hardships in recommending a discipline which would be fair to society and to Respondent in addition to being an effective deterrent to others. Id. at 986.

The Court also noted that a court's 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." Id.

In The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981), an attorney

appropriated his client's money and was disbarred. This case exemplifies the type of situation where disbarment is warranted, Respondent caused no actual harm aside from bothering the recipients of his advances. He was not hired as a result of his actions nor did he receive any monetary benefit.

In The Florida Bar v. Schulman, 484 So.2d 1247 (Fla. 1986), an attorney received a public reprimand from this Court, for purchasing a hospital report for use as a source of potential clients. The attorney had an investigator who would solicit business for him. The attorney represented these clients and ergo, his solicitations caused actual harm in distinction to Respondent. In The Florida Bar v. Dodd, 195 So.2d 204 (Fla. 1967), an attorney was disbarred for representing both the husband and wife in their divorce. This is the type of situation where disbarment is warranted. Respondent's acts are far removed from the seriousness of Dodd's actions.

In The Florida Bar v. Gaer, 380 So.2d 429 (Fla. 1980), an attorney received a public reprimand for sharing attorney's fees with a bondsman who solicited business for him. The bail bondsman referred 3 clients to the defendant. The defendant represented the 3 clients and shared part of his fees with the bail bondsman. This case further illustrates that disbarment is too harsh considering the facts of this case, in which Respondent received no aggrandizement nor employment from his mere attempted solicitation.

In The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981), an attorney was suspended for one year for the following actions: 1. solicitation; 2. attempt to

withdraw from the case without good cause; 3. conflict of interest; 4. misrepresentation to the court. The actions of this attorney are far worse on the ethical scale than Respondent's, and he was not disbarred.

In The Florida Bar v. Budish, 421 So.2d. 501 (Fla. 1982), this court imposed a public reprimand for the attorney's false and misleading advertisements. The actions of this attorney caused actual harm to the people who were misled by his ads.

In The Florida Bar v. Bowles, 460 So.2d 367 (Fla. 1984), an attorney received an eight month suspension for doing the following: 1. mishandling a bankruptcy proceeding, dissolution action, and a real estate matter; 2. Improper advertising. Clearly, Respondent's acts cause much less tangible real harm.

In The Florida Bar v. Dawson, 111 So.2d 427 (Fla. 1959), an attorney bought clients' business by agreeing in advance to pay some of their bills. This attorney was not disbarred by this Court. This Court stated:

> Definitive disbarment is an extreme measure which should be saved for the most serious breaches of discipline. As a matter of act, in many states complete disbarment is employed only in those cases which suggest that the offending lawyer is beyond rehabilitation or that his conduct has been so reprehensible that he should be permanently separated from the profession. Id. at 431.

In State ex rel. Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954), the court stated:

> ... Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude of course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable.

In The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967), an attorney received a 6 month suspension for actually soliciting employment from several people. The Court noted: "over the years this Court has not found any areas of black and white as to the degree of punishment to be imposed in all cases Rehabilitation as well as punishments involved in every case." Id. at 520. This passage illustrates that Mr. Weinstein should not be made into some type of benchmark as the Bar would like. [Initial Brief, page 18] The Court must consider rehabilitation in its decision and not just punishment. ".. 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." The Florida Bar v. Pahules, 233 So.2d 130, 132 (1970).

In The Florida Bar v. Stafford, 543 So.2d 1321 (Fla. 1989), an attorney received a 6 month suspension for the following acts: 1. engaging in conduct contrary to honesty; 2. asking persons to recommend employment; 3. dividing legal fees with nonlawyers; 3. violating disciplinary rule; 4. engaging in conduct that adversely reflects fitness. The Court found Stafford's action to be serious and suspended him for 6 months. Stafford paid the aggregate sum of $10,000.00-$11,000.00 for the cases that were in fact referred to him. Stafford secured ten or eleven cases as a result of his accomplished solicitation scheme. The actions of Stafford were substantially more flagrant than Weinstein's, who secured no cases as a result of his attempted rather than actual solicitation. This Court levied a suspension, a sufficient, appropriate discipline rather than the extreme measure

of disbarment.

The previous analysis of the leading, controlling Florida case law engenders a single, inescapable conclusion. The numerous diverse sanctions imposed by Referee Siegel are both sufficient and appropriate to punish Louis Weinstein, protect the public and promote the goals and purposes of discipline. Indeed, the Referee's recommendations of the requirements of community service and 10 hours of CLE ethics credits are designed to encourage reformation and rehabilitation, the second linchpin of the 3 pillars supporting Bar disciplinary proceedings, enunciated in the recent case of The Florida Bar v. Ariel Poplack, (Fla., April 30, 1992, Case No. 76,823):

> We have held that Bar disciplinary proceedings must serve 3 purposes: first, the judgement 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; 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; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved with like violations. Id. ap 566.

Respondent's actions, while clearly improper, do not even approach those rare cases in which disbarment was ascertained to be an appropriate measure. Although zealous enforcement of ethical practices is significant and valuable, overzealous, fanatical retribution confers no benefit to society nor the legal profession. This Court's approbation of the Bar's position that disbarment of Respondent is appropriate, would not serve the stated goals of discipline but rather would subvert its purposes and legitimize overkill and vengeance in

punishment.

The Bar's appellate counsel exhibits unbridled literary license in her representations to this Honorable Court of the facts of record in this case. A graphic illustration of this detrimental practice is counsel's statement at the bottom of page 19 of its initial brief, subsumed under its first argument that Weinstein:

> remained in the hospital room with him for 20 to 30 minutes.

However, the only testimony that speaks to this issue is that of Respondent and head nurse, Judith Overman. Respondent's testimony is unqualifiedly that he stayed in the room with Mortilla for about 8 to 10 minutes (Transcript of Grievance Committee on July 30, 1991, at page 186, lines 7 through 10). Even nurse Overman has conceded on cross-examination at the final hearing that Respondent could have been with the patient for as little as 10 minutes (Transcript of final hearing on June 4, 1992 at page 45, lines 18 through 20). To state as a fact that Respondent remained with Mortilla for 20 to 30 minutes is a single instance in a series of gross distortions of the facts in evidence in the record, by the Florida Bar.

The Florida Bar engages in yet another egregious factual misrepresentation in its assertion on page 20 of its Initial Brief, that Respondent's continued presence in Mortilla's hospital room could be for no other purpose but to patiently await an opportunity to obtain Mortilla's signature on his at the ready documents regardless of his condition. This is rank speculation and the only evidence of record completely negates this assertion. Nurse Overman's testimony directly addresses

this point. If Respondent wanted to obtain the execution of his documents, there was ample opportunity to secure such; however, Nurse Overman's testimony is directly on this issue:

> "**Q.** Nor did you, to your knowledge, see Mr. Weinstein present any kind of written forms, agreements or releases to this man?
>
> **A.** No, sir. (transcript of final hearing on June 4, 1992 at pages 46 through 47, lines 25 through 3.)"
>
> **Q.** Did you see any types of papers or anything like that that he was attempting to have the patient sign?
>
> **A.** No. (sworn statement of Judith Overman, taken on June 4, 1991 by Johh D. Vogt, Esquire, counsel for the Florida Bar, at page 11, lines 18 through 21).

Even in response to Bar counsel Richard Liss' queries, Overman stated:

> **Q.** Did you see whether or not Mr. Weinstein had any papers with him?
>
> **A.** The manila folder was there but I didn't see any papers out. (Transcript of final hearing held on June 4, 1992, page 27, line 11 through 14).
>
> **Q.** You didn't hear Mr. Weinstein asking this man to let Mr. Weinstein be his lawyer, did you?
>
> Did you hear any questions like that?
>
> **A.** No, I didn't.
>
> **Q.** You heard no such converstion going toward Mr. Weinstein's possible employment, did you?
>
> **A.** No, I didn't.
>
> **Q.** Nor did you, to your knowledge, see Mr. Weinstein present any kind of written forms, agreements or releases to this man?
>
> **A.** No, sir.

(Transcript of final hearing on June 4, 1992, at pages 46-47, lines 16 through 3).

The cases specifically relied on by the Appellant Florida Bar to purportedly substantiate its position that disbarment is an appropriate discipline, undermine this contention, and if fact demonstrate, that suspension in fact, the proper measure of punishment in this case.

In The Florida Bar v. Manspeaker 428 So. 2d 169 (Fla. 1983), the Referee himself recommended disbarment. This case is factually different because there were not any mitigating factors or remorse. [243] This attorny perpetrated fraud on his client, which is significantly more serious and harmful than an attempted solicitation.

The Florida Bar v. Curry 211 So. 2d 169 (Fla. 1968) cert. den. 393 U.S. 981 involves an attorny who was suspended for six months for actually soliciting business. In the Respondent's case, the Bar wants to go the extra step and disbar Respondent for an attempt to solicit. This is not consistent with case law. Curry illustrates that case law dictates a suspension.

In The Florida Bar v. Terry B. Croupen and Myron S. Zwibelman 731 S.W. 2d 247 (Mo. banc 1987), the attorney perpetrated an in person solicitation in a patient's hospital room. The attorney received only a public reprimand, a far cry from the disbarment sought by the Bar. Disbarment is excessive and inconsistent with case law.

In State ex rel. Florida Bar v. Bieley 120 So. 2d 587 (Fla. 1960), the attorney actively solicited clients. The Court suspended the attorney for six months. Bieley

involved a more deceptive level or scheme of solicitation because the attorney had someone else do the solicitation for him. The Respondent did not.

State ex rel. Florida Bar v. Dawson 111 So. 2d 427 (Fla. 1959), in this case, the attorney bought clients' business by agreeing in advance to pay their bills. This attorney was not disbarred. "Definitive disbarment is an extreme measure which should be saved for the most serious breaches of discipline. As a matter of fact, in many states complete disbarment is employed only in those cases which suggest that the offending lawyer is beyond rehabilitation or that his conduct has been so reprehensible that he should be permanently separated from the profession." [431]

State ex. rel Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954), stands for the proposition that disbarment should not be used if any punishment less severe would have the same end desired. [223] The Court also notes that the following factors must be kept in mind: 1. judgment must be just to the public and designed to correct anti-social tendency; 2. it must be fair to the respondent and the duty of the court to society is paramount. [227]

In The Florida Bar v. Meserve, 372 So. 2d 1373 (Fla. 1979) an attorney was suspended for two years for a number of serious acts. The Court considered his alcohol use as a mitigating factor. [1375] Meserve is a case which involves a large number of acts which are more serious than Respondent's actions, and yet Meserve received suspension, not disbarment.

This Court held in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970)

that suspension rather than disbarment was an appropriate penalty for mishandling trust funds in view of mitigating factors.

Respondent's suspension, in conjunction with other sanctions, will be sufficient to protect society from unethical conduct and is fair to the Respondent. Disbarment is unduly harsh and will deny the public the services of a qualified lawyer. [132]

In In The Florida Bar v. Perry, 377 So. 2d 712 (Fla. 1979), the attorney received a 6 month suspension for committing a number of acts which are significantly more serious than the Respondent's actions. This case illustrates that disbarment is too severe a penalty in Respondent's case.

The Florida Bar v. Scott, 197 So. 2d 518 (Fla. 1967), in this case, the attorney received a 6 month suspension for soliciting employment from several people. "Over the years this Court has not found any areas of black and white as to the degree of punishment to be imposed in all cases. Rehabilitiation as well as punishment is involved in every case." [520] This case enunciates that this Court must consider rehabilitation in its decision and not just punishment.

The Florida Bar v. Stafford, 542 So. 2d 1321 (Fla. 1989), in this case, the attorney received a 6 month suspension for the following acts: 1. engaging in conduct contrary to honesty; 2. asking persons to recommend employment; 3. dividing legal fees with a nonlawyer; 4. violating disciplanry rule; 5. engaging in conduct that adversely reflects fitness. The Court found Stafford's actions to be serious and suspended him. Stafford paid $10,000-$11,000 in total for the cases

that were referred to him. Stafford got ten or eleven cases as a result of his solicitation scheme. [132] Respondent never procured a client nor made any money as a result of his actions.

II. Respondant's false testimony under oath at final hearing, does not warrent disbarment under the apposite case law and existing mitigating circumstances.

The Florida Bar contends that The Florida Bar v. O'Malley, 534 So. 2d 1159 (Fla. 1988), is directly on point and supports its position that respondent should be disbarred. In O'Malley, the attorney perpetreted the criminal act of conversion of a substantial sum of monies ($100,000) in addition to his false testimony under oath. Yet the Bar conveniently omits to reveal that this Court meted out a suspension and not disbarment. This Court considered the extant mitigating circumstances and concluded that suspension in lieu of disbarment was warranted.

> "We agree with the Referee's finding of mitigating circumstances, and but for his findings, this would be a case for disbarrment. Id at 1162.

There are mitigating circumstances regarding Respondant's conduct as well.

The Florida Bar's claim that O'Malley mandates automatic disbarrment for false testimony under oath, is a glaring distortion of the facts of said decision and this Court's holding, and aptly illustrates, yet again, the Bar's callous, disingenuous statements and representations. The Bar's reliance on this case is misplaced as

a misconstruction. This decision maniefestly enunciates the proposition that this Court impelled to consider existing mitigating evidence before formulating appropriate discipline.

The Florida Bar quotes a portion of the opinion in The Florida Bar v. Manspeaker, 428 So. 2d 241 (Fla. 1983), in its Initial Brief. In Manspeaker however, unlike the instant case, the Referee himself recommended disbarment. There was also a complete absence of any mitigating fact. Id. at 243.

In both the preamble and standard 3.0 of the Florida Standards for Imposing Lawyer Sanctions, is the prescription that this Court should consider the existence of mitigating factors before determining an appropriate sanction.

The Lawyer Sanction Standard 9.32 delineates a laundry list of mitigating factors for this Court's consideration. The initial mitigating circumstance of (a) absence of a prior disciplinary record exists in this case. An allusion has been made to Respondent's singular previous dicipline for minor misconduct, consisting of a private reprimand. However, reference to the Lawyer Sanction Standard of Prior Discipline Orders, 8.0 through 8.4, inclusive, patently establishes that Respondent's sole prior minor misconduct is irrelevant since Respondent neither violated the terms of said private reprimand nor engaged in the same or simliar misconduct that is the subject of these proceedings. Therefore, Respondent is entitled to the absence of a prior disciplinary record as a mitigating factor to be considered in fashioning the proper punishment.

This Court's perusal is requested of the testimony of Respondent's ex-wife,

Ilona Weinstein and present wife, Eve Weinstein, spanning pages 164 through 180, inclusive, of the transcript of Final Hearing conducted on June 4, 1992. A review of this uncontroverted evidence demonstrates the abundant multitude of mitigating evidence existing in this case, including personal, emotional problems (Lawyers Sanction Standard 9.32 (c)), physical and mental disability (Lawyers Sanction Standard 9.32 (h)) and remorse (Lawyers Sanction Standard 9.32 (l)). Respondent's own testimony at final hearing elaborates the profound adverse effects, including social ostracism, mortification and ridicule, financial loss of clients, sleeping difficulties, loss of weight, etc. (Final Hearing transcript at page 210, lines 4 through 19).

This compelling evidence which this Honorable Court should consider, was undisputed by the Bar. Respondent's testimony at Final Hearing is further of import in its illustration of the other substantial penalties suffered by respondent: incarceration and attendant handcuffs, finger printing, frisking, bond and resulting newspaper coverage. (Final Hearing transcript pages 210 through 211, lines 20 through 25, 1 through 5). This proof substantiates the existence of mitigating consideration 9.32 (k): the imposition of other penalties or sanctions.

In its Initial Brief, the Florida Bar alludes to the Respondent's admissions in both his answer to the Complaint and response to the Bar's Request for Admissions. The Bar further mentions the Respondent's admissions made at the commencement of the Final Hearing. These admissions evince Respondent's cooperative attitude towards these disciplinary proceedings, which verifies the

existence of mitigating circumstance 9.32 (a).

The undisputed testimony of Respondent's ex-wife, Ilona Weinstein and current spouse, Eve Weinstein at Final Hearing, depicts Respondent's excellent character, proficiency and professional diligence. The Florida Bar did not even attempt to rebut this highly persuasive evidence.

Q. In addition to having been married to Mr. Weinstein years before the events that we are talking about today, some years before that, did you have some knowledge of Lou Weinstein's law practice?

A. Yes. We worked together three years at Reasbeck, Fegers, Hess and Weinstein. I was his legal secretary.

Q. Is that law firm in Broward County?

A. Yes, Reasbeck, Fegers, Hess and Weinstein.
(Testimony of Ex-wife, Ilona Weinstein, at Final Hearing, page 165, line 6 through 16.)

Q. Could you comment to His Honor on Lou Weinstein's diligence as an attorney in those days?

A. He worked day and night on cases -- even on vacations. We had some mountain property. He would take his cases with him. That is what caused our divorce.

Q. What do you mean?

A. I mean, his whole life was the law. He spent day in and day out with the law. He was up until 3:00 o'clock in the morning. He hardly ate or slept.
There was hardly any family life due to that.
(Ex-wife's testimony at Final Hearing, page 166, line 11 through 24.)

Q. Again, bear in mind that you were not, obviously, living together for sometime before the onset of these troubles in 1990. But were you

able to determine, from your observations of Lou Weinstein, any difference in his behavior, his personality or the way he was acting in 1990?

A. Well, he always came for his son. He was always there for his son. He has always been diligent with his son. That's his whole life too, his little boy and his practice.

I didn't know anything else. He was a good father and that's why I'm here.

Q. Despite his physical and other problems, he has always tried to keep up his obligations?

A. Yes, he has always been there for Merritt and given me my child support. Whatever problems Merritt had, he was there for him.
(Ex-wife's testimony at Final Hearing, page 170, line 4 through 22.)

The testimony of Respondent's wife, also uncontroverted by the Bar, corroborates the assertions of his ex-wife.

Q. Other than the time when he was operated on, have you always known him to be hardworking?

A. Very hardworking. He used to come home at midnight, 1:00 or 2:00 in the morning from work.

Q. Is that how he is to this day?

A. Yes. On the weekends, he works sometimes. We have clients calling the house at all times. He calls clients on the weekends.

Q. As far as you can tell, it's important that his clients are treated with respect?

A. Oh, yes.
(Testimony of present wife, Eve Weinstein, at Final Hearing, pages 176-177, lines 22 through 25, 1 through 10.)

Q. If His Honor would want to know from you, being the person closest to this man, if he has expressed remorse for these situations and these problems he has caused, that has caused the Bar to bring these inquiries -- do you feel that he is remorseful about these things?

A. Very much so.

Q. Given a chance again, do you think he would ever engage -- whatever activities that he did that have brought him here today, do you feel that he has put those things behind him and that he will be able to go on ethically and not do these things again?

A. Never again. He never did anything before. He has been practicing almost fifteen years and he has never done anything that was the least bit out of order until this.

Q. Do you feel that he has been taking it out on himself in the way that you mentioned, that he has lost weight and his personality has changed?

A. Yes he feels ashamed. He feels terrible about the newspaper article. I had relatives who saw it in the paper.

My son found out about it. I have friends and co-workers. A lot of people know. A lot of people I know just don't say anything. (Present spouse's testimony at Final Hearing, Pages 178-179, lines 20-25, 1-22).

This court's recently decided case of Poplack, is particularly illuminating of this court's present attitude in assessing disciplinary measures. This decision reflects, that the presence of mitigating factors is a pivotal consideration for this court, in fashioning an appropriate punishment. Poplack's misconduct consisted of an attempted criminal act, grand theft of an automobile, compounded by his lying to an investigating police officer. This misbehavior is more flagrant, egregious unethical conduct than the totality of Respondent's acts, or at worst,

tantamount thereto. This Honorable Court was swayed by the extant mitigating evidence showing that he acted under the emotional distress of a broken marriage. Poplack at 566. This tribunal assessed a thirty day suspension, together with probation, psychological counseling and the payment of costs.

The multiplicity of mitigating circumstances existing in Respondent's case, militate strongly in favor of adopting Referee Siegel's multiple punishments, as the discipline assessed by this court to Respondent. Analagous to Poplack, the Referee recommended diverse sanctions for Respondent, beyond suspension of ninety days, inclusive of a substantial period of community service of 100 hours, probation, ten hours of CLE ethics credits and the payment of costs of the Bar. The multitude of additional sanctions, beyond the ninety day suspension (Poplack received only a thirty day suspension for conduct arguably as serious as Respondent's) is a beneficial means to encourage and facilitate Respondent's reformation and rehabilitation, one of the three foundations upon which disciplinary proceedings rest.

The sole case involving an in-person solicitation at a hospital marshalled by Respondent, is the Missouri decision of In Re Crouppen, 731 S.W. 2d 247 (Mo. 1987), specifically addressed in appellant's Initial Brief. However, Bar counsel's tortured construction of the holding therein is a transparent attempt to mitigate the efficacy of the Missouri Supreme Court's assessment of only a public reprimand. The Florida Bar's distorted interpretation of the holding is borne out by even a cursory review of that decision.

> There is no confusion in the record on the critical point, however; respondents were univited guests at Virgil Brown's hospital bedside room prior to his surgery. It is further clear that both the purpose and the intent of their visit was to solicit Brown's legal business. DR 2-103(A) prohibits a lawyer from recommending his own or his partner's employment to a lay person who has not sought his advice. Virgil Brown did not personally seek respondents' advice. Therefore, respondents' uninvited attendance at Virgil Brown's bedside violated DR 2-103(A). Crouppen at 249.

A salient aspect of Crouppen is that it involved actual solicitation of employment, whereas there is a paucity of any evidence that Respondent's conduct was anything but an attempted solicitation, terminated prior to any request for representation. Even in Ohralik v. Ohio State Bar Association, 436 U.S. 447 (1978), quoted liberally by the Bar, the United States Supreme Court levied only a public reprimand for actual solicitation.

The history of case decisions by this court and landmark case law from other jurisdictions, abundantly demonstrates that the referee's recommended multiple types of discipline is not clearly erroneous and is consistent with governing case law. Both this case law and the presence of cogent mitigating circumstances, recited herein, which this court should consider under the Florida Standards for Imposing Lawyer Sanctions, Standards 3.0 and 9.32, mandate that the diverse punishment formulated by the referee is proper discipline for Respondent, and should be adopted by this court as the appropriate sanction.

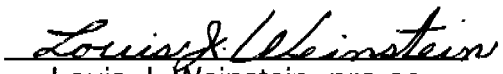
III. Respondent's violation of certain advertising rules by direct mail letters, is an isolated occurence.

An analysis of Respondent's communications in Dowe, Fluke, Seaman and Fekla show but a single form letter sent to four different recipients. The Florida Bar's characterization of this specimen letter as a pattern is obvious hyperbole. The referee correctly determined that this misconduct was but a minor factor in the discipline formulated, since Respondent did not procure any financial gain, nor did the form letter produce further contact by the recipients of these communications.

CONCLUSION

The Referee's recommended discipline of several, diverse types of punishment, in addition to a suspension of ninety days, is entitled to a presumption of correctness by this court under its previous decisions in this area of law. These sanctions are consonant with decisional law and in fact the appropriateness of the punishment recommended is buttressed by the presence of abundant compelling mitigating evidence. In accordance with the Florida Standards for Imposing Lawyer Sanctions, this court should consider the myriad of mitigating circumstances extant in this disciplinary case. Referee Seigel's multiple sanctions should be affirmed by this Honorable Court and adopted as the appropriate punishment for Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent Louis J. Weinstein was sent by regular U.S. mail to: LORRAINE C. HOFFMAN, Bar Counsel, The Florida Bar, Cypress Financial Center, 5900 N. Andrews Avenue, Suite 835, Ft. Lauderdale, 33309; JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahasee, FL 32399-2300; and JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, on this 15th day of March, 1993.

Louis J. Weinstein

LOUIS J. WEINSTEIN, pro se