IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN D. RUE,

Respondent.
_____ /

Supreme Court
Case Nos. 79,522 and 80,207

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding.

RESPONDENT'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS-PETITION FOR REVIEW

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INTRODUCTION

In the brief, The Florida Bar is referred to as either "THE FLORIDA BAR", "THE BAR", or "Complainant"; John D. Rue will be referred to as the "Respondent" or "RUE"; Allen Rue will be referred to as "A. RUE"; Paul Douglas will be referred to as "Mr. DOUGLAS"; Karen Douglas will be referred to as "K. DOUGLAS"; Beth Austell will be referred to as "B. AUSTELL"; Mary Gorman will be referred to as "Mrs. GORMAN"; Donald DeCicco will be referred to as "DE CICCO"; Donna DeCicco will be referred to as "Mrs. DE CICCO"; Lewis DeCicco will be referred to as "Mr. DeCICCO"; Joe F. Gorman will be referred to as "Mr. GORMAN"; other parties and/or witnesses will be referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings designated as page, date, and volume, if more than one.

"RR" refers to the Report of Referee.

"EX" refers to Complainant's Exhibits introduced into evidence at Final Hearing.

"R.EX" refers to Respondent's Exhibits introduced into evidence at Final Hearing.

"APP" refers to Appendix to Respondent's Answer Brief and Initial Brief In Support of Cross-Petition for Review, attached hereto.

"BF" refers to Complainant's Initial Brief

STATEMENT OF THE CASE

These disciplinary proceedings commenced in March 1992 with the filing of a two-count complaint which was designated Supreme Court Case No. 79,522.

On April 2, 1992, the Supreme Court assigned a Referee.

On July 22, 1992, The Florida Bar filed a three-count complaint which was designated Supreme Court Case No. 80,207.

On November 23, 1992, The Florida Bar filed additional charges in the form of a Notice of Inclusion.

On July 2, 1992, Respondent filed a Motion to Dismiss. On November 23, 1992, Respondent filed a second Motion to Dismiss. Both motions alleged as a basis of The Florida Bar's failure to abide by Rule 3-7.3(c), Rules Regulating The Florida Bar, in that it pursued its investigation of complaints which were initiated by attorney/complainants without requiring these complaints to be in writing and under oath. Respondent's motions to dismiss were denied by the Referee.

All three matters were consolidated for purposes of final hearing. The final hearing began on February 15, 1993 and lasted five full days. A dispositional hearing was held on March 5, 1993.

On March 30, 1993, the Referee rendered a Report of Referee. In her report, the Referee found Respondent not guilty as to most of the charges, including those pertaining to solicitation and made a limited finding of guilt as to the other charges. The Referee recommended a public reprimand, six-months probation, and

completion of an ethics course.

The Florida Bar seeks review of the Report of Referee with respect to the findings of fact and recommendation of discipline.

Respondent has cross-petitioned seeking review of the Referee's denial of Respondent's motions to dismiss the disciplinary proceedings.

STATEMENT OF THE FACTS

Respondent began his legal career in 1974 as a claims attorney for an insurance company. After leaving the insurance company in 1976, Respondent continued to practice in the area of personal injury, first with a private attorney and, starting in 1980, in his own law firm (TR 105-106, 2/17/93, II).

Respondent's firm had modest beginnings. In fact, between 1980 through 1988 he had only one employee, ABRAHAMSON, his secretary (TR 240, 2/18/93, II; TR 227, 2/18/93, II). In 1988 Respondent began to advertise extensively (TR 230, 2/18/93, II). As a result, Respondent's practice started to grow and concomittently so did his staff which was needed to service his clients (TR 224, 231, 2/17/93, II). By September 1988, Respondent added a receptionist, TRAIL (TR 26, 2/18/93, I); in January 1989 he hired attorney STARK (TR 10, 2/16/93, I); and in November 1989 he hired BEARDSLEE as his first full-time legal assistant (TR 241, 2/18/93, II). In fact, by 1990, Respondent's firm probably had about a dozen employees: four (4) attorneys, three (3) legal assistants, a receptionist, a bookkeeper, and three or four typists (TR 241, 2/16/93, II).

Because of the rapid expansion in his office staff, Respondent recognized the need to establish a personnel system to ensure that employees understood their responsibilities (TR 221, 2/17/93, II). In furtherance thereof, Respondent turned to his brother, A. RUE, as a consultant. A. RUE had a master's degree in both personnel administration and education and was employed as a personnel

officer with the Army (TR 219, 2/17/93, II). From October through December 1990, A. RUE worked full-time in Respondent's office creating personnel manuals which outlined supervisory controls, duties and responsibilities of legal assistants and other staff (TR 222, 225, 2/17/93, II).

It is within this context that The Florida Bar alleges the numerous acts of misconduct set forth in the two consolidated Complaints and the Notice of Inclusion.

As to Count I of Supreme Court Case No. 79,522, The Florida Bar alleges that Respondent caused, authorized and or ratified improper solicitation of clients, specifically involving the following: SCHMITT; WEYRAUCH; B. AUSTELL and BOEHM.

At Final Hearing, SCHMITT testified that he was injured in a motorcycle accident on August 8, 1990 (TR 91, 2/15/93, I) and that two to three weeks later he was contacted by BUCHER, a former police officer, who asked if he would be interested in retaining Respondent (TR 93, 2/15/93, I). SCHMITT testified that he knew BUCHER was not Respondent's employee and that BUCHER did subcontracting work for numerous attorneys (TR 99-100, 2/15/93, I).

BUCHER testified that he is a retired police officer who performs "traffic accident investigation, analysis and reconstruction for insurance companies" (TR 162, 2/18/93, II). Over the last four years BUCHER has worked for fifty different attorneys or firms, both plaintiff and defense (TR 166, 2/18/93, II). When asked for a referral to an attorney, BUCHER provides the names of at least three attorneys (TR 170-171, 2/18/93, II) and

that Respondent is one of the three attorneys whom BUCHER recommends in personal injury or automobile cases (TR 172, 2/18/93, II).

BUCHER testified that he has never been offered any inducement or promised compensation by Respondent for any referral (TR 169, 2/18/93, II) and that to engage in such conduct would destroy his credibility in the legal community (TR 170, 2/18/93, II). BUCHER'S compensation is based solely upon bills submitted for work performed (TR 172, 2/18/93, II).

Specifically with regard to SCHMITT, BUCHER acknowledged that he knew of SCHMITT as a police officer, and that he went to see him at the suggestion of one of his fellow police officers (TR 176, 2/18/93, II). At that meeting SCHMITT expressed dissatisfaction with his PBA counsel (TR 177-179, 2/18/93, II), and in response BUCHER suggested three attorneys, one of whom was the Respondent.

There was no testimony or evidence presented by The Florida Bar that Respondent knew of SCHMITT as a prospective client or of his conversation with BUCHER. The Referee specifically found that there is "no evidence that Respondent caused, authorized, ratified or even knew about any contact between BUCHER and SCHMITT" (RR 4).

WEYRAUCH, a former police officer, testified by telephone at Final Hearing that between June and July 1991, she was contacted by HAGAR from Respondent's law firm in person and between two to five times by telephone. According to WEYRAUCH, HAGAR suggested to her that her attorney was not a good attorney and that she should retain Respondent to represent her in a lawsuit against her

employer resulting from her termination (TR 86-87, 2/16/93, I). The Florida Bar presented no evidence that Respondent knew of WEYRAUCH or that he caused, authorized or ratified this alleged solicitation attempt. The Referee specifically found WEYRAUCH "not to be credible" [WEYRAUCH had been fired from the Edgewater Police Department for lying during an internal investigation (TR 90, 2/16/93, I)] and that there was no evidence that Respondent was involved in any solicitation by HAGAR, "if it did occur." The Referee further commented that it was "clear that Respondent's practice was limited to personal injury work and that he would not have undertaken labor law case" (RR 5).

At Final Hearing, B. AUSTELL testified that she was injured in a motorcycle accident which occurred on March 3, 1988 (TR 11, 2/15/93, I). BEARDSLEE was in the car behind the car that hit her. BEARDSLEE took pictures, gave her a business card, and told her that if she was hurt she would need a Florida attorney and should call him (TR 14-15, 2/15/93, I). The next day B. AUSTELL decided to call BEARDSLEE (TR 15, 2/15/93, I). BEARDSLEE brought a retainer contract, Statement of Client's Rights and Letter of Protection to AUSTELL (TR 16-17, 2/15/93, I; EX 2, 3). Respondent testified that he mentioned to BEARDSLEE that AUSTELL had called. BEARDSLEE indicated to Respondent that he was a witness to the accident and asked if he could talk with them (TR 130, 2/17/93, II).

In February 1990, the AUSTELL matter was assigned to STARK to prepare for trial (TR 14,2/16/93, I). In furtherance thereof,

STARK met with AUSTELL and her husband and was told of their concerns with regard to BEARDSLEE, including the circumstances of their initial meeting (TR 16, 2/16/93, I). STARK was surprised and uncomfortable and spoke with Respondent who was likewise concerned (TR 18, 2/16/93, I). STARK suggested, with Respondent's full concurrence, that B. AUSTELL seek new counsel (TR 49, 2/16/93, I).

Respondent testified that he first learned of the solicitation allegations from STARK in March 1990 and that he immediately spoke to BEARDSLEE about these allegations. BEARDSLEE denied improper conduct and said he was only a witness and left his card (TR 256, 2/18/93, II). The Referee specifically found that there is "no evidence that the Respondent caused, authorized, ratified or knew of the improper solicitation of the AUSTELLS by Mr. Beardslee" (RR 5).

As a result of the BEARDSLEE/AUSTELL incident, Respondent discussed solicitation with his nonlawyer employees. Respondent testified that solicitation is prohibited and an allegation of solicitation is a serious charge which can ruin the firm (TR 257, 2/18/93, II). Respondent further indicated that one of the reasons Respondent brought in A. RUE as a consultant was as a result of the allegations involving BEARDSLEE and the solicitation of AUSTELL (TR 258, 2/18/93, II; TR 232, 2/17/93, II).

BOEHM testified that she had been injured in a motorcycle accident which occurred on April 4, 1989 (TR 75, 2/15/93, I). BOEHM called Respondent's office in response to a note from her mother-in-law which suggested that she call Respondent's office

because they had pictures of her accident (TR 77-78, 2/15/93, I). The Florida Bar presented no evidence identifying the source of the telephone message. When BOEHM called, Respondent's receptionist suggested that she schedule an appointment with an attorney. BOEHM advised that she already had an attorney and the receptionist's response was that the Respondent's office couldn't help her (TR 77, 2/15/93, I). Respondent testified that he never heard of BOEHM and knew nothing of any photographs (TR 274, 2/18/93, II). There was no evidence presented by The Florida Bar that Respondent knew BOEHM or that he caused, authorized or ratified any attempt to solicit BOEHM.

Count I further alleges that Respondent's business cards were found in a tow truck and the operator was warned by the owner not to engage in "this activity" (TR 63, 2/17/93, I). In support of this allegation The Florida Bar presented only the testimony of TAYLOR, a Bar Staff Investigator, concerning his discussion with the owner. The source of the Bar's information was not revealed nor was TAYLOR able to identify the alleged operator or the number of cards which were allegedly found in the truck (TR 60-63, 2/17/93, I). Moreover, there was no evidence presented that Respondent caused, authorized or ratified the distribution of any cards.

In addition, Count I alleges that Respondent authorized M.A.S. Appraisal Service, an automobile body repair shop, to refer accident victims based upon the promise that Respondent would pay for the automobile repair estimate. In support of this allegation,

The Florida Bar offered the testimony of Bar Investigator TAYLOR concerning his conversation with LEVI. According to TAYLOR, LEVI confirmed that he was involved in an accident and when he went to M.A.S. Appraisal he was told of a $50.00 appraisal fee, but if he "used Respondent's firm there would be no charge for the service" (TR 65, 2/17/93). LEVI did not testify. Over objection by Respondent, LEVI'S affidavit, prepared by TAYLOR, was introduced into evidence (EX 44; TR 64, 2/17/93, I).

The deposition testimony of PAPSIDERO, the owner of M.A.S., established that M.A.S. was a motorcycle appraisal company which provides appraisals primarily to insurance companies for a $50.00 appraisal fee (R. EX 10 at 16, 22). Neither Respondent nor BEARDSLEE offered to pay PAPSIDERO for a referral and the only money PAPSIDERO received was from the $50.00 appraisal (R. EX 10 at 23). There was no evidence presented by The Florida Bar that Respondent received referrals from this company.

Count I further alleges that Respondent paid investigators a percentage of fees on cases which were solicited by that investigator. Beginning 1988 and prior to BEARDSLEE'S full-time employment as a legal assistant with Respondent's firm in 1989, BEARDSLEE was employed by Respondent as an investigator through an investigative firm owned by BEARDSLEE'S wife known as FACT FINDERS (TR 238-239, 2/18/93, II). The arrangement with BEARDSLEE was that he was paid a flat fee for investigations which included "getting pictures of accidents, taking measurements, interviewing witnesses, getting police reports" (TR 239-240, 2/18/93, II). Another of

Respondent's investigators, BUCHER, testified that he was paid as an investigator only for work performed (TR 172, 2/18/93, II).

There was no evidence presented by The Florida Bar that investigators were paid a percentage of fees on any cases, and the Referee specifically found "no credible evidence presented to support this allegation" (RR 7).

Count I further charges Respondent with causing solicitation through payments to his nonlawyer employees of bonuses and loans to them based upon their anticipated earnings. At Final Hearing Respondent testified with regard to his intent and efforts to create a profit-sharing plan for his employees (TR 248, 2/18/93, II; TR 186, 2/17/93, II). According to ABRAHAMSON, Respondent's secretary/bookkeeper, a flat bonus was given to nonlawyer employee/clerical workers in any case which was settled over $50,000 (TR 266, 2/16/93, II). Legal assistants, however, were paid a bonus based upon a percentage of the legal fee on those cases in which they worked as a paralegal (TR 118-120, 243, 267, 2/17/93, II). These bonuses were memorialized in a BONUS BOOK (EX 41). This bonus system was in effect between February 1990 and the end of 1991. The Florida Bar offered no evidence which established any relationship between the bonus payments and any alleged solicitation.

The Referee specifically found that other than AUSTELL, there was no evidence that Respondent's employees improperly solicited clients and there was no evidence that Respondent made loans to his employees against anticipated generation of fees (RR 7).

The Referee found Respondent guilty of only one of the numerous disciplinary rule violations charged by The Florida Bar, to wit: Rule 4-5.4(a) which prohibits sharing legal fees with a nonlawyer.

As to Count II of the Supreme Court Case No. 79,522, The Florida Bar alleges that Respondent advanced living and other expenses unrelated to court costs which included cash advances and payments on automobiles, and that the sales involved a contractual or business relationship with clients without proper written disclosure. At Final Hearing Respondent freely admitted that he occasionally advanced funds to existing clients for living expenses when there was hardship present (TR 234, 2/17/93, II). Respondent refused requests for advances when he felt there was no great hardship present [see e.g., DE CICCO letter (EX 16) in which DE CICCO'S request for funds was refused by Respondent (TR 30, 2/19/93). In advancing funds, Respondent would make a judgment call as to the needs of the particular client (TR 205, 1/17/93, II). Respondent would not take a client who insisted on an advance as a condition of employment (TR 204, 205, 2/17/93, II). Respondent listed the advances in his Response to Interrogatories (EX 43). There was no evidence presented which indicated that Respondent's advances were to induce clients to hire him or to keep them from going to another lawyer.

At Final Hearing Respondent admitted that he sold automobiles to the clients identified in his Response to Interrogatories without obtaining disclosures and authorizations (TR 154, 2/17/93,

II; EX 43). Respondent sold clients cars through G&R Enterprises which is a wholesale dealership owned by Respondent (TR 112-113, 2/17/93, II).

As to Count II, the Referee found Respondent guilty of violating Rule 4-1.8(a) and (c), Rules Regulating The Florida Bar.

Count I of Supreme Court Case No. 80,207 involves Respondent's contingency fee contract pertaining to his representation of K. DOUGLAS. The Bar alleged that on October 5, 1990, Mr. DOUGLAS was presented with and signed a contract of Employment and Statement of Client's Rights. K. DOUGLAS, the injured client, neither signed the employment contract nor was requested to do so. It was further alleged that K. DOUGLAS and her husband were not provided with a copy of the employment contract until they went to Respondent's office and made a demand.

At Final Hearing K. DOUGLAS testified that her husband contacted Respondent to represent her in an automobile accident which occurred on October 4, 1990 and that he did so with her authorization (TR 158-160, 2/16/93, II). She acknowledged that they obtained a copy of the signed contract several weeks to a month later (TR 162, 2/16/93). Mr. DOUGLAS' testimony confirmed that he contacted Respondent based upon a recommendation from one of his co-workers and made an appointment to meet him (TR 194, 3/16/90, II). During the meeting, Mr. DOUGLAS determined that he wanted Respondent to represent him and signed the contract (TR 195, 196, 2/16/93, II). The Referee found no evidence that Respondent "as a course of conduct failed to obtain client signature or

provide copies of contracts to clients" and specifically found that the failure in this case was an oversight and did not adversely affect K. DOUGLAS' rights (RR 8).

The Referee found Respondent not guilty of any impropriety with respect to any failure to have a written contingency fee contract signed by the client and failure to have the Statement of Client's Rights signed by client with a copy provided.

The Bar's complaint further alleges that Respondent improperly included in Respondent's contract of employment a provision authorizing a 10% fee to collect personal injury protection benefits (PIP) as well as payment of a penalty upon discharge. The clauses in question stated:

> If I fire the attorney or the attorney ends his representation due to my misconduct, lack of cooperation, or unwillingness to pay costs as billed, then I agree to pay the attorney $150.00 per hour for all attorney time spent on this case; such amount will be immediately payable, without notice to JOHN D. RUE, P.A. If the attorney is discharged after settlement offer, verdict, award, settlement or judgment in favor of me, the attorney shall have the option of having his fee based on the contingency provisions of this Agreement, just as if settlement or judgment had been concluded in full, or the hourly provisions of this Paragraph. In the event suit is filed against me to collect fees and/or costs, I agree to pay reasonable attorney's fees and costs for such action.
>
> The attorney shall have a lien on all my documents and property which are in his possession for payment of all sums due to him from me under this Agreement. My file kept by the attorney is owned by the attorney.
>
> I understand that I have the option of my processing the PIP directly with my company or my law firm will process the PIP for me at a charge of ten percent (10%) of benefits paid, or if litgated (sic) I agree to pay $150.00 per hour, regardless of the outcome.
>
> (EX 32)

Respondent testified that in or about 1989 he noticed a similar PIP and termination clause in the contract of another attorney and he decided to incorporate these clauses into his contract (TR 160, 2/17/93, II; TR 262, 2/18/93, II). As Respondent noted, the PIP clause gives the client the option of either collecting the benefits themselves or having the Respondent's firm collect it subject to the 10% charge. The lawyers working for Respondent never even suggested to Respondent that the language in his contract was improper (TR 61, 2/16/93, I). Mr. DOUGLAS' testimony confirms that Respondent explained his options to him at their October 5th meeting (TR 199, 1/16/93, II).

Contrary to the testimony of Respondent and TRAIL, K. DOUGLAS and Mr. DOUGLAS testified that they were dissatisfied with the representation but decided not to terminate Respondent because of the $150 per-hour charge (TR 205, 2/16/93, II); TR 166, 2/16/93, II). They acknowledged that they never discussed the $150 per-hour charge with Respondent (TR 212, 2/16/93, II). Respondent testified that no one ever complained about these clauses and that the $150 per-hour clause was never enforced (TR 262, 2/18/93, II). Respondent's office policy was to give the client their file, if requested, and not to withhold a file until payment was received (TR 262, 263, 2/18/93, II). The Florida Bar presented no evidence that the $150 per-hour provision was ever enforced. (In fact, the AUSTELLS received their file without the requirement of any advance payment).

The Referee found Respondent guilty of violating Rule 4-1.5(A)

(entering into an agreement for, charging or collecting an alleged prohibited or clearly excessive fee) and Rule 4-1.5 (F) (4) (b) for having a written contingent fee contract exceeding 33-1/3% of the recovery. Nevertheless, the Referee specifically noted that she "does not find these provisions were used against the client in punitive or coercive (sic) adversely affected her legal rights or that Respondent failed to handle her claim in an improper manner" (RR 10).

The Florida Bar offered the testimony of K. DOUGLAS and Mr. DOUGLAS with regard to their dissatisfaction with Respondent's representation in support of the charges that Respondent failed to: obtain the final opinion of K. DOUGLAS' physician; to communicate with K. DOUGLAS; and to pursue alternative remedies prior to settlement. The Referee found that The Florida Bar failed to prove all of these allegations by clear and convincing evidence.

In addition the Bar alleged in Count II that Respondent failed to make efforts to ensure that the nonlawyer employee's conduct is compatible with the lawyer's professional obligations and in essence, engaged in conduct which assisted the unauthorized practice of law. The Referee found that the Bar failed to prove the allegations by clear and convincing evidence and found Respondent not guilty of these charges.

Count III alleged that Respondent obtained employment from clients, including Mr. DOUGLAS, by promising to aid them in the purchase of an automobile through his dealership and that he failed to provide, disclose or obtain consent regarding the inherent

conflict of interest. The Referee found that the "evidence failed to establish that Respondent offered to sell Mr. DOUGLAS an automobile" (RR 10). The Referee found Respondent not guilty of these charges.

In the Notice of Inclusion, The Florida Bar set forth additional charges against Respondent involving his representation of clients WOLF, DE CICCO and GORMAN.

In support of the allegations of solicitation pertaining to WOLF, The Florida Bar presented the testimony of CARYL, WOLF'S friend who claimed that he had contacted WOLF and advised that he would send his lawyer to talk with him (TR 7, 2/18/83, I) and that by the time the legal assistant had contacted WOLF, WOLF had retained another law firm (TR 11, 2/18/83, I). CARYL acknowledged that he didn't know if WOLF had called Respondent to represent him (TR 23, 2/18/83, I).

WOLF testified that he was severely injured as the result of a motorcycle accident which occurred on April 8, 1990 (TR 110, 2/15/93, II). He stated that he never authorized CARYL to obtain counsel for him (TR 121, 141, 2/15/93, II). Because of his injuries WOLF does not remember whether he requested Respondent to visit him but he does remember that the first time he called an attorney he called Respondent to talk about his motorcycle (TR 131, 132, 2/15/93).

Respondent testified that WOLF called him on April 16, 1990 and left a message with his answering service (R. EX 7). Respondent returned the call during which time he took notes about

the accident and scheduled an appointment to see WOLF in the hospital on April 18, 1990. When Respondent met with WOLF two days later, WOLF signed various documents, including the contract, Statement of Client's Rights and medical authorizations (TR 163-165, 2/17/93, II).

The Referee stated that she "believes and the record supports Respondent's contention that WOLF called him of his own initiative" and that the "Respondent visited WOLF on April 18, 1990, in response to a telephone call from WOLF which Respondent returned on April 16, 1990" (RR 11).

As to the solicitation of DE CICCO, DE CICCO testified that he was hospitalized as the result of an injury which occurred on October 5, 1989 (TR 216,217, 2/15/93, II). At that time, DE CICCO was a minor and was advised by his parents that Respondent would be representing him (TR 217-218, 2/15/93, II). Mrs. DE CICCO testified that she noticed her husband talking to Respondent in the hallway (TR 173, 2/15/93, II). Mrs. GORMAN testified that she called Respondent to represent her son who was injured in the same accident and that Respondent came to the hospital the next day (TR 248, 250, 2/15/93, II). Mr. DE CICCO testified that Respondent introduced himself and said that he had just been to see the GORMANS. Mr. DE CICCO said that he needed a lawyer and agreed to have Respondent represent his son (EX 15, at 8). The Referee found no clear and convincing evidence to establish the Bar's allegation of solicitation and recommended a finding of not guilty.

The Florida Bar's Notice of Inclusion alleged numerous other

violations, to wit: conflict of interest in representing both DE CICCO and GORMAN; improper business transaction involving DE CICCO and the sale of an automobile; failure to provide clients WOLF, DOUGLAS, and DE CICCO with the signed copy of the Statement of Client Rights; fraudulent misrepresentation to DE CICCO that he had 24 hours to accept a settlement; and misrepresentation to WOLF'S former counsel that he was a "friend of the family." Likewise, with respect to each charge, the Referee determined that the record failed to establish these allegations by clear and convincing evidence and found Respondent not guilty.

SUMMARY OF THE ARGUMENT

A Referee's findings and recommendations must be upheld unless clearly erroneous or without evidentiary support. In the instant case, the Referee found Respondent not guilty of most of the charges, including all allegations of solicitation. The Florida Bar has not proven that the Referee's findings of fact or not guilty recommendations are clearly erroneous or lacking in evidence. Accordingly the Referee's findings and not guilty recommendations must be upheld.

The evidence established and Respondent admitted that he created a profit-sharing plan wherein clerical employees were paid a flat bonus in cases which resulted in a substantial recovery and legal assistants would share in a percentage of the attorney's fee in cases which they were assigned to process. No wrongful intent byRespondent was shown. Respondent's plan was found to be a violation of Rule 4-5.4(a), Rules Regulating The Florida Bar.

The evidence established and Respondent admitted that he made advances to clients in some limited instances for living expenses where hardship was present contrary to Rule 4-1.8(e).

In addition Respondent sold automobiles to several clients through a dealership which he owned. In some instances, payment was made from proceeds later collected on behalf of the client. Respondent acknowledged that he did not always provide to the client a written disclosure relating to potential conflict. Nor did he obtain the client's written consent waiving the potential conflict. However, no harm to any client was shown. Respondent's

actions in this regard were found to violate Rules 4-1.8(a) and (e).

Finally, Respondent included in his employment contract two provisions which were found to violate Rules 4-1.5(A) and 4-1.5(F)(4)(b). The first involves giving a client the option of collecting PIP benefits on his own without a fee or through Respondent's efforts at a 10% fee. The second is a termination clause which permitted Respondent to collect a $150.00 per hour fee upon discharge.

None of the conduct referenced above was based upon a complaint filed by a client but was, in fact, a byproduct of intensive scrutiny during the course of an overly broad investigation undertaken by The Florida Bar.

Respondent maintains that his actions warrant no greater disciplinary sanction than that recommended by the Referee, to wit: a public reprimand, six-months probation requiring completion of an ethics course and payment of one-half of the investigator and transcript costs.

Notwithstanding this position, Respondent maintains that a dismissal is fully justified in this case based upon The Florida Bar's violations of its own Disciplinary Rules by proceeding with its investigation under the guise of The Florida Bar as the Complainant. In this manner The Florida Bar sought to intentionally circumvent for the benefit of lawyer-complainants the requirement that complaints be in writing and under oath.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION THAT RESPONDENT IS NOT GUILTY OF SOLICITATION IS FULLY SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND, THEREFORE, SHOULD BE UPHELD.

As acknowledged by The Florida Bar, it is well established that a Referee's findings and recommendations will be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). Further, it is the function of the Referee to weigh the credibility of witnesses and, as the fact finder for the Supreme Court, to resolve conflicts in the evidence. The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992); The Florida Bar v. Stalnaker 475 So.2d 815 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

Based upon this principle, The Florida Bar has the heavy burden of demonstrating that there is no evidence in the record to support the Referee's findings. This is clearly a much greater burden than merely demonstrating that the record contains some evidence which would support the factual allegations set forth in its Complaint.

In the instant case The Florida Bar has failed to meet this burden and has instead presented its version of the testimony and evidence which is contrary to the Referee's factual findings. In order to grant the relief requested by the Bar, this Court would by necessity assume the role of a second trier of fact, reweighing the

credibility of the witnesses and the evidence presented over the five days of final hearing. This Court has consistently refused to accept this role. In The Florida Bar v. MacMillan, 600 So.2d 457 (Fla. 1992), this Court held:

> If findings of the Referee are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the Referee. (Emphasis added)

Unable to demonstrate that the Referee's findings are clearly erroneous, Complainant's brief instead focuses on the evils of solicitation. However, the record reflects that Respondent is in full agreement with this position: solicitation is evil and not to be tolerated. As Respondent commented, an allegation of solicitation is serious and can ruin a firm (TR 257, 2/18/93, II).

Respondent's concern about solicitation is demonstrated by his actions. Respondent first learned of the allegation involving the solicitation of AUSTELL from STARK (TR 256, 2/18/93, II); TR 18, 2/16/93, II). Upon learning of the allegations, Respondent spoke with BEARDSLEE (TR 256, 2/18/93, II), as well as his other employees. His concern in this regard is further manifested by his efforts to establish a personnel system to ensure control over his nonlawyer employees (TR 258, 2/18/93, II).

With respect to AUSTELL, The Florida Bar overlooks the fact that the AUSTELLS were allegedly solicited by BEARDSLEE on March 3, 1988, immediately following a motorcycle accident. It is undisputed that BEARDSLEE was fortuitously present at the scene of the accident. Under any reasonable interpretation of the testimony

and evidence, it would be illogical to conclude that Respondent knew in advance of the AUSTELL'S accident and directed BEARDSLEE to initiate the contact. The Referee properly found that there is no evidence that Respondent "caused, authorized, ratified or knew of the improper solicitation of the AUSTELLS by BEARDSLEE" (RR 5).

The fact that Respondent initially sought to place a lien for attorney fees upon termination of his representation of AUSTELL or that he did not report the allegations involving BEARDSLEE'S 1988 conduct to law enforcement agencies upon learning of the allegation in 1990 does not constitute evidence sufficient to establish that the Referee's findings of not guilty as to the solicitation of AUSTELL is clearly erroneous.

Moreover, the record does not reflect any evidence that either the profit-sharing program (i.e., bonus) for Respondent's nonlawyer employees or loans to employees was in any way related to solicitation. On the contrary, bonuses were given to <u>all</u> clerical staff in recoveries over $50,000 and to legal assistants at the conclusion of the particular case which they were assigned to process. There was no evidence of any payment to any nonlawyer employee or any other party for the referral of a case.

With respect to SCHMITT, Respondent testified that he did not ask BUCHER to approach SCHMITT and he did not know of the contact by BUCHER (TR 273, 2/18/93, II).

BUCHER was not Respondent's employee; he was an independent contractor who was hired by Respondent to perform accident reconstruction (TR 109, 2/17/93, II). Although Respondent has

accepted clients who have been recommended by BUCHER, he has never paid BUCHER for any referrals (TR 273, 1/18/93, II) and there was no evidence presented to the contrary.

The Referee properly found that "there was no evidence that Respondent caused, authorized, ratified or even knew about any contact between BUCHER and SCHMITT" (RR 4).

With respect to the alleged solicitation of WEYRAUCH, the Referee found WEYRAUCH "not to be credible" (possibly because her employment as a police officer was terminated because she lied during an investigation). The Referee further found that Respondent would not have undertaken WEYRAUCH'S labor law case because he did not do that type of work.

Based upon the foregoing, the Referee properly found Respondent not guilty of solicitation of WEYRAUCH and SCHMITT. In support of its position, The Florida Bar merely asserts that SCHMITT and WEYRAUCH had nothing to gain by their testimony. This assertion does not constitution even an attempt to meet the burden of demonstrating that the Referee's findings are clearly erroneous.

With regard to BOEHM, Respondent testified that he never heard of her and did not know about any photographs (TR 274, 2/18/93, II). In fact, ironically, BOEHM'S testimony that once she advised Respondent's office that she had an attorney she was told that they couldn't help her (TR 77, 2/15/93, I) further supports Respondent's position that his staff is instructed to say that they cannot help any caller who is represented by an attorney (TR 275, 2/18/93, II).

There is no testimony or evidence that Respondent ever had any

contact, either directly or indirectly with BOEHM, or that he or his staff tried to persuade her to discharge her counsel and retain Respondent. The Referee properly found Respondent not guilty. In its brief, The Florida Bar does not cite any evidentiary basis to demonstrate that this finding is clearly erroneous.

Further, as indicated by the Referee's findings, the Bar failed to prove by clear and convincing evidence any solicitation regarding the tow truck company or M.A.S. Appraisal. The Bar's only evidence was hearsay testimony presented by the Bar's investigator, a clearly prejudiced witness. The Bar could not even produce the name of the driver of the tow truck at issue. Its only evidence as to M.A.S. was the affidavit of LEVI, prepared by TAYLOR, which suggests that M.A.S. Appraisal offered to waive the $50 appraisal fee if Respondent was retained. That double-hearsay evidence was rebutted by the testimony of PAPSIDERO. In its brief, the Bar does not even attempt to demonstrate that the Referee's findings as to these allegations is incorrect.

With respect to WOLF, Respondent testified that he called WOLF on April 16, 1993 in response to a telephone message from his answering service (TR 276-279, 2/18/93, II; R.EX 7) and made an appointment to talk to him at the hospital on April 18, 1993. While WOLF may not recall the conversation because of his condition, he did not deny that he requested Respondent to visit him in the hospital and does, in fact, recollect that Respondent was the first attorney he called (TR 131-132, 2/15/93, II). The

Referee considered the testimony and found that WOLF hired Respondent to represent him of his own initiative (RR 11). The Florida Bar does not demonstrate that the Referee's finding in this regard is clearly erroneous. In fact, The Florida Bar merely asserts that WOLF "had previously signed a contract with other counsel" (BF 26). This assertion is irrelevant to the issue of whether Respondent solicited the representation of WOLF.[1/]

With regard to DE CICCO, it is undisputed Mrs. GORMAN called Respondent to represent her son and that his presence in the hospital was pursuant to his representation of GORMAN (TR 248, 250, 259, 2/15/93, III). While at the hospital, Respondent met Mr. DE CICCO and after a brief meeting in the hospital hallway,

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1/ Moreover, while arguing the impropriety of Respondent's contact with WOLF, The Florida Bar conveniently overlooks the obvious impropriety concernng the actions of the Troutman law firm who contacted WOLF at the request of a former client CARYL, a friend of WOLF. Contact with WOLF was made by a nonlawyer employee/investigator at the direction of Troutman or another attorney in the firm. Upon learning that WOLF had already retained counsel, the investigator was irate with CARYL for having wasted his time in sending him to see WOLF "basically on a sure thing." (TR 101, 1/18/93, I). As noted by the Referee, "When WOLF signed the contract on April 16, 1990, with another law firm he was likely under the influence of morphine having just recently been released from intensive care. Further, this law firm was not contacted by WOLF but by a friend on his behalf" (RR 11). If any conduct fits squarely within the solicitation prohibitions of Spence, Payne, Masington and Grossman, PA. v Philip M. Gerson, P.A, 483 So. 2d 775 (Fla. 3d DCA 1986), it is the conduct of The Florida Bar's own witnesses. The testimony presented, in conjunction with the comments of the Referee, leaves a question as to whether The Florida Bar has initiated a solicitation investigation with respect to their own witnesses and if not, why not?

Mr. DE CICCO retained Respondent to represent his son DE CICCO (R.EX 15 at 8). It is undisputed that DE CICCO and GORMAN and their families were close friends (almost family), that they were involved in the same accident and that both families thought of the accident case as one case (TR 178-79, 2/15/93, II; 261-2/15/93, II). The Referee found that The Florida Bar failed to prove its allegation of solicitation of DE CICCO by clear and convincing evidence (RR 11).

It is Respondent's position that the Referee's findings of fact and recommendation of not guilty as to solicitation are overwhelmingly supported by substantial, competent evidence. While The Florida Bar may disagree with the Referee, The Florida Bar has not met its burden of establishing that the findings and recommendations are either clearly erroneous or without evidentiary support. Accordingly, the Referee's findings of fact and recommendation of not guilty should be upheld.

II. RESPONDENT'S CONDUCT WARRANTS A DISCIPLINARY SANCTION NO GREATER THAN A PUBLIC REPRIMAND, PROBATION, AN ETHICS COURSE AND PARTIAL PAYMENT OF COSTS AS RECOMMENDED BY THE REFEREE.

The Florida Bar's most serious allegation against Respondent was that he "caused, authorized, and or ratified the improper solicitation of clients to his office." The Referee found Respondent not guilty on any solicitation charge. Moreover, in finding Respondent not guilty the Referee found that The Florida Bar's allegations were not proven by clear and convincing evidence. Significantly, in most instances, the Referee noted that there was

no evidence to substantiate the solicitation allegations, to wit:

As to SCHMITT:

> There is no evidence that Respondent caused, authorized, ratified or even knew about any contact between BUCHER and SCHMITT. (Emphasis added). (RR 4)

As to WEYRAUCH:

> [T]here is no evidence that the Respondent was involved in any solicitation by Mr. HAGAR, if it did occur. (RR 4)

As to AUSTELL:

> There is no evidence that the Respondent caused, authorized, ratified, or knew of the improper solicitation of the AUSTELLS by Mr. BEARDSLEE. (RR 5)

* * *

> [T]here is no evidence the Respondent's employees improperly solicited clients. There is also no evidence that Respondent made loans to his employees against the anticipated generation of fees in the future. (RR 7)

With regard to the allegation that Respondent paid his investigator a percentage of fees generated by the investigator's solicitation of cases:

> There was no credible evidence presented to support this allegation. (RR 7)

Moreover, the Referee found that there was no clear and convincing evidence as to most of the remaining charges. In fact, the only charges of which Respondent was found guilty were those which he admitted. Accordingly, the issue then becomes the appropriateness of the discipline based upon the misconduct which Respondent admitted and the Referee specifically found him guilty, to wit: payment of bonuses in 1990 and 1991 to his legal assistants which consisted of a percentage of the fee received (RR

7); advancing funds to clients for living expenses (RR 8); automobile sales to clients without written disclosure and transmittal to the client without reasonable opportunity for the client to seek the advice of independent counsel, and without written client consent (RR 8); improper contract clauses, specifically a fee of $150 per-hour upon termination and a fee of 10 % to collect PIP benefits (RR 9). These clauses were utilized by Respondent from approximately 1989 through 1991.

The Referee recommended a public reprimand, six months probation requiring completion of an ethics course, and payment of a portion of the costs. The Florida Bar argues that the discipline recommended by the Referee is inadequate and that a three-year suspension is warranted. The Florida Bar argues case law to support its position. However, the cases cited by The Florida Bar do not support a three-year suspension. In fact, in most instances the cases cited by The Florida Bar involve suspensions for substantially less than three years and in many instances include more serious allegations as additional misconduct.

For example, with regard to Respondent's contract clause which permits a 10% fee to process the client's PIP benefits, The Florida Bar cites The Florida Bar v. Gentry, 475 So.2d 678 (Fla. 1985). Gentry, however, involves an attorney's fee of 1/3 fee to collect PIP benefits. Gentry also involves failure to properly maintain a trust account and neglect of a legal matter as additional misconduct. Further, unlike RUE who has no disciplinary history, the respondent in Gentry had a prior six-month suspension. Even

with a prior suspension and additional serious misconduct, the respondent in Gentry received only an eighteen-month suspension.

In the case sub judice, Respondent's contract gives clients the option to collect the PIP benefits on their own at no fee. It is unrefuted that Respondent's clients were fully aware of this option (TR 198, 199, 210, 3/16/90, II). Moreover, the 10% charge is similar to an administrative processing fee, rather than an attorney's fee. The Florida Bar has cited no case which holds that an administrative fee of this nature is violative of any disciplinary rule. Respondent maintains that an administrative fee of this type is a technical violation and arguably does not constitue a clearly excessive fee. In addition, Respondent began including the 10% option charge in his contract in or about 1989 and promptly removed it in early 1991 or 1992 when its propriety was questioned by The Florida Bar (TR 157, 158-196, 1/17/93, II); TR 12, 3/15/93, I).

Respondent's contingency fee agreement also included a provision for payment of $150 per-hour if Respondent is fired by the client or if discharged due to misconduct, lack of cooperation or unwillingness to pay costs. In addition, if discharge occurs after settlement offer, verdict award or judgment, Respondent has the option of basing his fee on either the contingency or hourly provisions (EX 31; APP A).

In support of discipline as to the termination clause, The Florida Bar cites The Florida Bar v. Doe, 550 So.2d 111 (Fla. 1989) and Rosenberg v. Levin, 409 So.2d 1016 (Fla. 1982). In Doe,

however, the discharge clause in question was for $350 per hour or 40% of the greatest gross amount offered in settlement. Moreover, although he later reduced his fee to $250 per hour, the respondent in Doe filed a lien claiming a $350 fee. At the time that he filed his lien, the respondent knew that the clause was suspect. Even under these circumstances the respondent received only a private reprimand.

This Court most recently considered a termination clause in The Florida Bar v. Hollander, 607 So.2d 412 (Fla. 1993). In Hollander, the termination clause gave the respondent an hourly fee for services at the prevailing hourly rate and entitled the firm to receive a pro rata share of any recovery. This Court found that the agreement allowed respondent's firm to collect twice for the same work. Hollander, 607 So.2d 412, 415 (Fla. 1992). This provision is clearly more onerous than Respondent's clause and yet in Hollander the respondent received only a public reprimand.

Like the PIP provision, Respondent began utilizing the termination clause in his contract or about 1989 and promptly removed it when its propriety was questioned by The Florida Bar. (TR 157, 158-195, 2/17/93, II; TR 12, 3/15/93, I). Accordingly, unlike the respondent in Doe, Respondent never sought to enforce the termination provision and removed it from his contract when its propriety was questioned by The Florida Bar. Accordingly, while Respondent fully accepts that his PIP and termination clause might be violative of the disciplinary rules in a technical sense, he would ask the Court to consider his actions in view of its ruling

in The Florida Bar v. Fetterman, 439 So.2d 835 (Fla. 1983). In Fetterman the Court merely cautioned the respondent in lieu of imposing sanctions where the respondent voluntarily ceased using questionable language in an advertisement.

Respondent acted in a similar manner with regard to his bonus program when he learned that its propriety was questioned by The Florida Bar. During 1990 and 1991, Respondent initiated a profit-sharing plan for his employees which consisted of payment to all clerical employees upon settlement of a case (TR 26, 12/16/93, I). Legal assistants received a percentage of the firm's fee on cases in which they worked (TR 242-244, 3/16/90, II; TR 118-120, 2/17/93, II). These were bonuses and separate from their salaries. Bonuses were never paid as an incentive for bringing a case into the firm (TR 121, 122, 2/18/93, I; TR 49, 50, 2/18/93, I). In instituting the bonus program, Respondent was unaware that his profit-sharing plan might be considered to be violative of the Bar rules (TR 35, 2/19/93, I). When it was questioned he immediately terminated the program (TR 48, 2/18/93,I).

In The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), cited by The Florida Bar, the respondent received a suspension for only three months and one day with proof of reinstatement for misconduct which included communicating an offer of settlement to an adverse party, placing trust funds in a general account, and payment of a salary to an employee of his legal clinic which was contingent upon the fees received by the clinic. The instant case does not involve payment of a contingent salary and does not

involve mishandling of trust funds.

In The Florida Bar v. Stafford, 542, So.2d 1321 (Fla. 1989), cited by The Florida Bar, the respondent received only a six-month suspension for entering into a solicitation plan wherein he paid a police officer a percentage of the fees for cases which the officer referred. Stafford is clearly distinguishable from the instant case in that the case sub judice does not involve any solicitation, payment of referral fees or sharing fees with persons other than employees.

With regard to sharing fees, this Court has approved a public reprimand even where a respondent entered into an agreement to share a fee with a nonlawyer witness. The Florida Bar v. Sagrans, 388 So.2d 1040 (Fla. 1980).

As to the charge of selling automobiles to clients, The Florida Bar cites cases involving business transactions with clients, all of which are distinguishable from the instant case. In The Florida Bar v. Swofford, 527 So.2d 812 (Fla. 1988), the respondent was disbarred for misconduct involving the purchase of property from his client which he thereafter sold at a profit. In The Florida Bar v. Abagis, 318 So.2d 395 (Fla. 1975), the respondent received several disciplinary sanctions, one of which was a public reprimand for having executed an agreement with his clients with regard to real estate which obligated him to make mortgage payments, rent the property, attempt to sell it, termite proof and repair, and to receive a contingent fee above the sale price.

In The Florida Bar v Hornbuckle, 347 So.2d 1030 (Fla. 1977), cited by The Florida Bar, the respondent obtained loans from clients and gave some of them in return mortgage deeds on his property. Respondent was unable to repay the loans when due. Misconduct of this nature, which certainly adversely affected the Respondent's clients, resulted in only a sixty-day suspension and two-year probation.

In The Florida Bar v Rogers, 583 So.2d 1379 (Fla. 1991), cited by The Florida Bar, Respondent entered into a business transaction with his clients in which he was both an attorney for a partnership as well as an investor. Mr. Rogers failed to disclose the conflict, used client funds for other than intended purposes and refused to provide an accounting. Even under these circumstances, the respondent received only a 60 day suspension.

Respondent's sale of cars to clients is clearly a different type of transaction than those which are the subject of the cases cited by the Bar. There was no showing of overreaching by Respondent. All of the Bar's cases involve business transactions in which it is reasonable to expect that a client might need to consult with independent counsel to ensure that his interests are protected. However, how many persons have need of independent counsel prior to purchasing a car?

It is unreasonable, therefore, for Respondent to have assumed that this type of transaction simply did not fall within the rules which require disclosure and written consent of the client. Moreover, no client complained. Pursuant to Fetterman, supra

Respondent requests that he be cautioned instead of sanctioned should this Court consider these transactions to be violative of the Bar rules.

With regard to Respondent's misconduct involving advancing funds to client, The Florida Bar cites The Florida Bar v. Rogowski, 399 So.2d 1390 (Fla. 1981). However, the respondent in Rogowski received only a six-month suspension for misconduct which included advancing funds from his client's trust account. In Rogowski, the Respondent's trust account balance was less than his outstanding liabilities. However, there is no allegation of trust account misuse in the instant case.

This case involves advancing funds to clients for only humanitarian purposes only and involved only a small number of clients in relation to the size of Respondent's practice. Respondent estimated that over the past four years he has opened between 12-1400 files (TR 14, 3/5/93). Respondent has admitted in his response to the Bar's Interrogatories of advancing funds to thirty-five clients during 1989 through 1991 (EX. 43). Including the thirteen additional clients which were suggested by TAYLOR, the number of clients who received funds from Respondent over a three-year period total forty-eight (EX 42). [TAYLOR'S memorandum (EX 42) includes some clients who were included by Respondent in his Response to Interrogatories (EX 43). The duplicates are not included in this total].

Further, the advances by Respondent never were to retain a client (TR 15, 3/15/93; TR 134, 2/17/93, II), and were for solely

humanitarian purposes. Respondent's testimony in this regard was clearly confirmed by his employees: ASHER (TR 118, 2/18/93, I); TRAIL (TR 63-64, 3/18/93, I); and ABRAHAMSON (TR 248, 3/16/90, II). Legal assistant TRAIL stated:

> [Respondent's Counsel]: ...Did Mr. Rue ever advance funds to clients?
>
> [Trail]: Sometimes, yes.
>
> [Respondent's Counsel]: What were the circumstances?
>
> [Trail]: Bad circumstances, actually. If the client was getting ready to lose their apartment or their electricity was going to be turned off or, you know, didn't have money to put food on the table for their kids, circumstances like that.
>
> [Respondent's Counsel]: Are you aware of any instances where clients said they would drop the firm if they weren't given advances?
>
> [Trail]: No.
>
> [Respondent's Counsel]: Are you aware of any instances in which the firm was told they wouldn't be hired unless they would give advances?
>
> [Trail]: No.
>
> (TR 63-64, 3/18/93, I)

Although advancing funds to clients is a violation of disciplinary rules, Respondent maintains that the fact that the funds were advanced only for humanitarian purposes rather than to induce a client to retain Respondent, should be considered in determing discipline. At a minimum, advancing funds under these circumstances does not justify increasing the disciplinary sanction recommended by the Referee. See The Florida Bar v. Wooten, 452 So.2d 547 (Fla. 1984), wherein the respondent received a public

reprimand for advancing funds to a client for maintenance and support of the client and his family.

None of the cases cited by The Florida Bar are applicable to the case sub judice. Instead of arguing the relevancy of the cited cases, The Florida Bar appears to rely on a cumulative misconduct argument, citing as one case The Florida Bar v. Welty, 381 So.2d 1220 (Fla. 1980). However, in Welty the respondent received only a six-month suspension for misconduct relating to deficits in his trust account at times in amounts in excess of over $24,000. This case is obviously more serious than the instant case in that there is no allegation of any mishandling of Respondent's trust accounts.

The cases cited by The Florida Bar simply do not support a three-year suspension and certainly do not support increasing the discipline recommended by the Referee.

Finally, The Florida Bar's suggestion that Respondent be ordered to account for each and every "improper" fee taken is unwarranted, particularly since the Referee found no evidence of solicitation and there was no evidence that the termination clause was ever enforced. Further, Respondent's 10% fee to collect PIP benefits was always an option given to the client and while technically improper may arguably fall within the category of an administrative processing fee rather than a clearly excessive attorney's fee. Had the Referee felt otherwise, an appropriate finding and recommendation would have been made.

In determining discipline, Respondent would urge the Court to consider the following:

(1) Respondent never enforced the termination clause and removed it from his contract when it was questioned by The Florida Bar.

(2) Respondent removed the PIP option clause from his contract when it was questioned by The Florida Bar.

(3) With regard to the aforementioned provisions, even the Referee commented that they were not used against the client in a punitive or coercive manner (RR 9).

(4) Respondent fully cooperated with The Florida Bar and gave The Florida Bar access to all of his books, records and authorized his accountant to speak with the Bar investigators without requiring a subpoena (TR 189-190, 2/17/93, II). See Standard 9.32(e), Standard for Imposing Lawyer Sanction.

(5) Absence of prior disciplinary record. See Standard 9.32 (a), Standard for Imposing Lawyer Sanction.

(6) Absence of a dishonest or selfish motive. See Standard 9.32(b), Standard for Imposing Lawyer Sanction.

(7) No client was harmed.

III. THE FLORIDA BAR'S FAILURE TO STRICTLY COMPLY WITH THE RULES REGULATING THE FLORIDA BAR JUSTIFY DISMISSAL OF THIS PROCEEDING.

As set forth in Respondent's Motion to Dismiss and Respondent's Second Motion to Dismiss (APP B and C, respectively), Respondent requested dismissal of these proceedings based upon The Florida Bar's failure to comply with the provision of the Rules Regulating The Florida Bar as it pertains to complaint processing

and the requirement that all complaints be in writing and under oath.

The procedure for processing a complaint permits bar counsel to review inquiries. However, once a decision is made to pursue an inquiry, Rule 3-7.3(b), Rules Regulating The Florida Bar, clearly states that:

> [A] disciplinary file shall be opened and the inquiry shall be considered as a complaint, if the form requirement of (c) is met . . . . (Emphasis added)

The rule further mandates that:

> All complaints, except those initiated by The Florida Bar, shall be in writing and under oath. The complaint shall contain a statement providing that: Under penalty of perjury I declare the foregoing facts are true, correct and complete. (Emphasis added).

Rule 3-7.3(c), Rules Regulating The Florida Bar.

Due to the changes in confidentiality, all bar investigations, including inquiry/complaints which are either summarily dismissed by staff or closed based upon a no probable cause finding, become subject to public scrutiny. Accordingly, the requirement that all complaints be in writing and under oath was instituted to discourage the filing of spurious or malicious complaints and to make those who initiate disciplinary proceedings accountable for the truth and accuracy of their allegations.

In this case, The Florida Bar conducted investigations of Respondent based upon allegations received telephonically from attorney William M. Chantrau and in writing from attorney Charles Tindell. In neither instance was either attorney/Complainant required to file their grievance under oath, in compliance with the

Rules. The Florida Bar simply does not have the discretion to waive the oath requirement.

Even more troublesome is the Bar's disparate treatment of complaints by lawyers and complaints by the public. Neither Mr. Chanfrau nor Mr. Tindell (who said he was filing a grievance) were required to make their complaint under oath. Yet, Mr. Douglas' complaint was returned to him with the specific request that it be notarized. Why are only lawyers forgiven the oath requirement? Is it an attempt to shield lawyers from defamation actions brought by wrongfully accused respondents?

This case also smacks of selective prosecution. The Troutman firm was not prosecuted for soliciting Wolf. This despite the fact that: (1) they were not contacted by Mr. Wolf; (2) an investigator, not a lawyer, signed him up; and (3) Mr. Wolf was under sedation when he signed the contract. Neither Mr. Stark nor Ms. Hunt were prosecuted for using the contract that the Bar says is improper. Selective prosecution by the Bar is misconduct warranting dismissal. See dissenting opinion of Justice Overton, The Florida Bar v Johnson, 313 So.2d 33, 35 (Fla. 1975).

This case clearly demonstrates the evils of predicating a disciplinary proceeding upon unverified rumors. It led to a shot-gun style of investigation, unchecked by any authority, which led to a Florida Bar staff investigator spending over 200 hours contacting over 40 people, including former clients, employees, former employees, four insurance carriers and numerous health care providers (TR 81-87, 93, 12/17/93, I). All of this investigation

was generated by a complaint from no client. Yes, Mr. Chanfrau reported misconduct. But, he was not required to file a complaint. Mr. Tindell filed a complaint. But, he, too wasn't required to place it under oath. Later, Mr. Douglas filed a grievance which essentially alleged client dissatisfaction (TR 223, 2/16/93, III). The unsworn complaints (all of which have been proven to be untrue) from attorneys Chanfrau and Tindell were processed under the guise of The Florida Bar acting as the "Complainant". This was a direct misrepresentation of the source of the complaint.

Accepting complaints in the manner described above encourages the reporting of rumors by competitors or individuals with axes to grind rather than encouraging the submission of truthful, accurate information upon which a Bar investigation should properly be based. Those with economic motives or other agendas are encouraged, not discouraged, to report baseless rumors in, perhaps, an attempt to gain a competitive advantage. The adverse publicity resulting from such investigations may raise so many questions in the community that it may destroy the reputation of wrongfully accused attorneys. If the complaints are shown to be groundless, by insulating the complainant the Bar may have shielded them from a proper defamation action brought by an aggrieved Respondent.

Accordingly, Respondent requests that this Court dismiss this proceeding. Just as The Florida Bar expects strict compliance with the Rules of Professional Conduct by each of its members, so does each member have the right to expect no less than strict compliance with the Rules of Discipline by The Florida Bar. In dismissing

guilty findings for failure to comply with Bar rules, this Court has stated:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

The Florida Bar v Rubin, 362 So.2d 12, 16 (Fla. 1978).

CONCLUSION

The Referee's findings and recommendations are fully supported by the record in this case. The referee made her detailed factual findings after weighing five days of testimony and after reviewing numerous exhibits. Perhaps, most importantly, they were made after she viewed the demeanor of the witness, giving her the best position to weigh their credibility. Her finding that Respondent did not solicit cases is supported by the overwhelming weight of evidence.

Respondent requests that the Supreme Court approve a sanction no greater than a public reprimand, six-months probation requiring the completion of an ethics course and payment of one half investigative and transcript costs. Alternatively, Respondent requests the entry of an order dismissing this proceeding based upon The Florida Bar's failure to comply with the Rules Regulating

The Florida Bar as it relates to requiring all complaints be in writing and under oath.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Respondent and Initial Brief of Respondent in Support of Cross-Petition for Review was hand-delivered to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927, and that a true and correct copy was hand-delivered to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 and sent by mail to Jan K. Wichrowski, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801 this 11th day of October, 1993.

Patricia S. Etkin

PATRICIA S. ETKIN
Co-Counsel for Respondent