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)

REPLY BRIEF OF THE FLORIDA BAR

LORRAINE C. HOFFMANN #612669
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 N. Andrews Avenue, Suite 835
Fort Lauderdale, Florida 33309
(305) 772-2245

JOHN T. BERRY #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5839

JOHN F. HARKNESS, JR. #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

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I. RESPONDENT HAS INCLUDED ARGUMENT IN HIS ANSWER BRIEF WHICH, HAVING NO BASIS IN FACT, CAN ONLY BE FOR THE PURPOSE OF CONFUSING, CONFOUNDING AND CONTORTING THE ISSUES ON APPEAL.

It is always difficult for a litigant to know what to do with red herrings tossed into the tank by an opponent. One approach is to simply ignore them, assuming that the court will recognize them for what they are: noisily flapping extraneous matter, flung in with abandon to confuse, confound and distract. Another approach is to grab a net and extract the bothersome devils, one by one. In this case, the bar will proceed via the latter method.

Throughout his answer brief, Respondent adapts an attitude of virulent contempt for The Florida Bar, noting what he perceives to be its "overzealous, perhaps fanatical attempt to 'tar and feather' [him]." This vitriole continues, as Respondent accuses the bar of "unbridled literary license", "a 'loose and easy' attitude regarding facts in the record", and motivations born of "vengeance or retribution." Dramatic and theatrical though they are, these vague and emotional charges have no place in sound legal argument. They address no issue, make no point, and simply serve to divert attention from issues properly before the Court.

Another red herring is found in Respondent's discussion of his candor before the Referee at final hearing. Because this issue is so crucial to the determination of Respondent's case, he chooses to make the sweeping statement that he "did not in fact lie to the Referee [at final hearing]" early in his answer brief, indeed on the first page. On

the next page, Respondent condemned and castigated the bar for even suggesting that he lied. However, sadly, Respondent did lie to the Referee at final hearing. The Referee himself made such a finding in his report (see Amended Report of Referee: Findings of Fact, paragraph 37 at page 9, and Recommendations on Guilt, paragraph 14 at page 24), and Respondent himself admits to the lie in the second argument of his answer brief, on page 17.

Respondent's next attempt to befuddle the facts occurs on page 3 of his answer brief, where he charges the bar with engaging "in a litany, which borders on an absence of candor toward this forum, by its reiteration that the Referee's discipline is a suspension of 90 days." Apparently, the substance of Respondent's argument is that the bar has attempted to mislead the Court into believing that the Referee's recommended sanction is inadequate because it consists of a 90-day suspension-- and nothing more. Again, this argument has no basis in fact and is advanced solely for the dramatic tension it provides. Clearly, the bar has not attempted to so mislead the Court. The Referee's recommended sanction, with all of its terms and conditions, is plainly set out in the bar's initial brief, in its statement of the case, on pages 2-3.

Next, Respondent pounces on the bar's references to admissions he made in response to the bar's request for admissions, and later, at the beginning of the final hearing. Applying tortured logic to the blighted truth, Respondent attempts to persuade this Court that these admissions "evince Respondent's cooperative attitude towards these disciplinary proceedings.... " In reality, nothing could be further from the truth. Respondent's admissions were simply the unavoidable

result of the bar's discovery and his own inability to defend against certain of the bar's charges at final hearing. Throughout the litigation of this matter, Respondent never did anything to evince a "cooperative attitude" toward these proceedings. He never waived a finding of probable cause, he never produced his files (or copies from the Circuit Court's files) regarding the personal injury cases which were the subject of certain counts of the bar's complaint, and he never took full and unconditional responsibility for his blatant misconduct in preying on a hospitalized motor vehicle accident victim for the sole purpose of padding his own pockets. Even at this late date, Respondent still rationalizes his grotesque behavior as a manifestation of crushing financial desperation. It is interesting to note that the Referee characterized this same misconduct, without Respondent's dramatic flair, as "the product of selfish motive" in "an effort to rejuvenate a lagging practice and income." [See Amended Report of Referee, page 26.] Furthermore, it is important to note that there is nothing in the record to support Respondent's claim that he cooperated in these disciplinary proceedings. Rather, he forced The Florida Bar to discover, develop and prove its case-- and the bar has done so.

Finally, Respondent draws the Court's attention to the testimony of his current and former wives, characterizing such testimony (on page 20 of his answer brief) as "highly persuasive evidence" of his "excellent character, proficiency and professional diligence." Indeed, Respondent provided the Court with more than two (2) pages of excerpted testimony from these two (2) highly biased witnesses. This testimony, however, is simply another red herring. It is neither "highly persuasive" nor is it even probative of the issues before the

Court. By contrast, an example of truly persuasive character evidence would be the kind entertained by the referee in The Florida Bar v. Lord[1], 433 So. 2d 983 (Fla. 1983), where Respondent's character witnesses "were leaders and outstanding members of the Palm Beach area Bar, banking and business community." In comparison to such testimony, the opinions of Respondent's wife and ex-wife are valueless, given the overshadowing bias they present.

Having extracted the extraneous, the bar is now able to focus the Court's attention on the essence and purpose of its petition for review. However, the foregoing discussion is significant in that it demonstrates that Respondent never has, and perhaps never will, appreciate and understand the effect his pattern of misconduct has had on those who suffered its impact.

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[1]A case which Respondent argues in his answer brief to substantiate his argument relative to disciplinary sanctions.

ARGUMENT

II. THE CASE LAW CITED IN RESPONDENT'S ANSWER BRIEF DOES NOT VITIATE THE FLORIDA BAR'S POSITION: RESPONDENT'S CONDUCT IN ATTEMPTING TO SOLICIT PROFESSIONAL EMPLOYMENT FROM A HOSPITALIZED MOTOR VEHICLE ACCIDENT VICTIM, HIS DELIBERATELY FALSE TESTIMONY UNDER OATH AT FINAL HEARING, AND HIS VIOLATION OF CERTAIN ADVERTISING RULES, TAKEN TOGETHER, CONSTITUTE A DEMONSTRATED PATTERN OF MISCONDUCT WHICH WARRANTS DISBARMENT.

Although Respondent's answer brief contains argument relative to the case law cited and argued by the bar in its initial brief, the bar is satisfied with its original argument and will not revisit that case law herein. However, because Respondent's answer brief also contains argument based on additional case authority, and because that authority is incompletely or inappropriately reported or construed by Respondent, the bar will address each of Respondent's cases individually.

Respondent's first reference to additional authority occurs on page 3 of his answer brief, in his discussion of The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992). Argued in several parts of his brief, Respondent uses Poplack to: establish the standard of review in bar cases (page 3); to reiterate the purpose of bar disciplinary proceedings (page 11); and to argue the force and effect mitigating factors should have in bar disciplinary proceedings (pages 22-23). The bar does not oppose Respondent's Poplack argument as it relates to the standard of review and the purpose of bar discipline. The bar does, however, vigorously dispute Respondent's argument that Poplack requires this Court to review Respondent's mitigating factors as a

"pivotal consideration." While the Poplack court acknowledged Poplack's emotional distress (due to marital difficulties), it did not declare this mitigating factor to be "pivotal" or singularly persuasive. Rather, the court acknowledged Poplack's claim of emotional distress, but also noted that he did not lie under oath, that his lie was not related to his practice of law, and that he presented many witnesses who testified to his "significant rehabilitation". None of these persuasive factors are present in the instant case.

The rest of Respondent's case authority is used to create a calibrated scale by which to measure Respondent's misconduct. If this scale were calibrated with cases presenting the same or similar fact patterns, it would be called precedent. However, this is not the case. Respondent's scale is based on a range of discipline, without the necessary counterbalance of similar misconduct.

On page 11 of his brief, Respondent argues the applicability of three (3) cases: The Florida Bar v. Rendina, 583 So. 2d 314 (Fla. 1991), The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983), and The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981). Rendina and Stillman resulted in disbarment; Lord resulted in a six-month suspension, although there was a strong dissent which favored disbarment. Arguing from Rendina, Respondent urges a distinction between his own misconduct and that of Rendina, who attempted to bribe an assistant state attorney and pled guilty to the resulting criminal charge. For Respondent, this distinction is that Rendina "was disbarred for a criminal act." That argument is inconsistent with the findings of the referee in Rendina, which were accepted and approved by the court. While the commission of a crime was one of the violations

found by the referee, he also found Rendina guilty of: "the commission of an act contrary to honesty, justice or good morals; engaging in illegal conduct involving moral turpitude; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; engaging in conduct that is prejudicial to the administration of justice; and engaging in any other conduct that adversely reflects on fitness to practice law." But for the finding relative to Rendina's conviction (and the apparent difference in what these two (2) respondents were attempting to do), there is little to distinguish Rendina from Louis Weinstein. The similarity between them becomes increasingly apparent given the Rendina court's opinion that the fact that the bribe was attempted but not effectuated was "irrelevant", and that the mitigating circumstances presented were inadequate to override the sanction of disbarment.

Citing to Lord, Respondent makes much of the fact that the respondent in that case violated federal law, yet received only a six-month suspension. This argument is somewhat perplexing, as Lord's guilty plea to four (4) misdemeanor counts of violating Title 26 of United States Code, Section 7203 (1976) for failure to file tax returns has no nexus whatsoever to the misconduct committed by Respondent. Further, the referee in Lord was persuaded by Lord's unblemished bar record, his rehabilitation, his outstanding and relevant character witnesses, the fact that he pled guilty to the bar's charges before the referee, and the fact that The Florida Bar did not seek disbarment. None of these factors are present in the instant case.

In arguing the applicability of Stillman, Respondent goes even farther afield. In that case, the respondent appropriated a client's money to his own use, was convicted of grand larceny and was

incarcerated. It is axiomatic that such misconduct generally results in disbarment. Yet, oddly, Respondent has selected this case, with its completely different fact pattern, to juxtaposition against his own for the purpose of illustrating the comparative harm involved. In the shadow of Stillman, Respondent argues, he is only guilty of "bothering the recipients of his advances". Clearly, Respondent's analogy is as flawed as is his conclusion.

Respondent's next three (3) cases deal with solicitation, but of a kind very different from that with which Respondent has been charged. In The Florida Bar v. Schulman, 484 So. 2d 1247 (Fla. 1986), a private investigator did the soliciting and the respondent discontinued the practice before he was even aware of the ensuing investigation. Further, The Florida Bar did not petition for review. In The Florida Bar v. Gaer, 380 So. 2d 429 (Fla. 1980), the Respondent was a new attorney who accepted three (3) referrals from a bail bondsman. The respondent in The Florida Bar v. Abrams, 402 So. 2d 1150 (1981) practiced law in Micronesia, where he stated, at trial, that he represented a government witness who had not requested his services and whom he did not actually represent. In between his discussion of these three (3) cases, Respondent briefly mentioned The Florida Bar v. Dodd, 195 So. 2d 204 (Fla. 1967)[2], a disbarment case resulting from the duel representation of both litigants in a divorce action. Beyond the fact that Dodd was disbarred, the bar is unclear as to Respondent's purpose in arguing this inaposite case.

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[2]This case is not listed in Respondent's table of citations.

Respondent's last two (2) cited cases address the issue of actual harm. In The Florida Bar v. Budish, 421 So. 2d 501 (Fla. 1982), the respondent misled two (2) clients via false and misleading advertisements. In The Florida Bar v. Bowles, 460 So. 2d 366 (Fla. 1984), the respondent mishandled a number of legal proceedings and also used inappropriate advertising. Respondent argues that the respondents in both of these cases caused actual, tangible harm, while he did not. Of course, this simply isn't true. Each family whose lives and sorrow Respondent intruded upon was actually and tangibly harmed. Further, as the Referee stated, Respondent's conduct brought the entire profession "into disrepute." It is the position of The Florida Bar that this harm is also actual, tangible and real.

Accordingly, the Respondent's cited case authority does not alter, in any way, The Florida Bar's position regarding the appropriate sanction for what the referee termed Respondent's "pattern of misconduct".[3] For this pattern of misconduct, Louis J. Weinstein should be disbarred.

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[3]See Amended Report of Referee, page 26.

ARGUMENT

III. RESPONDENT'S MEDICAL AND FINANCIAL PROBLEMS DO NOT CONSTITUTE COMPELLING MITIGATING EVIDENCE SUFFICIENT TO EXCUSE HIS DEMONSTRATED PATTERN OF MISCONDUCT, AND AVOID DISBARMENT.

In his answer brief, Respondent strains mightily to convince the court that "the abundant multitude of mitigating evidence existing in this case, including personal, emotional problems, physical and mental disability and remorse (citations omitted)"[4] is sufficient to excuse his pattern of misconduct and spare him from disbarment. The bar vigorously disagrees.

Initially, there is no record support for Respondent's claim of an "abundant multitude of mitigating evidence." The Referee simply noted that Respondent has a continuing history of kidney disease, and that he underwent surgery in 1990. Further, the Referee concluded that Respondent's physical problems affected his earning capacity "and impelled him to violate the Rules of Discipline in an effort to rejuvenate a lagging practice and income."[5] The Referee did not find that Respondent's personal financial and/or medical problems excused his misconduct. Rather, the Referee stated that "Respondent's misconduct is a product of selfish motive and forms a pattern of misconduct with multiple offenses as aggravating factors."[6]

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[4]Respondent's Answer Brief, page 19.

[5]Amended Report of Referee, page 26.

[6]Amended Report of Referee, page 26.

Finally, Respondent's argument is effectively refuted by the court's reasoning in Stillman. In that case, the court declined to accept evidence of the respondent's rehabilitation after he appropriated client funds to his own purposes. The Stillman court based its decision on the fact that, because Stillman had not again been subject to the type of personal pressure and desperate economic conditions which he experienced at the time of the misappropriation, there could be no assurance that he would not repeat the misconduct if he were placed under similar circumstances in the future. Louis J. Weinstein says that he violated the Rules Regulating The Florida Bar because he had financial and medical problems. Unfortunately, at some point in time, every Florida attorney probably has or will experience financial and/or medical problems as well. However, no other Florida attorney has ever attempted to solicit professional employment from a post-comatose accident victim in his hospital room. Further, and perhaps more importantly, there is nothing in the record to persuade this Court that, under similar circumstances, Louis J. Weinstein would not do such a thing again.

CONCLUSION

Respondent's answer brief does little for his cause. Despite his vigorous arguments to the contrary, there is no record evidence of mitigating circumstances compelling enough to diminish the intentional, grossly invasive and wildly overreaching misconduct in which Louis Weinstein engaged. It is impossible to rationalize and difficult to even imagine a financial or medical problem so overwhelming as to cause a lawyer to prey upon an incapacitated and mentally incompetent accident victim just days out of a coma. Yet Louis Weinstein did just that. He read about the accident victim in a local newspaper, formulated his plan, and went to Holy Cross Hospital nearly a month later to carry it out. He invaded the victim's hospital room carrying medical releases and a retainer agreement, and attempted to converse with the victim even though he was too ill to be capable of rational speech. This conduct was not motivated by kidney disease nor was it the product of financial pressure. Very simply, it was motivated by greed.

If there remained any question about Respondent's fitness to continue practicing law, after the in-hospital solicitation debacle, it was conclusively answered by Respondent's conduct before the Referee at final hearing. Testifying under oath, he deliberately lied. While this Court has periodically addressed the appropriate penalty for perjury, the most recent discussion is in The Florida Bar v. Rightmyer, 18 Fla. L. Weekly S148 (March 19, 1993), where this Court said:

> We can conceive of no ethical violation more damaging to the legal profession and process than lying under oath, for perjury strikes at the very heart of our entire system of justice-- the search for the truth. An officer of the court who knowingly and deliberately seeks to corrupt the

> legal process can logically expect to be excluded from that process.

Rightmyer, at S148.

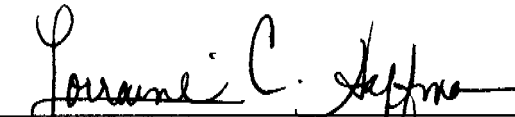
Accordingly, Respondent's answer brief only demonstrates, clearly and conclusively, that Louis J. Weinstein has no comprehension of the trenchant division between ethical and unethical behavior. Absent this essential quality, he is unfit to practice law. Perhaps Mr. Weinstein has always suffered from this disability; perhaps he came to develop it during his 15 years at the bar. Regardless, he has encountered his crucible and has fallen woefully short of the mark. Louis J. Weinstein should be ordered to pay the costs in this case, and he should be disbarred.

Respectfully submitted,

LORRAINE C. HOFFMANN #612669
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 N. Andrews Avenue, Suite 835
Fort Lauderdale, Florida 33309
(305) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of The Florida Bar has been sent, by regular U.S. mail and by certified mail #P 250 173 451, return receipt requested, to Louis J. Weinstein, Esq., 7852 Wiles Road, Coral Springs, Florida 33067, on this 25th day of March, 1993.



LORRAINE C. HOFFMANN