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)

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

In order to ensure a clear record, the following terms of reference will be used throughout this brief: The Florida Bar, appellant herein, will be referred to as "the Bar" or "The Florida Bar". Louis J. Weinstein, the appellee herein, will either be referred to by his full name, or as "Respondent" or "Weinstein".

STATEMENT OF THE CASE AND THE FACTS

I. STATEMENT OF THE CASE

The Florida Bar filed its Complaint and Request for Admissions on November 19, 1991. Respondent submitted an Answer and a Response to Complainant's Request for Admissions (admitting specific misconduct) on April 10, 1992. On February 18, 1992, the Honorable Paul Siegel, Circuit Court Judge in and for the Eleventh Judicial Circuit, Dade County, Florida, was appointed as Referee to conduct disciplinary proceedings according to the Rules of Discipline. The Bar voluntarily dismissed the charges which alleged criminal misconduct on April 21, 1992. Pursuant to timely notice, Judge Siegel conducted the Final Hearing in this cause on June 4, 1992. At the beginning of the Final Hearing, Respondent made further admissions as to the misconduct charged in the Bar's Complaint. [Final Hearing Transcript, pages 6, 186-189.] Thereafter, The Florida Bar presented the testimony of two witnesses (Paul Mortilla and Judith Overman), and entered eight (8) exhibits into evidence. Respondent presented the testimony of his wife and ex-wife, in addition to his own. Respondent also tendered seven (7) exhibits, six (6) of which were received into evidence. In addition to the foregoing, the Referee heard argument of counsel and accepted copies of case law submitted by the parties for the purpose of illuminating the issues before the Referee. A listing of this case law is contained in the Complainant's Memorandum of Law on Discipline, pages 2-3.

At the conclusion of the Final Hearing, the Referee directed the parties to conduct specific and limited research on the terms "attempt" and "solicitation" (in a non-criminal context), and to submit this research in memoranda of law [both memoranda are included in the record on appeal]. Further, because Respondent introduced documents and testimony into evidence at Final Hearing which had not been provided to the Bar in advance (and which were at variance with Respondent's prior testimony before a Grievance Committee), the Referee gave the Bar additional time in which to conduct further discovery. On the Bar's motion, a Special Setting was scheduled for September 24, 1992 in order to take additional testimony. However, hours before the scheduled hearing, Respondent agreed to enter into a Joint Stipulation (obviating the need for the hearing) wherein he essentially admitted having lied to the Referee at Final Hearing. [Final Hearing Transcript, pages 137, 139, 151; Joint Stipulation, September 24, 1992.]

On October 5, 1992, the Referee submitted his Report of Referee, finding Respondent guilty of: (1) attempting to solicit employment for pecuniary gain; (2) engaging in conduct which is unlawful or contrary to honesty and justice; (3) violating a series of Rules of Professional Conduct pertaining to targeted, direct mail solicitation letters; (4) making intentional misrepresentations of material fact; and (5) attempting to violate the Rules of Professional Conduct. The Referee recommended that Respondent be suspended from the practice of law for a period of ninety (90) days and that he be subject to the following additional conditions: one hundred fifty (150) hours of community service (excluding the provision of legal advice) to Hurricane Andrew

victims in south Dade County, Florida (during the term of his suspension), and probation (not to exceed one (1) year), to begin after the expiration of the suspension and continuing until Respondent completes ten (10) credits of continuing legal education in the field of ethics. The Referee also recommended that Respondent be taxed for all costs relating to this proceeding; at the conclusion of the Final Hearing, these costs totalled $2,741.72. The Report of Referee, together with the record, were sent to this Court on October 5, 1992.

On October 12, 1992, Respondent sent the Court a Motion to Amend Referee's Report together with a Motion to Stay Consideration of Referee's Report. These motions addressed the Referee's findings of fact, determination of guilt, and recommendation for punishment on the narrow issue of Respondent's conduct in sending two (2) targeted, direct mail solicitation letters to motor vehicle accident victims or their survivors: one letter was mailed to the Seaman family on or about January 28, 1991 and the other was mailed to Geza Fakla on or about February 28, 1991. Both of these letters were sent after this Court's December 21, 1990 revisions to the attorney advertising rules, which were to become effective January 1, 1991. The Bar did not oppose the motion for a stay, but filed a Motion to Strike Respondent's Motion to Amend Referee's Report. The Bar also filed a Motion for Amendment of Referee's Report Based on Clerical Mistake. The Court remanded the proceeding to the Referee for consideration of the post-hearing motions. On November 20, 1992, the Referee filed an Amended Report, recommending findings of fact as to Respondent's misconduct in sending the two (2) targeted direct mail solicitation letters to motor vehicle

accident victims, but withdrawing his recommendation as to the finding of guilt and imposition of sanctions for these violations, based on his determination that the rules under which Respondent was charged were not implemented and strictly enforced until April 1, 1991 -- after Respondent's conduct occurred. [See Amended Report of Referee, pages 22-23.] Based on this determination, the Referee reduced Respondent's sanction by requiring fewer hours of community service: the original requirement of one hundred fifty (150) hours was decreased to one hundred (100) hours.

On November 25, 1992, Respondent filed a Petition To Waive Notice And For Reasonable Time To Close Practice, asking this Court for an Order which would allow him ninety (90) days in which to close his practice, and excuse him from the notice to clients requirements of Rule 3-5.1(h), Rules Regulating The Florida Bar. The Florida Bar filed a motion in opposition. The Court has elected to hold its ruling on Respondent's pending motion in abeyance until such time as the Amended Report of Referee is considered.

The Florida Bar filed its Petition for Review on December 4, 1992.

STATEMENT OF THE FACTS

Although the Referee has found that Respondent is guilty of a number of acts of misconduct (as set out in the Amended Report of Referee), The Florida Bar's focus, on appeal, is the appropriateness of the discipline recommended -- given Respondent's demonstrated pattern of blatant dishonesty and improper solicitation of potential clients. This pattern of misconduct is clearly illustrated by the five (5) separate acts of solicitation which essentially gave rise to this action. The first four (4) solicitations occurred via targeted, direct mail letters sent to motor vehicle accident victims, or their survivors. The fifth, and most disturbing act of solicitation, was accomplished in person, and had as its target a hospitalized, incapacitated and partially paralyzed head trauma patient who was just days out of a coma.

A. TARGETED DIRECT MAIL SOLICITATION LETTERS

On or about October 17, 1990, Respondent wrote and sent targeted, direct mail solicitation letters to the families of two (2) individuals who had died in an automobile accident: Thomas Dowe (Dowe) and James Fluke (Fluke). [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request for Admissions.] Respondent had learned about this accident, and its two fatalities, through an account published in a local newspaper. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 38.] Respondent's letters were designed to persuade the Dowe and Fluke families to hire him to represent them in their

anticipated motor vehicle tort claims. [Final Hearing Transcript, pages 133, 137, 139, 146-147, 153-155.] In his zeal to solicit their business, Respondent told both the Dowe and Fluke families, in his letters to them, that he had "concluded two (2) very large cases involving catastrophic automobile accidents: one in which [his] client was killed and one in which [his] client suffered extensive brain damage." [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request for Admissions.] In essence, Respondent intended this statement to suggest that he, and he alone, had "concluded" both of these cases. [Amended Report of Referee, page 7.] The case in which Respondent asserts that his client was killed pertains to Jean Ellis, as the Personal Representative of the Estate of Jerry Allen Ellis, deceased, to wit: Jean Ellis, individually, Janice Ellis, individually, and Blanche Ellis, individually, vs. General Asphalt Co., Inc., and Upper Keys Marine Construction Co., Inc., Case No. 85-43881 CA 20 (Ellis). The case in which Respondent asserts that his client suffered extensive brain damage pertains to Wayne Rose vs. General Asphalt Co., Inc. and Upper Keys Marine Construction Co., Inc., Case No. 86-09337 CA 27 (Rose). Both cases were filed in the Eleventh Judicial Circuit, in and for Dade County, Florida. [Admitted in Respondent's Answer To Complaint and Respondent's Response to Complainant's Request for Admissions.]

While it is true that Respondent filed both of these cases, he did not "conclude" either one of them. In seeking to persuade these two (2) families to hire him to pursue whatever legal action he would advise, Respondent lied to both of them. In fact, Ellis was concluded through a negotiated settlement arrived at primarily through the efforts

of the law firm of Freedman and Neufeld, P.A. [Joint Stipulation, paragraph 3; The Florida Bar's Final Hearing Exhibits 9-35.] Rose was also settled by Freedman and Nuefeld, P.A., as Respondent had withdrawn from the case, as evidenced by the Stipulation For Withdrawal And Substitution of Counsel and Order permitting his withdrawal. [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request for Admissions.]

Not only did Respondent lie about the actual resolutions of these two (2) cases to the Dowe and Fluke families, but he also lied to another motor vehicle accident victim (Geza Fakla), and still another motor vehicle accident victim's survivors (the Seaman family). He subsequently told these same lies, under oath, to the Grievance Committee, to Bar Counsel, and even to the Referee at Final Hearing. While his misrepresentations regarding Rose were (slightly) less egregious[1], Respondent carried the ruse about having "concluded" Ellis to Final Hearing -- and beyond. Although he had testified (under oath) before a Grievance Committee that the Ellis settlement was

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[1]Respondent admitted, at the Grievance Committee meeting and at Final Hearing, that his withdrawal from Rose was precipitated by a conflict of interest. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, pages 16-17; Final Hearing Transcript, pages 140-142.] At Final Hearing, Respondent characterized his claim to have "concluded" Rose as "very, very careless" [Final Hearing Transcript, page 133, lines 11-12], "very negligent" [Final Hearing Transcript, page 143, line 16], and "a negligent mistake" [Final Hearing Transcript, page 146, line 24]. In telling the Dowe and Fluke families that he had "concluded" Rose, Respondent was neither careless, negligent nor mistaken; he made an intentional misrepresentation designed to influence his ability to solicit these two families' claims. [Final Hearing Transcript, pages 146-147; Amended Report of Referee, page 10, paragraph 41.]

negotiated primarily by Alan S. Neufeld, Esq. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Hearing Transcript, page 22, lines 13-16], Respondent testified at Final Hearing (again, under oath) that he worked with Freedman and Neufeld, as co-counsel, to jointly negotiate the settlement in Ellis. [Final Hearing Transcript, pages 133-139, 151-152, 155.] He also testified that he was instrumental in reaching settlement [Final Hearing Transcript, page 155, lines 5-6], that he was a party to several conference calls with the insurance adjuster, and that he attended a face-to-face settlement meeting as well. [Final Hearing Transcript, page 152, lines 1-8.] Respondent was so adamant about his on-going and active involvement in settling Ellis that he did not waver from his position even when asked direct questions by Bar counsel and the Referee at Final Hearing. In response to Bar counsel's question as to who did the Ellis settlement negotiations, Respondent answered that he and Mr. Freedman did. [Final Hearing Transcript, page 151, lines 16-19; Amended Report of Referee, pages 8-9, paragraph 37.] In response to the Referee's question as to who actually conducted the Ellis settlement negotiations, Respondent answered that he and Mr. Neufeld did. [Final Hearing Transcript, page 137, lines 1-15.] Indeed, not until September 24, 1992 (nearly four (4) months after the Final Hearing), after the Bar had completed its additional discovery and was ready to proceed that afternoon to Special Setting[2] to prove that Respondent lied (to the

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[2]The Florida Bar had moved for a Special Setting in which to present additional testimony and documentary evidence of Respondent's non-participation in the settlement of the Ellis case. The Referee had scheduled this Special Setting for September 24, 1992 at 5:00 P.M. The Bar was prepared to present the testimony of four additional witnesses.

Dowe, Fluke, and Seaman families, as well as to Geza Fakla, Bar Counsel and the Referee) about his involvement in settling the Ellis case, did Respondent come forward and admit that he had, in fact, misrepresented his involvement in "concluding" the case, and that the settlement negotiations were conducted by the Law Offices of Freedman and Nuefeld, P.A. [Joint Stipulation, paragraph 3; The Florida Bar's Final Hearing Exhibits 9-35; Amended Report of Referee, page 9, paragraph 37.]

Respondent's letters to the Dowe and Fluke families presented other problems as well, under the Rules Regulating the Florida Bar: they constituted communications likely to create an unjustified expectation about results Respondent could achieve; they failed to contain the required language about the availability of free information concerning Respondent's qualifications and experience; they were not plainly marked "advertisement" in the required places and in the required typeface; and they were not sent to staff counsel at The Florida Bar headquarters. [Amended Report of Referee, pages 10-11, paragraphs 42-46.]

In addition to his letters to the Dowe and Fluke families, Respondent authored and caused to be mailed two (2) more targeted, direct mail solicitation letters. As with the Dowe and Fluke correspondence, these letters were directed to the victims of motor vehicle accidents or their survivors, and were precipitated by reports of the accidents which Respondent found and read in a local newspaper. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Hearing Transcript, pages 66 and 81.] The first of these two (2) letters was dated January 28, 1991, and was directed to the

family of Cathy Jean Seaman (Seaman), who was killed in an automobile accident fifteen (15) days earlier, on January 13, 1991. [The Florida Bar's Final Hearing Exhibit 4.] The second letter was dated February 28, 1991, and was directed to Geza Fakla (Fakla) who had severed a hand, but survived an automobile accident twenty-five (25) days earlier, on February 3, 1991. [The Florida Bar's Final Hearing Exhibit 5.] In the Seaman letter, Respondent made claims similar to those in his Dowe and Fluke letters, again referring to Ellis and Rose. Again, these claims were intentional misrepresentations designed to influence the family's decision about whether to hire Respondent to represent them. [Final Hearing Transcript, pages 133, 146-147, 153-155; Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions.] In the Fakla letter, Respondent claimed that he had "previously successfully handled just this type of defective products case, obtaining a multimillion dollar result." [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions.] In composing his solicitation letters to Fakla and the Seaman family, Respondent wrote with abandon, committing a litany of other prohibited acts: he sought to ingratiate himself with the recipients by telling them that he had been "recommended to contact [them]", although no one had recommended that Respondent contact either Fakla or the Seaman family [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions]; he disseminated communications likely to create an unjustified expectation about results he could achieve [Amended Report of Referee, page 14, paragraph 58; page 16, paragraph 70]; he failed to make required

disclosures about attorney's fees and expenses [Final Hearing Transcript, page 6; Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions]; he made statements which were merely self-laudatory and which described or characterized the quality of his services; he failed to mark, in red ink, the word "advertisement" on the letters and the envelopes in which they were mailed; he failed to send copies or samples of the letters and the envelopes in which they were mailed to anyone at The Florida Bar headquarters; he failed to include the required language asking the recipients to disregard the letters if they had already retained counsel; he failed to provide the recipients of his letters with a written statement of his qualifications; he failed to disclose to the recipients of his letters how he obtained the information which caused him to write to them [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions]; and he sent the letters themselves less than thirty (30) days after the occurrences of the automobile accidents which precipitated his letters of solicitation. [Final Hearing Transcript, page 6; Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions.]

B. IN-PERSON SOLICITATION

In late 1990, Robert Dowe (Dowe) filed a complaint with The Florida Bar, having received a targeted, direct mail solicitation letter from Louis J. Weinstein a short time after the death of his son, Thomas Dowe, in an automobile accident. In his complaint, Dowe characterized Respondent's solicitation letter as offensive, and in poor taste.

Pursuant to the Bar's usual practice and procedure, Respondent was provided with a copy of Dowe's complaint, and asked to submit a written response, which he did on January 8, 1991. [The Florida Bar's Final Hearing Exhibit 6.] In defending his conduct, Respondent minimized its impact and harm, comparing it to the greater evil of an in-person solicitation, where "the risks of coercion, duress and overreaching" may be present. [The Florida Bar's Final Hearing Exhibit 6, page 2; Final Hearing Transcript, pages 212-218.] Respondent wrote these words, addressed to Bar Counsel, on or about January 8, 1991.

On or about January 28, 1991, Phillip Mortilla (Mortilla) was gravely injured in a motorcycle accident in Fort Lauderdale, Florida. He was thrown from his motorcycle and traveled approximately twenty-nine (29) feet through the air before he impacted the ground. This impact caused deep head trauma, at least five occurrences of cerebral bleeding, significant cerebral swelling, and coma. Mortilla was taken by ambulance to Holy Cross Hospital, where he was placed in the Intensive Care Unit, listed in serious condition, and monitored for additional swelling (which would necessitate emergency surgery). [Final Hearing Transcript, pages 50-51, 53-55.] An account of Mortilla's accident appeared in the local newspaper; the article disclosed Mortilla's name, the nature of his injuries, and the name and location of the hospital where he was admitted. [Final Hearing Transcript, pages 51-52; The Florida Bar's Final Hearing Exhibit 7.] Louis J. Weinstein read this newspaper account of Mortilla's accident, and determined to solicit his motor vehicle tort claim. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 164.]

For nearly a month, Mortilla lay in Intensive Care, comatose. His brother, Paul Mortilla (Paul) was appointed as his legal guardian, and hired an attorney to represent Mortilla's interests. Paul left express and explicit instructions with hospital personnel that Mortilla was to receive absolutely no visitors, except for family and his attorney, Douglas Blankman. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, pages 55-56; Final Hearing Transcript, page 82.] Shortly before February 22, 1991, Mortilla emerged from his coma, and was transferred into Intermediate Care. He was relocated to a hospital room where there were no visitor restrictions in place. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, pages 24, 56.]

Although Mortilla was no longer in Intensive Care, his recovery was far from complete on February 22, 1991. He was disoriented and disassociated, incapable of conversation, and could not walk. He had no control over his motor reflexes, could not feed or groom himself, was incapable of personal hygiene and had to be tied to his bed or chair so that he would not fall out of it. He suffered from paralysis on one side of his body, and one arm was locked in an involuntary position beneath his chin. Further, his cerebral injuries caused him to suffer from an imagined but insatiable hunger, combined with an eating disorder. The result of this condition was that Mortilla would force large quantities of food into his mouth without the ability to judge the need to chew and swallow. Because of this disorder, Mortilla was in danger of choking and/or aspirating food (both liquid and solid) into his lungs every time he ate. Accordingly, he was not permitted to eat or drink without direct, trained supervision. Despite this condition,

Mortilla had lost thirty (30) to thirty-five (35) pounds, and was in an emotional state described by his brother Paul as "frustrated and agitated and very disoriented." [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, pages 16-18, 58-63.]

Nevertheless, on the afternoon of February 22, 1991, Louis J. Weinstein walked into Holy Cross hospital during visiting hours, ascertained Phillip Mortilla's room number, and proceeded to his room for the express and premeditated purpose of soliciting Mortilla's personal injury case. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 164.] In furtherance of this purpose, he brought with him a retainer agreement and medical release forms. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 171; Final Hearing Transcript, page 67.] There is no question that Weinstein knew that his conduct was, in his own words, "the wrong thing to do", yet he proceeded nonetheless, in order to "improve [his] practice." [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 178, lines 4-6.]

Once in Mortilla's room (where he found him alone), Respondent introduced himself as an attorney and began to ask Mortilla specific questions about his motorcycle accident, in order to make an appraisal of the value of his case. [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, pages 166-167; Final Hearing Transcript, pages 25-26.] After his first question, Respondent ascertained that Mortilla was neither competent nor coherent, yet he continued to press Mortilla with his line of

questioning, "just to make sure." [The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 169.] While he was with Mortilla, Judith Overman (Overman), a duty nurse on the floor, came into Mortilla's room and asked Respondent whether he was Mortilla's attorney; Respondent said that he was. [Final Hearing Transcript, pages 26, 37-38.] Based on this response, Overman permitted Respondent to remain in Mortilla's room. However, because she had overheard Respondent question Mortilla about his accident, and because Mortilla did not seem to know or recognize him, Overman grew suspicious about Respondent. She went to check Mortilla's Cardex at the nurse's station and found a notation indicating that Mortilla's attorney was expected to visit. Still, as she was not comfortable with Respondent's presence or his conduct, Overman wanted to verify his identity, so she attempted to reach Paul by telephone, unsuccessfully. [Final Hearing Transcript, pages 26-28.]

During a subsequent check on Mortilla, while Respondent was still in the room with him, Overman found Respondent feeding Mortilla cookies. Fearful that Mortilla would choke again,[3] Overman took the cookies away from Respondent, and instructed him not to feed her patient. [Final Hearing Transcript, pages 29-31.]

Sometime after the feeding incident, Paul arrived for a routine visit, and found Respondent in Mortilla's room. [Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions.] Paul asked Respondent who he

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[3]Mortilla had begun to choke once before; the medical staff had to "push him forward and empty his mouth." [Final Hearing Transcript, page 17.]

was, and why he was in Mortilla's hospital room. Respondent lied to Paul, first telling him that he was a friend, and then saying that one of the police officers in attendance at Mortilla's accident scene had asked him to talk with Mortilla. When Paul Mortilla pressed him, asking over and over "Who do you represent?", Respondent continued to withhold his identity until Paul forced him out of Mortilla's room. Then, in the hospital corridor, Respondent identified himself as an attorney. [Final Hearing Transcript, pages 65-67.] While Phillip Mortilla has no recollection of the events surrounding Louis J. Weinstein's visit to his hospital room on the afternoon of February 22, 1991, that nearly half-hour visit (and the gross invasion of privacy it represented) had a profound and menacing effect on the entire Mortilla family. [Final Hearing Transcript, pages 34, 68-79.]

Knowing it was wrong,[4] Louis J. Weinstein visited Phillip Mortilla at Holy Cross Hospital for one reason: to solicit professional employment from him for the purpose of filing a motor vehicle tort claim. [Amended Report of Referee, pages 5-6, paragraph 28; Admitted in Respondent's Answer To Complaint and Respondent's Response To Complainant's Request For Admissions.] Louis J. Weinstein's sole motivation, in knowingly violating the Rules Regulating The Florida Bar by attempting to solicit Mortilla's personal injury case, was to realize personal, pecuniary gain. [Amended Report of Referee, page 6, paragraph 30; The Florida Bar's Composite Exhibit 1, Grievance Committee Hearing Transcript, page 178, lines 4-5.]

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[4]As evidenced by his own admission, as well as his letter of January 8, 1991 to counsel for The Florida Bar; see The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 178; and The Florida Bar's Final Hearing Exhibit 6.

SUMMARY OF THE ARGUMENT

Based on the pernicious pattern of misconduct demonstrated herein, Louis J. Weinstein should be disbarred from the practice of law. In his zeal to realize personal financial gain, he has abandoned his responsibilities as "a representative of clients, an officer of the legal system, and a public citizen", as set out in the Preamble to the Rules of Professional Conduct, Chapter 4 of the Rules Regulating The Florida Bar. He has used local newspapers as source sheets for his base solicitations, noting and following up on those who have become victims of tragedy or loss. He has attempted to lure prospective clients with distasteful letters, filled with tacit promises and blatant lies, sometimes within days of the accidents which caused their grief. He went so far as to plan and attempt to carry out an in-person solicitation of a motor vehicle tort claim while the accident victim was still in the hospital. In order to accomplish this, Weinstein had to carefully follow the patient's progress for nearly a month and wait, like a predator, for an opportunity to gain access to the patient once he was released from Intensive Care. All of these actions are made the more reprehensible by virtue of Weinstein's apparent knowledge that he was engaged in wrongdoing at the time he committed these acts. Finally, Weinstein's fitness to continue to practice law was appreciably diminished when, at Final Hearing, he deliberately offered false testimony, under oath.

Contrary to the Referee's recommendation in this case, justice will not be served by a mere suspension. Louis J. Weinstein knew the rules and yet he chose to break them because the potential profit was great, and the risk of penalty was small. If the Referee's

recommendation in this case is allowed to stand, the equation remains the same, but the odds improve once the maximum penalty is defined: for the chance of securing a significant fee, some unscrupulous (or financially pressed) members of the Bar may be willing to risk a suspension, especially if precedent limits its term to ninety (90) days or less. To remedy this, the sanction must be enhanced until the balance tips, making the gamble a poor one, no matter how hefty the potential fee. The only way to accomplish this chilling effect on future in-person solicitations is to impose a sanction in this case which is so grave and threatening that others would be dissuaded from similar misconduct. Accordingly, Louis J. Weinstein should be disbarred from the practice of law.

ARGUMENT

I. RESPONDENT'S IN-PERSON ATTEMPT TO SOLICIT PROFESSIONAL EMPLOYMENT FROM A POST-COMATOSE, HOSPITALIZED MOTOR VEHICLE ACCIDENT VICTIM WARRANTS DISBARMENT.

Louis J. Weinstein has admitted the misconduct charged in the argument set out above. He also admitted that he read of Mortilla's motorcycle accident in the newspaper, formed the intent to solicit his motor vehicle tort claim, preserved and maintained that intent for nearly a month, and then went to Holy Cross hospital on the afternoon of February 22, 1991 in order to accomplish the solicitation. Weinstein also admitted that he went to the hospital prepared to carry out his purpose, bringing with him a retainer agreement and medical release forms, which he hoped to have Mortilla sign that very afternoon. Finally, Weinstein admitted that he did not complete the solicitation only because he could not: Mortilla was so physically and mentally impaired that he could not even sign his name. Had he been able to, Weinstein admitted that he would have solicited his case.[5]

In evaluating Weinstein's conduct on the afternoon of February 22, 1991, it is significant to note the unabashed tenacity with which he pursued Mortilla. Although he testified that he recognized, almost immediately, that Mortilla was incompetent (and incapable of conversation), Weinstein still fed him cookies and remained in the hospital room with him for twenty (20) to thirty (30) minutes. In that

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[5]See The Florida Bar's Final Hearing Composite Exhibit 1, Grievance Committee Transcript, page 171.

he did not know Mortilla prior to that afternoon, Weinstein's continued presence in Mortilla's hospital room could be for no other purpose but to patiently await an opportunity to secure Mortilla's signature on his at-the-ready documents, regardless of his condition. The fact that Weinstein never seized upon such an opportunity or was otherwise unsuccessful in carrying out his intent must not accrue to his benefit. As the Referee correctly pointed out in his Amended Report:

> ...I have not found the Respondent guilty of violating Rule 4-7.4(a) only because he could not successfully have solicited professional employment from the mentally and physically impaired Phillip Mortilla. However Respondent's punishment should be no less severe because he is guilty of an attempted solicitation under Rule 4-8.4(a) rather than an actual solicitation under Rule 4-7.4(a).

Amended Report of Referee, page 25.

Given the facts of Weinstein's attempted solicitation, compounded as they are by his misrepresentations to Paul Mortilla and Judith Overman (as well as his misrepresentations in the targeted direct mail solicitation letters and his false testimony under oath), the Referee still recommended suspension. The Bar vehemently disagrees and urges this Court to impose the sanction of disbarment.

Because there is no precedent from which to take a measure for the appropriate discipline in this case, this fact becomes significant in itself. The complete lack of Florida case law directly on point emphasizes the atrocity of Weinstein's conduct: in formulating and carrying out his sinister and selfish design, he crossed a line which, judging by the dearth of similar cases, few if any lawyers ever cross.

As Weinstein was well aware (as demonstrated by his January 8, 1991 letter to Bar counsel), the prohibition against in-person, direct

solicitation is a well settled tenet of contemporary American law. In Ohralik v. Ohio State Bar Association, 436 U.S. 447, 98 S. Ct. 1912 (1978), the United States Supreme Court held that:

> [t]he solicitation of business by a lawyer through direct in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client.

Ohralik, at 1917.

Indeed, there is much in this opinion which directly relates to the issues Respondent presents:

> The substantive evils of solicitation have been stated over the years in sweeping terms: stirring up litigation, assertion of fraudulent claims, debasing the legal profession in the form of overreaching, overcharging, underrepresentation, and misrepresentation. The American Bar Association, as amicus curiae, defends the rule against solicitation primarily on three broad grounds: It is said that the prohibitions embodied in DR 2-103(A) and 2-104(A) serve to reduce the likelihood of overreaching and the exertion of undue influence on lay persons, to protect the privacy of individuals, and to avoid situations where the lawyer's exercise of judgment on behalf of the client will be clouded by his own pecuniary self-interest [footnotes omitted].

Id., at 1921

The Court then goes on to point out the specific dangers of in-person solicitation, which relate directly to this case:

> The detrimental aspects of face-to-face selling even of ordinary consumer products have been recognized and addressed by the Federal Trade Commission, and it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person.

Id., at 1923.

It is precisely this harm, anticipated by the United States Supreme Court, which Respondent caused when he invaded the privacy of Philip Mortilla as he lay in bed at Holy Cross hospital. It is precisely this harm, anticipated by The Florida Bar, which the Bar seeks to prohibit and prevent by strictly enforcing the Rules of Professional Conduct relating to in-person solicitation.

In terms of sanctions imposed, the out-of-state case law presents a broad spectrum of discipline. In Ohralik, an attorney visited one accident victim in the hospital, and another at her home on the day she was released from the hospital, for the purpose of soliciting their cases on a contingent fee basis. The Ohio State Bar Association brought disciplinary proceedings against the attorney, predicated upon complaints from the two accident victims. The State Bar held that such conduct warranted indefinite suspension from practice, which result was upheld by the United States Supreme Court. In a Missouri case, it was alleged that two attorneys appeared uninvited in the hospital room of a man awaiting surgery. Disciplinary proceedings were brought against the attorneys, on the charge of direct solicitation. However, the Master who heard the case found the evidence "insufficient to support a finding that [the attorneys] were not requested by [the patient] to contact him concerning their possible employment." Accordingly, the sanction in this case was a public reprimand. In re Terry B. Crouppen and Myron S. Zwibelman, 731 S.W. 2d 247 (Mo. banc 1987), at 248.

Examination of Florida case law on solicitation revealed only one case involving in-person solicitation at a hospital. The same discipline attached as in Crouppen for the same reason: the Court accepted the

premise that Respondent, in good faith, was present at the hospital in response to a telephone call summoning him there. The Florida Bar v. Abramson, 199 So. 2d 457 (Fla. 1967).

In terms of reaching a decision as to what discipline is appropriate in the case at bar, a review of other, more general Florida solicitation cases is instructive and begins with the most recent case: The Florida Bar v. Stafford, 524 So. 2d 1321 (Fla. 1989). In that case, a lawyer had an arrangement with a police officer whereby, in exchange for a 15% referral fee, the police officer solicited personal injury cases for the lawyer to handle. The lawyer received a six (6) month suspension for this form of solicitation.[6] In rendering its opinion in this case, the Court also provided a capsule history of the sanctions imposed for other solicitation violations in Florida, noting that "this Court has generally imposed suspensions for varying lengths of time." Stafford, at 1322. In examining the litany of cases presented in Stafford, however, it is significant to note that no respondent received less than a ninety (90) day suspension, even though none of the conduct represented was nearly as reprehensible as that committed by Louis J. Weinstein on the afternoon of February 22, 1991. In State ex rel. Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954), a lawyer was found guilty of both direct and indirect solicitation over a six (6) year period, and was punished with a two (2) year suspension, subject to reduction upon timely payment of costs. In State ex rel. Florida Bar v. Dawson, 111 So. 2d 427 (Fla. 1959), a lawyer solicited professional employment

[6]The decision in Stafford was close, as three (3) justices regarded the solicitation involved as warranting disbarment. Justice Kogan wrote for the minority.

through an intermediary and purchased interests in the subject matter of litigation handled by him (by agreeing to pay the costs of the litigation in the event that there was no recovery), as an inducement to professional employment. This lawyer received an eighteen (18) month suspension. Another lawyer who solicited clients through an intermediary was the respondent in State ex rel. Florida Bar v. Bieley, 120 So. 2d 587 (Fla. 1960); he received a six (6) month suspension. In The Florida Bar v. Britton, 181 So. 2d 161 (Fla. 1965), the only case where the sanction imposed was a mere ninety (90) days, a lawyer was found to have improperly solicited two (2) clients. However, the conduct at issue was not so offensive as to urge the Florida Bar to seek a more punishing sanction. Indeed, the ninety (90) day suspension recommended by the Referee was accepted as sufficient by the Board of Governors of the Florida Bar. But for Britton, all of the solicitation cases treated in Stafford resulted in lengthier suspensions. In The Florida Bar v. Scott, 197 So. 2d 518 (Fla. 1967), a lawyer teamed up with intermediaries to solicit professional employment from a group of widows whose husbands had been killed in a common accident; he was suspended for six (6) months. The respondent in The Florida Bar v. Curry, 211 So. 2d 169 (Fla. 1968), cert. den. 393 U.S. 981, was both a lawyer and an accountant. In preparing tax returns for clients, he included letters soliciting their legal business as well. The sanction for this misconduct was also a six (6) month suspension. Still another case of solicitation through an intermediary is presented in The Florida Bar v. Meserve, 372 So. 2d 1373 (Fla. 1979), where a lawyer received a two (2) year suspension for a variety of misconduct,

including such solicitation. Finally, in The Florida Bar v. Perry, 377 So. 2d 712 (Fla. 1979), a lawyer's Conditional Guilty Plea was accepted, and he was suspended for six (6) months for a series of inappropriate acts, including the referral of a non-client to his law partner.

While all of these cases, but for Britton, impose a sanction of more than ninety (90) days suspension, no case embodies conduct nearly as offensive, intrusive, overreaching or coercive as that of Louis J. Weinstein. Therefore, even though the Stafford court noted that suspension is the customary punishment for attorney solicitation, the wisdom of the Court in Curry, supra, cannot go unheeded:

> Meting out punishment to an offender is one of the most delicate and difficult duties in all our jurisprudence. Hardly any two will agree on the same punishment. What is punishment to one offender is of no consequence to another. In this instance, the Referee was of the opinion that a finding of guilty and a reprimand was adequate. The Board of Governors thought somewhat differently and added the six (6) month suspension. We are not constrained to overturn the finding of The Board of Governors.

Curry, at 172.

In the case at Bar, as in Curry, the Board of Governors has found the recommended sanction to be inadequate. In the instant case, the Board of Governors has recommended disbarment.

In considering the propriety of such a sanction with regard to Louis J. Weinstein, the Court is respectfully urged to review the specific violations of the Rules Regulating The Florida Bar found by the Referee and enumerated in his Amended Report of Referee. [See Amended Report of Referee, III: Recommendation as to Whether the

Respondent Should be Found Guilty, page 18.][7] Further guidance may be found in the Florida Standards for Imposing Lawyer Sanctions (Florida Standards). It is the Bar's position that these Rules generally, and the Rule prohibiting solicitation and attempted solicitation specifically, taken with The Florida Standards, are "prophylactic measures whose objective is the prevention of harm before it occurs." Ohralik, at 1923. Accordingly, both the Rules and the Standards should be broadly construed.

The controlling Florida Standard in this case is 7.0, Violation of Other Duties Owed As A Professional. In keeping with the prophylactic objective outlined by the United States Supreme Court in Ohralik, Standard 7.0 states, in the Introduction, that "these standards have been developed out of a desire to protect the public ...." The Introduction to this Standard also states that:

> [i]n general, then, a sanction of disbarment or suspension will rarely be required, and a sanction of public reprimand, private reprimand or probation will be sufficient to insure that the public is protected and the bar is educated. While it will as a rule be inappropriate to impose a sanction of disbarment or suspension for six months or more, there are situations when a more severe sanction should be imposed.

Standards, at 68.

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[7]The Rule violations found by the Referee in his Amended Report of Referee are as follows, in the order of their occurrance in the Report: Rule 3-4.3, Rules of Discipline; Rules 4-8.4(a), 4-8.4(c), 4-7.1(b), 4-7.4(b)(2)d., 4-7.3(d)(3), 4-7.4(b)(1)a., 4-7.4(b)(1)b., 4-7.1(a), and 4-8.1(a), Rules of Professional Conduct, Rules Regulating The Florida Bar.

Clearly, this is one of the rare but anticipated situations where "a more severe sanction should be imposed." Based on the particular facts of this case, which must be considered carefully and individually, and matched to the sanction imposed (See The Florida Bar v. Scott, supra, at page 520) disbarment is the appropriate penalty for Respondent's in-person solicitation of the hospitalized, incapacitated, and freshly post-comatose Phillip Mortilla.

II. THE REFEREE ERRED IN CHARACTERIZING RESPONDENT'S VIOLATION OF SPECIFIC ADVERTISING RULES, VIA TARGETED, DIRECT MAIL SOLICITATION LETTERS, AS MINOR BUT AGGRAVATING FACTORS IN THE DISCIPLINE RECOMMENDED IN VIEW OF THE FACT THAT SUCH MISCONDUCT WAS PART OF A DEMONSTRATED PATTERN OF MISREP-RESENTATION AND MISCONDUCT.

Based on his Amended Report, the Referee was not particularly distressed by the totality of Respondent's conduct in this case, as he noted that, beyond his attempted solicitation of Mortilla, Weinstein's other misconduct was "a basis for increasing somewhat (to the ninety day period) the appropriate term of suspension...." The Referee goes on to characterize this additional misconduct as "aggravating factors in that they demonstrate multiple offenses and a pattern of misconduct." [Amended Report of Referee, page 25.]

In reaching this conclusion the Referee is, respectfully, misguided. Respondent's attempted solicitation of Mortilla should have started the meter running with a sanction well in excess of a ninety (90) day suspension, pursuant to Stafford and the other general solicitation cases cited herein. Any further misconduct of the same or similar kind would serve to demonstrate a recurring pattern of misrepresentation and misconduct, warranting significant enhancement of the original sanction imposed.

In considering the totality of Respondent's misconduct, and measuring it against the established standards for disbarment, the Court may be guided by its opinion in Murrell, supra, wherein it was determined that "disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with appropriate

professional standards." Certainly, the totality of Respondent's conduct in this case rises to the standard for disbarment set by Murrell. Not only did Louis J. Weinstein engage in repeated violations of the rules controlling advertising and direct mail solicitation, but he enlarged his course of misconduct to include an in-hospital solicitation of a severely injured and completely vulnerable member of the general public. This pattern of misconduct is clearly inconsistent with approved professional standards. The Bar is aware of and acknowledges the warning set out in Murrell, that "[f]or isolated acts, censure, public or private, is more appropriate." Murrell, at 131. In this case, Respondent's acts were not isolated. Rather, they demonstrated a pattern of behavior that flies in the face of the Rules Regulating The Florida Bar as well as the Standards. Under the rule of The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), disbarment is the only punishment severe enough to protect the public from similar conduct, and to deter like violations by other members of the Bar.

Finally, the Court may be guided by the language of 7.1, and the attendant commentary in the Florida Standards, which provide, in pertinent part, as follows:

> 7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> Commentary
>
> Disbarment should be imposed in cases when the lawyer knowingly engages in conduct that violates a duty owed as a professional with the intent to benefit the lawyer or another, and which causes serious injury or potentially serious injury to a client, the public or the legal system.

Based on the foregoing, it is clear that Respondent acted intentionally, each time he acted. It is also clear that his conduct constituted a violation of his duty as a professional, that his intent was to realize financial gain, and that the harm or injury he caused was serious enough to fall within the scope of Ohralik. For this pattern of deliberate misconduct, Louis J. Weinstein should be disbarred.

III. RESPONDENT'S DELIBERATELY FALSE TESTIMONY, UNDER OATH AT FINAL HEARING, WARRANTS DISBARMENT.

While Respondent made numerous misrepresentations in his attempts to solicit Mortilla, Fakla, and the Dowe, Fluke and Seaman families, the most damning misrepresentations were those he made under oath, at Final Hearing. Three times, in answer to direct questions posed by the Referee and Bar counsel, Respondent denied that he had lied about his non-involvement in the settlement of the Ellis case. Only when he faced a Special Setting and was advised of the names and expected testimony of the four (4) witnesses prepared to testify against him, did Louis J. Weinstein determine that he had no choice but to tell the truth.

Under the rule of The Florida Bar v. O'Malley, 534 So.2d 1159 (Fla. 1988), Respondent's false sworn testimony, without further misconduct, is grounds for disbarment in and of itself. In O'Malley, a lawyer deliberately lied while under oath at a deposition; he later admitted having done so. The Court said:

> A lawyer may commit no greater professional wrong. Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment. The Florida Bar v. Manspeaker, 428, So. 2d 241 (Fla. 1983).

O'Malley is directly on point; Louis J. Weinstein should be disbarred.

CONCLUSION

In this case, Louis J. Weinstein has admitted to misconduct which shocks the conscience and discredits the legal profession at large. He has engaged in intentional behavior which was grossly invasive and wildly overreaching -- and his victim was the most vulnerable individual whom the Rule drafters could possibly have anticipated: a physically incapacitated, mentally incompetent accident victim, just days out of a coma. This behavior caused potentially serious injury to the public and to the legal system. (See Standard 7.1). To compound this gross misconduct, Respondent also made flagrant misrepresentations and committed further Rule violations in the solicitation letters he sent to other victims or their survivors. His motive and intent in all of these actions were simple and clear: personal financial gain.

The measure for Respondent's sanction must be taken from the misconduct he has committed. In determining what his sanction shall be, the Court will also shape and determine, on some level, the manner in which the public perceives the legal profession. As this Court said many years ago in Lambdin v. State, 9 So. 2d 192 (Fla. 1942):

> Practice of the law is an impersonal name applied to the mechanics of administering justice through the medium of judges and lawyers. The administration of justice is a service rendered by the State to the public and exacts of those who engage in it the highest degree of confidence and good faith ... we are convinced that individually, the great majority of the bar are deeply sensitive to the trust imposed on them, and enjoy the confidence of the public, but as a class the performance of some affords ground for mistrust and the public is prone to take the measure of the class by the conduct of the miscreants.

Lambdin, at 193.

The Court must determine the facts, weigh the evidence, and determine and apply the law. It must also, under Pahules, protect the public and the Bar, with only as much punishment as is required to accomplish that weighty task. Under the facts of this case, disbarment is the only sanction appropriate, and the minimum sanction required.

Respectfully submitted,

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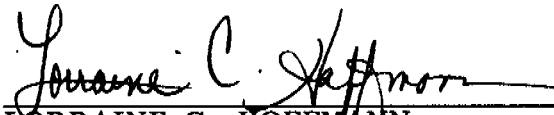
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar has been sent, by regular U.S. mail and by certified mail #P 247 960 602, return receipt requested, to Louis J. Weinstein, Esq., 7852 Wiles Road, Coral Springs, FL 33067, on this 31st day of December, 1992.



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