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FILED
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JUL 19 1993
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. 79,522 & 80,207
[TFB Case Nos. 91-31,241 (07C);
92-30,174 (07C);
and 92-31,118 (07C)]

v.

JOHN D. RUE,

Respondent.
_____/

INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 217395

and

JAN K. WICHROWSKI
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
Attorney No. 381586

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SYMBOLS AND REFERENCES

The Florida Bar, the complainant, is referred to occasionally as the bar.

The transcript of the final hearing is designated by T- , volume number, date, and page(s) number. (T-Vol.___, 2-___-93, p.___). There is only one volume of testimony for Friday, February 19, 1993, and therefore no volume number is designated for that date.

The Report of Referee dated March 30, 1993, will be referred to as ROR, followed by the referenced page number(s) of the Appendix, attached. (ROR-A-___).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex.___, followed by the exhibit number.

STATEMENT OF THE CASE AND FACTS

This is a bar disciplinary proceeding involving two separate cases before the Supreme Court of Florida, Case numbers 79,522 and 80,207, which have been consolidated for purposes of hearing and discipline.

Case number 79,522 involves allegations of numerous instances of improper solicitation, improper monetary advances to clients, and improper business transactions with clients. The grievance committee found probable cause on January 8, 1992, and the bar's complaint was filed on March 16, 1992. The earlier case, case number 79,522, was assigned to the referee on April 2, 1992, and discovery was conducted.

Case number 80,207 involves the allegations of Paul and Karen Douglas, former clients of the respondent. It alleges that the respondent's contingent fee contract had an improper fee penalty for termination of his services; that the respondent failed to have the contract signed by the client, failed to provide a copy of the contract and statement of client's rights to the clients, and that the respondent's contract called for him to receive a clearly improper and excessive fee of ten percent (10%) of a client's personal injury protection (PIP) benefits for the simple nonlegal effort of filing medical bills with the insurance carrier. It also charged the respondent with lack of

diligence and lack of communication in regard to Mr. and Mrs. Douglas, lack of supervision of nonlawyer employees and attempted engagement in improper business activities with a client. Probable cause was found by the committee on July 1, 1992, and the bar's complaint was filed on July 22, 1992.

The respondent filed pleadings seeking dismissal of the charges due to the fact that no signed perjury statement was present in portions of the case. The Florida Bar responded pointing out the reason that the rule was inapplicable was that this was an investigation initiated by The Florida Bar and therefore the perjury statement was not required. A hearing was held on the respondent's First and Second Motions to Dismiss and Motion for Partial Summary Judgment on December 3, 1992, at which time the referee denied the respondent's motions.

On October 1, 1992, the referee consolidated the two complaints of The Florida Bar for purposes of final hearing and discipline. Also included in the consolidation was the Notice of Inclusion filed by The Florida Bar on November 23, 1992, alleging further misconduct by the respondent in regard to engaging in improper solicitation, engaging in a conflict of interest, engaging in an improper business deal with a client, failing to provide the client with a signed copy of the fee contract and statement of client's rights, and making misrepresentations to

the clients. Also charged, at paragraph six of The Florida Bar's Notice of Inclusion, was that the respondent deducted improper fees from a client's settlement. This last allegation was stricken by The Florida Bar prior to the conclusion of the final hearing.

The final hearing was held the entire week of February 15, 1993. The referee entered the Report of Referee on March 30, 1993, recommending that the respondent be found guilty of a portion of the allegations and that he receive the discipline of a public reprimand, six months probation requiring completion of an ethics course, and payment of a portion of The Florida Bar's costs in bringing about the discipline. The Board of Governors considered the referee's finding of facts and discipline at their May, 1993, meeting and voted to seek review of the referee's recommendations as to both facts and discipline, believing many of the factual findings to be clearly erroneous and to lack support in the evidence and the recommended discipline to be wholly inadequate. The respondent has filed a Cross-Petition for Review seeking review of the referee's denial of his motions to dismiss.

The facts are as follows: In case number 79,522, a Florida Bar investigation brought forth several allegations of improper in-person solicitation of personal injury clients by respondent. The Florida Bar initiated this grievance and none of the clients

alleged to have been improperly solicited complained to The Florida Bar.

In one instance, a police officer, Paul Schmitt, was injured in a motorcycle accident while off duty, T-Vol.I, 2-15-93, p. 91. He testified that he was approached by an investigator several times. The investigator, Ken Bucher, an independent contractor who worked for many area attorneys, allegedly urged the injured police officer to fire his original counsel and retain the respondent, as the respondent could provide him better representation, T-Vol.I, 2-15-93, pp. 92-96. Mr. Bucher's testimony was contradictory. He maintained that he recommended three different attorneys, including the respondent, to the officer and approached him upon the request of a mutual friend, T-Vol.II, 2-18-93, pp. 176-180. Mr. Bucher further testified that he was aware of the criminal penalties for solicitation, that the respondent was his most consistent employer, and that he had handled over eighty-eight (88) cases for the respondent's firm, T-Vol.II, 2-18-93, pp. 168, 189. The referee accepted the investigator's version. The judge specifically found there was no evidence that the respondent authorized the contact and found the respondent not guilty, ROR-A-2-4.

Secondly, a female police officer, Beth Weyrauch, injured by a gunshot wound while on duty, testified that a different

investigator, a full time employee of the respondent's, Tom Hager, approached her and suggested that she fire her present counsel and retain the respondent in connection with her lawsuit against the police department for improper termination due to her injury, T-Vol.I, 2-16-93, pp. 85-87. The referee found the bar's witness lacking in credibility and found the respondent not guilty, noting that there was no evidence that the respondent was personally involved in any solicitation by Mr. Hager, ROR-A-4-5. The witness admitted that she was terminated from the police department a second time because she admittedly lied about an unrelated incident while on the job, T-Vol.I, 2-16-93, p. 91.

Thirdly, in 1988, Richard and Beth Austell were approached at the scene of their motorcycle accident by Don Beardslee, an investigator who worked regularly for the respondent. Mr. Beardslee told the Austells that they were injured and needed an attorney, gave them the respondent's business card with his name printed on it, and told them to call the number the next morning. They called the next morning and Mr. Beardslee drove to their residence with the respondent's contract, T-Vol.1, 2-15-93, pp. 11-17, 57-63. The Austells ultimately terminated the respondent's representation because they were uncomfortable about a lie Mr. Beardslee advised them to use. Mr. Beardslee, the Austells testified, told them to say they were personal friends of his prior to the accident, T-Vol.I, 2-15-93, pp. 20, 26. The

referee found no improper solicitation by the respondent because, the referee stated, there was no indication that the respondent caused, authorized, ratified, or knew of the improper solicitation, ROR-A-5. The respondent admitted paying Mr. Beardslee a fee for his work on the case, T-2-19-93, p. 42, and being questioned about the matter by Mr. Beardslee before Mr. Beardslee signed the clients up, T-Vol.II, 2-17-93, pp. 129-130.

Karen Boehm testified that she was seriously injured in a motorcycle accident in 1989 and received a message afterwards to call the respondent's office because they had photos of her accident. She called the respondent's office and the person answering the phone attempted to set her up with an appointment. Ms. Boehm did not recall the names of anyone to whom she spoke. When she advised the respondent's office that she already had counsel, she was told the respondent's office could not help her with the photos, T-Vol.1, 2-15-93, pp. 75-79. The referee did not comment specifically, but also found the respondent not guilty of solicitation in connection with this incident, ROR-A-5-6, 12.

Testimony was also given that an area tow truck company manager had found a stack of the respondent's business cards in one of his trucks after the truck driver's employment had been terminated, T-Vol.I, 2-17-93, pp. 63, 64. The respondent denied that the cards had been placed there for solicitation purposes.

The referee also recommended that the respondent be found not guilty of solicitation in this regard, without specific comment, ROR-A-6, 12.

Mr. Hugo Levi was allegedly told by a local motorcycle appraiser that the $50.00 appraisal fee would be waived if he used the respondent's law firm to represent him in connection with his motorcycle accident, T-Vol.1, 2-17-93, pp. 65-66. Mr. Levi's affidavit was placed into evidence, Bar Ex. 44, and the bar's investigator testified as to his investigation in this regard. The motorcycle appraiser denied the allegation, Respondent's Ex. 10, and the referee recommended a not guilty finding as to improper solicitation, ROR-A-6, 12.

Mr. Donn Wolf testified that the respondent improperly solicited him in his hospital bed after a serious motorcycle accident, as charged in the Notice of Inclusion. He had already signed a contract with another law firm prior to any contact with the respondent. Mr. Wolf was adamant that he did not initiate the contact with the respondent, T-Vol.II, 2-15-93, pp. 114-117. The respondent testified that Mr. Wolf telephoned him and asked him to come to the hospital, T-Vol.II, 2-18-93, pp. 277-283. The referee recommended a not guilty finding as to improper solicitation, ROR-A-10-11, 14.

The respondent admitted to and was found guilty of improperly advancing monies to clients for living expenses, ROR-A-7, 12. These improper advances were occasional and took place over a substantial number of years, T-Vol.II, 2-16-93, p. 248. The respondent also loaned money to at least one nonlawyer employee who used the money to make an improper advance to clients, T-Vol.I, 2-18-93, pp. 118-120; T-Vol.II, 2-16-93, pp. 250-251.

The respondent also initiated improper business deals with many of his clients by selling them automobiles through his used car business. No precautions, such as disclosure and an opportunity to consult with other counsel, were taken to ensure that an arms-length transaction took place. Payment for the automobiles was made upon settlement of the client's cases. The referee recommended that the respondent be found guilty in this regard, ROR-A-8.

Further, the respondent admitted to paying his nonlawyer employees a "bonus" on each case which was a percentage of his fees in the case. The referee found no correlation between this bonus system and solicitation by nonlawyer employees, although the bar argued that the design of the plan was, in and of itself, a violation by making such an incentive available. The respondent was found guilty of improper fee sharing, ROR-A-7.

As to all of the above, the referee recommended that the respondent be found not guilty of the following Rules of Professional Conduct: 4-4.2 for communicating about the subject of the representation with a person the lawyer knew to be represented by another lawyer in the matter without the consent of the other lawyer; 4-5.3(a) for failing to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that his nonlawyer assistants' conduct was compatible with the professional obligations of the lawyer; 4-5.3(b) for failing to make reasonable efforts to ensure that his nonlawyer assistants' conduct was compatible with the professional obligations of the lawyer; 4-5.3(c)(1) and 4-5.3(c)(2) for ordering, or with knowledge of the specific conduct, ratifying the involved conduct and/or failing to take reasonable remedial actions after knowing of the conduct at a time when its consequences could have been avoided or mitigated; 4-7.4(a) for soliciting, or permitting employees or agents to solicit in his behalf; for entering into agreements for, charging, or collecting a fee for professional employment obtained in violation of this rule; and 4-8.4(a) for violating, or attempting to violate, the Rules of Professional Conduct, knowingly assisting or inducing another to do so, or doing so through the acts of another, ROR-A-11-13.

The respondent was found guilty of violating the following Rules of Professional Conduct: 4-5.4(a) for sharing fees with a

nonlawyer; 4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership or other pecuniary interest adverse to a client; and 4-1.8(e) for providing financial assistance to a client in connection with pending or contemplated litigation in a manner not within the exceptions of Rule 4-1.8(e)(1) or (2), ROR-A-11-13.

Case number 80,207 involved Mr. and Mrs. Paul Douglas as the complaining witnesses. Beginning in 1990, the respondent represented Mr. and Mrs. Douglas in a personal injury lawsuit resulting from an automobile accident. The respondent failed to have Mrs. Douglas, who was the actual party in the auto accident, execute a contract or Statement of Client's Rights. Her husband did sign them, T-Vol.II, 2-16-93, pp. 160-163, 195-197, Bar Ex. 32. The respondent also failed to provide Mr. and Mrs. Douglas with either a copy of the contract or the statement of client's rights until months after their execution of the documents and then only upon their insistence, T-Vol.II, 2-16-93, pp. 162, 203-204.

Further, the contract widely in use at that time by the respondent provided for a fee of $150.00 per hour to be immediately payable to the respondent if his representation was terminated, Bar Ex. 32. Mr. and Mrs. Douglas testified that when they attempted to terminate the respondent's representation, his paralegal threatened them with this portion of the contract.

They did not terminate the respondent's services because they could not afford to pay the respondent immediately, T-Vol.II, 2-16-93, pp. 166-168, 205-286. The contract also called for ten percent (10%) of the personal injury protection (PIP) benefits to go to the respondent should the client wish the respondent to recover these for the client by filing the rudimentary paperwork required for these benefits which are automatically payable upon demand by statute. This fee was in addition to the respondent's standard one-third contingency fee, Bar Ex. 32. The referee found that none of the above adversely affected Mr. and Mrs. Douglas. The referee recommended that the respondent be found not guilty of violating Rules of Professional Conduct: 4-1.5(f)(2) for failing to have the written contingent fee contract signed by the client; and 4-1.5(f)(4)(c) for failing to give a copy of the Statement of Client's Rights to the client, failing to have it signed by the client and failing to afford the client a full and complete opportunity to understand each of the rights set forth therein. A guilty finding was recommended as to Rules of Professional Conduct: 4-1.5(a) for entering into an agreement for, charging, or collecting an illegal, prohibited, and/or clearly excessive fee pursuant to 4-1.5(b); and 4-1.5(f)(4)(B) for having a written contingent fee contract exceeding thirty-three and one-third percent (33 1/3%) of the recovery in regard to the PIP charges, ROR-A-8-10.

The respondent was also charged with neglect and failure to supervise his nonlawyer employees because Mrs. Douglas testified that she never met or communicated with the respondent prior to the time of the settlement of her case and that all communications were handled through the paralegal, T-Vol.I, 2-16-93, pp. 173-178.

The respondent's office manual for paralegals was mainly drafted by the respondent's nonlawyer brother who testified that he had never heard of any rules of ethics for attorneys, T-Vol.II, 2-17-93, pp. 233-234. The manual called for the paralegals to conduct all aspects of the clients' cases, Bar Ex. 47. At the final hearing, there was testimony that the paralegal work was in fact supervised by attorneys.

The referee recommended a not guilty finding as to the above and to the following Rules of Professional Conduct: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; 4-1.4(b) for failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; Rules 4-5.3(a) and (b) for failing to make reasonable efforts to ensure that the firm had in effect measures giving reasonable assurance that a nonlawyer employee's conduct is compatible with the professional obligations of the lawyer; 4-5.3(c) for being responsible for the

conduct of his nonlawyer employees and that such conduct would be a violation of the Rules of Professional Conduct if engaged in by a lawyer; and 4-5.5(b) for assisting a person who is not a member of the bar in the performance of an activity that constituted the unlicensed practice of law.

The respondent was also charged with engaging in a conflict of interest by attempting to sell Mr. Douglas an automobile. There was conflicting testimony in this regard and no sale ever took place. A not guilty finding was recommended as to Rule 4-1.7(b) for representing a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest without client consent; and 4-1.8(a) for entering into a business transaction with a client or knowingly acquiring an ownership, possessory, security, or other pecuniary interest adverse to a client without complying with the requirements of 4-1.8(a)(1-3), ROR-A-13-14.

By stipulation, the bar made further allegations against the respondent in a Notice of Inclusion. The respondent was further charged with improperly soliciting his client Donn Wolf as described above. Further, as to Donald DeCicco, the respondent was charged with improper solicitation. Donald DeCicco, a minor,

was a passenger on the motorcycle of John Gormon, the driver, who was also a minor. John Gormon's mother telephoned the respondent to retain his services while John was in the hospital. While visiting the Gormons at the hospital, the respondent also signed up Donald DeCicco as a client, T-Vol.II, 2-15-93, pp. 168-211. The respondent stated that John Gormon's mother asked him to contact the DeCiccos, however Mrs. Gormon denied this and further testified that she had no authority to retain counsel for the DeCiccos, T-Vol.III, 2-15-93, pp. 245-261.

The respondent was also charged with being involved in selling Donald DeCicco an automobile. The payment for the car was by a promissory note payable from Donald DeCiccos' personal injury settlement and this was reflected on his settlement statement, Bar Ex. 19. A conflict of interest violation was also charged because the respondent represented both the passenger and the driver and the issue of the driver's contributory negligence was specifically charged in pleadings, as the insurance defense attorney testified, T-Vol.I, 2-17-93, pp. 18-22.

Misrepresentation was also charged because the DeCiccos testified that they were told they had only twenty-four hours to accept the settlement offer or it would be withdrawn by the insurance defense counsel, T-Vol.II, 2-15-93, p. 189. The

insurance defense counsel testified that no such time limit was ever given, T-Vol.I, 2-17-93, p. 25. The respondent testified that he did not tell the DeCiccos there was a time limit but an associate attorney in his office may have done so, T-Vol.II, 2-17-93, pp. 143-144.

Clients DeCicco and Gormon, in addition to Douglas, did not receive a signed copy of their contract and Statement of Client's Rights at the time of execution, T-Vol.II, 2-17-93, pp. 142-143; T-Vol.II, 2-16-93, pp. 203-204. Further, clients DeCicco and Gormon were never presented with any Statement of Client's Rights by the respondent at any time, T-Vol.II, 2-17-93, pp. 142-143, 172-174.

The referee recommended a not guilty finding as to all of the above, stating only that the allegations were not established by clear and convincing evidence as to Rules of Professional Conduct: 4-7.4(a) for improper solicitation; 4-1.7(a) for conflict of interest; and 4-1.5 for failing to provide a Statement of Client's Rights for signature and copies of the Statement of Client's Rights and contract to the client after execution. The referee also found no clear and convincing evidence for violations of Rules 4-1.4(b) for inadequate communication with clients; and 4-8.4(c) for misrepresentation in regard to the fraudulent twenty-four hour time limit statement, ROR-A-14.

Paragraphs six and eight of the bar's complaint regarding an improper fee and the improper delay of a settlement check were stricken by The Florida Bar as they were unsupported by final hearing testimony.

The referee recommended that The Florida Bar should bear one half of the transcript and investigator charges while the respondent should be responsible for the remaining $9,047.51 of the current total bar costs of $14,559.32, ROR-A-15 and The Florida Bar's Affidavit of Costs.

As to all of the above, the referee recommended that the respondent receive a public reprimand and be placed on probation for a period of six (6) months requiring completion of an ethics course approved by the Supreme Court of Florida. The respondent, age 51, has no prior disciplinary record and was admitted to The Florida Bar in 1974.

SUMMARY OF ARGUMENT

The referee's conclusions and findings of not guilty as to improper solicitation by the respondent are in clear error. The great weight of the evidence indicates that a finding of guilt is warranted against the respondent for improper in-person solicitation of accident victims as well as failure to properly supervise his nonlawyer employees to prevent such practices.

The referee's recommendation of a public reprimand and six months probation requiring completion of an ethics course is wholly inappropriate where the referee found the respondent guilty of numerous violations. These violations reflected long term and regular practices by the respondent which violated the rules of ethics. The respondent improperly shared fees with nonlawyer employees, engaged in automobile business deals with clients without the required disclosure, provided improper financial assistance in the form of cash and automobiles to clients, and sought and collected prohibited fees. These serious transgressions call for a suspension of at least three years requiring proof of rehabilitation prior to reinstatement.

ARGUMENT

POINT I

RESPONDENT IS GUILTY OF IMPROPER SOLICITATION.

There is substantial, weighty and clear evidence of the respondent's improper solicitation of personal injury clients. The Florida Bar is well aware that by seeking review of the referee's findings of fact it is trodding on a well beaten path. The Florida Bar is, in fact, usually on the opposing side of this argument. Nevertheless, it is the position of The Florida Bar and the Board of Governors of The Florida Bar that the referee made such grave errors in interpreting the evidence and reaching conclusions in this case that a thorough review of the facts is essential here.

Some of the improper solicitation by the respondent was made through "investigators", also known as "runners" or "touters", lay people who do the actual legwork on behalf of the soliciting attorney. As noted in the artfully written opinion by the Honorable Justice Terrell in State ex rel. Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954), such in-person direct solicitation is a violation which puts the entire bar in a doubtful light. Although some forms of advertising have been permitted since the time of that opinion, in-person solicitation remains a violation. Mr. Murrell was suspended for soliciting cases personally or through his touter or runner. The Court

noted,

> In this country there are reasons for exacting a high standard of professional conduct on the part of members of the bar that may not prevail in other countries. Some of these reasons are embraced in the canons of ethics, American Bar Association, the preamble to which points out that "In America where the stability of courts and all departments of government rests upon the approval of the people, it is peculiarly essential that the system for establishing and dispensing justice be maintained so that the public shall have absolute confidence in the integrity and impartiality of its administration. It cannot be done unless the conduct and motives of our profession are such as to merit the approval of all just men." (At p. 224).

In The Florida Bar v. Stafford, 542 So. 2d 1321 (Fla. 1989), this Court more recently acknowledged that improper solicitation is of great concern, "In recent years, perhaps no single aspect of the practice of law has received more public criticism than the unethical solicitation of clients." at p. 1323. The Honorable Justice Kogan stated in his opinion where he concurred in part and dissented in part: "It is conduct such as this that truly makes a mockery of our legal system's ethics, and it should not be tolerated by the Bar or by this Court." at p. 1323.

A lawyer who engages in so-called ambulance chasing denigrates attorneys as a group, as stated in Murrell, supra, "... he will be likened to the proverbial rotten apple that taints the other apples in the barrel." at p. 224. This conduct harms the public by depriving them of a proper forum for making the choice of a lawyer. It harms the public's perception of lawyers by provoking disrespect. Further, it harms the other,

ethical members of the bar who strive to obtain their clients in an ethical manner. The Florida Bar is perceived with disrespect by those ethical lawyers who see the bar as useless in stopping such unethical conduct by others.

The referee took the position that the respondent was not guilty of any rule violations regarding improper solicitation. Although acknowledging that improper solicitation took place in regard to Mr. and Mrs. Richard Austell, who were solicited by the respondent's employee Don Beardslee, the referee stated, "There is no evidence that the Respondent caused, authorized, ratified or knew of the improper solicitation of the Austells by Mr. Beardslee." ROR-A-5. The Florida Bar respectfully disagrees.

Mr. Beardslee's conduct in this case was very similar to that of the criminal defendant in Brady v. State, 518 So. 2d 1305 (Fla. 3d DCA 1987), where the defendant was convicted, which was upheld, of violating F. S. 817.234(8)(1985), which prohibits in-person solicitation of personal injury cases. Mr. Brady, a nonlawyer employee of a law firm, arrived at the scene of a motor vehicle accident, took photographs, gave one of the drivers a business card for his law firm, and offered legal assistance. In the Austell case, Mr. Beardslee, an employee of the respondent's law firm, T-Vol.II, 2-18-93, pp. 251-253, approached the Austells within a few minutes after their motorcycle was rear-ended by an

automobile. He gave them the respondent's law firm's business card and told them to call the firm the next day because whether they knew it yet or not, he was sure that they were hurt and they would need a Florida attorney. He took photographs of the accident scene before approaching the Austells. The next day, the Austells did call Mr. Beardslee. He came to where they were staying, had them sign a contingency fee contract with the respondent, Bar Ex. 2, and gave them a letter of protection. They were residents of South Carolina, T-Vol.I, 2-15-93, pp. 13, 17, 57-63. At no time did Mr. Beardslee advise the Austells to seek other counsel or attempt to make this an arms-length transaction. The respondent clearly benefitted from Mr. Beardslee's solicitation because his firm came to represent these clients.

Further, the respondent's own testimony indicates he knew there was reason to question whether or not Mr. Beardslee had improperly solicited the Austells:

> Bar Counsel: How did Mr. Beardslee tell you that he knew the Austells?
>
> Respondent: Well, when he came in, I told him that they [Austells] had called. He said, "I was a witness to that accident. Can I go over and talk to them?" I said, "Well, I guess. I got something else to do here.", T-Vol. II, 2-17-93, pp. 129-130.
>
> . . .
>
> Bar Counsel: Was Mr. Don Beardslee listed as a witness on that accident report of the police?
>
> Respondent: I don't believe so, T-2-19-93, p. 43.

At no time did the respondent attempt to report Mr. Beardslee's conduct to any law enforcement agencies. Further, he attempted to collect an attorney's fee for his firm's work done prior to being terminated, until the subsequent attorney informed him of a case, Spence, Payne, Masington and Grossman, P. A. v. Philip M. Gerson, P. A., 483 So. 2d 775 (Fla. 3d DCA 1986), which held that an attorney was not entitled to a fee if the case had been obtained through improper solicitation. In Bar Ex. 30, the October 24, 1990, letter from the respondent to Robert W. Elton, subsequent counsel for the Austells, the respondent stated he was seeking attorney's fees. In fact, in this letter the respondent states, "I have discussed the allegations of the Austell's (sic) concerning Mr. Beardslee and contacts with the Austell's (sic) during this firms (sic) handling of their claim. We find no merit to their allegations and we have witness' (sic) to substantiate the initial conversations concerning the photographs as taken at the accident scene as well as subsequent conversations with the clients in our office concerning this claim. As well we will be pursuing our claim for lien for attorneys fees and costs and since we have filed a notice of lien, we would appreciate your advising us as when the case is ultimately disposed of in order we may file appropriate litigation to protect our interest as it may appear." The respondent ultimately collected only costs for the case.

The referee acknowledged that an improper solicitation took place, yet found the respondent not guilty of engaging in any misconduct because, "There is no evidence that the Respondent caused, authorized, ratified or knew of the improper solicitation of the Austells by Mr. Beardslee." ROR-A-5. This finding of not guilty is untenable. It is a well known fact that attorneys frequently use nonlawyer runners to improperly solicit clients. How convenient for an attorney to look the other way and be unaware of improper actions by lay employees. However, The Florida Bar charged the respondent in this regard. Paragraph nine of The Florida Bar's Complaint in this case specifically charged the respondent with violating Rule 4-7.4(a) for soliciting, or permitting employees or agents to solicit in his behalf (emphasis added); for entering into an agreement for, charging, or collecting a fee for professional employment obtained in violation of this rule; further, for failure to supervise his nonlawyer employees in violation of the following Rules of Professional Conduct: 4-5.3(a) - a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; 4-5.3(b) - a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and 4-5.3(c)(1) - for ordering,

ratifying, or having knowledge of conduct by a nonlawyer which would violate the Rules of Professional Conduct if engaged in by a lawyer.

It must be noted that the respondent freely admitted and the referee found in paragraph four of her report that the respondent improperly shared fees on a percentage basis with his nonlawyer employees, ROR-A-7. This is clear motivation for solicitation.

The respondent was also charged with advancing loans to his employees based upon their anticipated earnings. See paragraph seven of the bar's complaint filed in case number 79,522. The referee found the respondent not guilty of this conduct in paragraph four of her report, ROR-A-7. However, the testimony directly contradicts this finding.

Testimony of nonlawyer employee Lori Ann Trail:

> Q Okay. Many of the employees also are able to obtain loans from Mr. Rue's law office. Have you ever done that?
>
> A Yes. (T-Vol.I, 2-15-93, pp. 73-74)

Testimony of Jean Abrahamson, former office manager for respondent:

> Q Are you aware of Mr. Rue making loans to his employees out of the law firm's money?
>
> A Yes, ma'am.
>
> Q ...and what was the purpose of those loans to Don Beardslee?

A So that he could advance monies to clients.

(T-Vol.II, 2-16-93, pp. 249-252)

The referee's findings of not guilty with respect to the other allegations are similarly contrary to the evidence. The referee articulated no basis for the sweeping findings of not guilty.

Mr. Schmitt, T-Vol.I, 2-15-93, pp. 90-101, and Ms. Weyrauch, T-Vol.I, 2-16-93, pp. 82-94, gave clear and precise testimony about being improperly solicited by agents of the respondent. They were not complaining parties and had nothing to gain by testifying against the respondent. The referee's findings should reasonably be of guilt by the respondent in regard to their improper solicitation.

Ms. Karen Boehm's testimony, T-Vol.I, 2-15-93, pp. 74-79, is also clear and convincing in regard to receiving a telephone call from the respondent's firm after her severe motorcycle accident. The respondent's firm specialized in motorcycle accident representation, T-Vol.II, 2-18-93, p. 235.

The testimony as to a number of the respondent's business cards being found in a tow truck cab is further proof of the scope of improper solicitation by the respondent, T-Vol.I, 2-17-93, p. 60; ROR-A-6, paragraph E. A sworn affidavit from Mr.

Hugo Levi related his experience of being told by a motorcycle appraiser that if he used the respondent's law firm to represent his accident case, there would be no charge for the appraisal, T-Vol.I, 2-17-93, p. 65; Bar Ex. 44; ROR-A-6, paragraph F.

As to The Florida Bar's Notice of Inclusion, Mr. Donn Wolf testified that he never telephoned or in any manner requested the respondent to come to his hospital bed and obtain his signature on a contract of representation after his motorcycle accident, T-Vol.II, 2-15-93, p. 116; Bar Ex. 9. In fact, he had previously signed a contract with other counsel, Bar Ex. 8; ROR-A-10-11, paragraph 11. Once again, these facts are so clear that the referee's finding to the contrary can not be upheld. Mr. Wolf was not a complainant and had no motive to harm the respondent by his testimony.

The respondent was further charged with improperly solicitating Donald DeCicco. See paragraph two of The Florida Bar's Notice of Inclusion.

Donald DeCicco and his parents testified that the respondent approached them in the hospital improperly seeking to solicit the representation of Donald, a minor, after his motorcycle accident, Bar Ex. 15; T-Vol.II, 2-15-93, pp. 171-179, 216-220.

The respondent asserted that he approached the DeCiccos at the request of the Gormons, who had called him to represent their son, the driver of the motorcycle involved in the accident. The Gormon and DeCicco families were close friends, T-Vol.III, 2-15-93, p. 249. Mrs. Gormon, who handled retaining the respondent, testified contrary to the respondent's testimony she stated that she did not feel she could presume to arrange representation for the DeCiccos, T-Vol.III, 2-15-93, pp.252-254, 257-258, 263. No one in any of the Gormon or DeCicco families testified that they had requested respondent to contact the DeCiccos.

Either way one looks at this scenario, a rule violation for improper solicitation is present. As to the DeCiccos, who also were not complainants but testified at the behest of The Florida Bar, the respondent improperly solicited them in the hospital only five days after the serious accident. This is clearly a violation of Rule 4-7.4(a), prohibiting lawyers from personally soliciting clients with whom they have no family or prior professional relationship. Further, even had the respondent visited the DeCiccos upon the request of Mrs. Gormon, the case of Philip M. Gerson, P. A., supra, provides that this would also be improper solicitation because Mrs. Gormon had no authority to obtain representation. See also The Florida Bar v. Abramson, 199 So. 2d 457 (Fla. 1967). The referee failed to address this

factual situation. The mental state of all of these individuals in relation to respondent's initial contacts with them must also be considered. The majority of the contacts were made immediately after their serious accidents, making it even more unfair to the clients.

Given the multitude and the weight of the evidence that the respondent engaged in improper solicitation, a finding of guilt is warranted as to the respondent's improper solicitation and his failure to properly supervise his employees in order to prevent the unauthorized solicitation.

POINT II

A THREE YEAR SUSPENSION AND PAYMENT OF COSTS IS WARRANTED FOR RESPONDENT'S MISCONDUCT

The referee has recommended a public reprimand and six months probation requiring only completion of an ethics course approved by the Supreme Court of Florida for the respondent's misconduct. In regard to case number 79,522, the referee found the respondent guilty of violating Rule 4-5.4(a) for improperly sharing fees with nonlawyers by his widespread use of a system giving nonlawyer employees a percentage of each case on which they worked. The respondent was also found guilty of violating Rule 4-1.8(a) for engaging in a business transaction with clients without proper disclosure by selling automobiles to clients during the pendency of their cases and receiving payment from the proceeds of the cases at the time of settlement. Further, a guilty finding was made as to Rule 4-1.8(e) for providing financial assistance to a client which was not for court costs or expenses of litigation, ROR-A-12-14. None of the above were isolated incidents but rather were a common practice by the respondent, a successful personal injury attorney.

Further, as to case number 80,207, the respondent was found guilty of violating Rules 4-1.5(a) and 4-1.5(f)(4)(B) for receiving illegal, prohibited, or clearly excessive fees by charging as a legal fee ten percent (10%) of uncontested personal

injury protection (PIP) funds collected by him on behalf of a client despite the fact that Florida Statutes Section 627.736 provides that such benefits are payable upon demand. No legal work, nor any effort beyond sending a copy of the bill to the PIP carrier, was done. See The Florida Bar v. Gentry, 475 So. 2d 678 (Fla. 1985). The respondent was also found guilty of violating Rule 4-1.5(a) in conjunction with his widespread use of an improper discharge clause in his contingent fee contract calling for a fee of $150.00 per hour to be immediately payable to him if his firm was terminated. See The Florida Bar v. Doe, 550 So. 2d 1111 (Fla. 1989) and Rosenberg v. Levin, 409 So. 2d 1016 (Fla. 1982). The clients testified that the respondent's nonlawyer employee threatened them with this discharge clause when they attempted to fire the respondent and this caused them not to discharge him, T-Vol.II, 2-16-93, pp. 166-167, 205-206.

In sum, the respondent was found guilty of improperly sharing fees with nonlawyer employees, selling cars to clients without the required disclosure, providing improper financial assistance to clients, and seeking and collecting prohibited fees.

This type of misconduct calls for far greater sanctions than a public reprimand and an ethics course. The Florida Standards for Imposing Lawyer Sanctions provides at 4.32 that suspension is called for in regard to the conflict of interest situation where

the respondent advanced automobiles and money to clients in anticipation of the receipt of the proceeds of their case.

> 4.32 - Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

It is clear that an attorney becomes improperly financially involved in a case when he advances living expenses or automobiles. However, the respondent's actions in providing this prohibited financial assistance to clients is far more serious in scope than just a mere conflict of interest; it also attacks our legal system as a whole because other attorneys who professionally adhere to the rules are denied clients who seek the prohibited funds available from unethical attorneys such as the respondent. Every personal injury lawyer is aware of needy clients. Nevertheless, ethical attorneys abide by the rules and do not seek to purchase clients by the offering them improper financial incentives and automobiles. Thus, Standard 7.2 is appropriate:

> Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The latter standard is also appropriate with respect to the respondent's other rule violations for improperly collecting PIP funds, improperly including a termination penalty in his contingent fee contracts, and sharing fees with nonlawyer employees.

Clearly, there are a multitude of violations involved here. Further, none of these are isolated incidents but rather represent long term and regular practices by the respondent's firm. A public reprimand is not appropriate for these multiple violations. Public reprimands should be utilized for isolated instances of neglect, technical, unintentional violations of trust accounting rules, or lapses of judgment, The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980).

Under Standard 9.22(d), the existence of multiple offenses are a well settled aggravating factor. Under Standard 9.22(i), the respondent's substantial experience in the practice of law as a member of The Florida Bar since 1974 is also aggravating. In mitigation, the respondent has no prior disciplinary history.

Case law further demonstrates that nothing less than a suspension of three years, requiring proof of rehabilitation prior to reinstatement, is appropriate. An attorney was suspended for three months and one day, requiring proof of rehabilitation prior to reinstatement, in The Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982), where the lawyer engaged in a variety of unethical practices, including improperly sharing fees with a nonlawyer employee. In The Florida Bar v. Stafford, 542 So. 2d 1321 (Fla. 1989), this Court suspended Mr. Stafford for six months, requiring proof of rehabilitation, for engaging

in a variety of practices designed to increase his law practice profits, including improperly dividing fees with nonlawyers.

As noted above, the conflict of interest situation must not be ignored where the respondent obtained a financial interest in the outcome of the litigation by advancing monies and automobiles to clients. In The Florida Bar v. Swofford, 527 So. 2d 812 (Fla. 1988), the Court disbarred an attorney for engaging in a conflict of interest situation where he entered into an improper business transaction with his client.

In The Florida Bar v. Abagis, 318 So. 2d 395 (Fla. 1975), the court suspended an attorney and required proof of rehabilitation where he acquired a proprietary interest adverse to his client's cause of action. In The Florida Bar v. Hornbuckle, 347 So. 2d 1030 (Fla. 1977), the Court suspended the attorney for sixty days followed by two years of probation because he had entered into private business transactions with clients. The suspension was imposed even though he had made disclosures to the clients.

Where an attorney improperly advanced funds to clients, mishandled trust accounts and failed to timely prepare required disbursement statements, he was suspended for sixty days followed by one year of probation. The Florida Bar v. Rogowski, 393 So. 2d 1390 (Fla. 1981). It is the position of The Florida Bar that

more serious discipline is warranted in the case at hand because Mr. Rogowski's conduct involved only two clients who were given advances.

An attorney was suspended for six months, rather than being publicly reprimanded as recommended by the referee, in The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991). Mr. Rogers engaged in conflict of interest situations with his clients, entered into business transactions with them and failed to disclose his conflicting interest. He also failed to utilize client funds for their intended purpose and provide appropriate accountings.

Finally, see The Florida Bar v. Golden, 561 So. 2d 1146 (Fla. 1990). The Court held in this case that cumulative misconduct for disciplinary purposes is present when the attorney's various misconducts occur near in time to the other offenses, regardless of when discipline is imposed. This is appropriate to the case at hand because the respondent is charged with a number of transgressions. It is clear from the case law and the standards that a suspension of at least three years is appropriate for the respondent's misconduct in view of the widespread misconduct in his office, the number of years over which it occurred, and the effect that this type of misconduct has on the legal community and society as a whole.

It is the position of The Florida Bar, as argued above, that a guilty finding is warranted for the respondent's misconduct with respect to improper solicitation. Clearly, a guilty finding by the Court in regard to the improper solicitation charge would warrant an even more serious sanction and lengthy suspension.

Finally, Rule 3-5.1(h) of the Rules Regulating The Florida Bar must be noted. This rule provides that whenever the Supreme Court of Florida finds an attorney guilty of entering into, charging, or collecting a prohibited fee, it may order the attorney to forfeit the fee or any part thereof. In the case of a clearly excessive fee, the excessive amount of the fee may be ordered returned to the client and a fee otherwise prohibited by the Rules Regulating The Florida Bar may be ordered forfeited to the Clients' Security Fund of The Florida Bar. It is the position of The Florida Bar that it would be appropriate to order the respondent to account for each and every improper fee taken in regard to a) his improper termination clause in his contract, b) his improper PIP fees, and c) any and all cases earned through improper solicitation. Rule 4-1.5(a) provides that an attorney's fee is prohibited where it was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. Allowing the respondent to retain these prohibited fees despite a clear finding that he has earned them through rule violations would be unjust and contrary to the purposes of attorney discipline.

As noted in the Report of Referee, the referee failed to award The Florida Bar a portion of its costs due to the not guilty findings on portions of the charges. Should this Court overturn the referee's findings of fact as requested above, The Florida Bar believes it would be appropriate that it be awarded all of its costs which were necessary to prosecute this matter.

CONCLUSION

WHEREFORE, The Florida Bar requests this Honorable Court to reject the referee's recommended conclusions as to the facts regarding solicitation and to impose the appropriate discipline for the substantial and numerous violations by suspending the respondent from the practice of law for not less than three years requiring proof of rehabilitation prior to reinstatement. The Florida Bar further seeks payment of its costs in full and accounting and reimbursement from the respondent to his clients as to his collection of prohibited fees.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB Attorney No. 217395

and

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
TFB Attorney No. 381586

BY: 

JAN K. WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief have been furnished by Airborne Express mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by Airborne Express mail to Mr. John A. Weiss, Counsel for Respondent, at P. O. Box 1167, Tallahassee, Florida 32301; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 16th day of July, 1993.

Jan Wichrowski

JAN K. WICHROWSKI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case Nos. 79,522 & 80,207
[TFB Case Nos. 91-31,241 (07C);
92-30,174 (07C);
and 92-31,118 (07C)]

v.

JOHN D. RUE,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 217395

and

JAN K. WICHROWSKI
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
Attorney No. 381586

INDEX

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

The Florida Bar,

Complainant

v. Case Nos. 79,522 & 80,207

John D. Rue,

Respondent.

REPORT OF REFEREE

I. **Summary of Proceedings**: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings (excluding hearings on motions) were held on February 15, 1992, to and including February 19, 1992, and on March 5, 1992.

The following attorneys appeared as counsel for the parties:

For the Florida Bar: Jan K. Wichrowski

For the Respondent : John A. Weiss

II. **Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged**: After considering all the pleadings and evidence before me, pertinent portions

of which are commented upon below, I find:

Case No. 79,522

As to Count I

1. The parties agree that at all times relevant to this matter, the Respondent, John. D. Rue, was a member of The Florida Bar, subject to the jurisdiction of the Florida Supreme Court and the Rules Regulating The Florida Bar and that he resided in and practiced law in Volusia County, Florida. (Paragraphs 1 and 2 of Complaint).

2. In paragraphs 3 and 4 of the Complaint, the Bar alleges that the Respondent "caused, authorized, and or ratified, the improper solicitation of clients to his law firm." This allegation has not been proven by clear and convincing evidence for the reasons summarized below.

a. W. Kenneth Bucher is a retired police officer, who, since December of 1988, has been engaged full-time in the business of traffic accident investigation, analysis and reconstruction for insurance companies, law firms, and private enterprise.

(TR-162,164[2/18/93 vol.II). He started his business as a part-time venture in 1979 while he was still a police officer. (TR-162[2/18/93 vol.II). Respondent is one of many attorneys in the Volusia County area who have used Mr. Bucher's services. (TR-166-169[2/18/93 vol.II). Paul Schmitt is a former police officer and acquaintance of Mr. Bucher through the police department. (TR-92-93[2/15/93 vol.I). On August 28, 1990, Paul Schmitt was injured in a motorcycle accident. (TR-91[2/15/93 vol.I). He hired Charles Tindell, the PBA attorney, to represent him. (TR-92[2/15/93 vol.I). Mr. Schmitt testified that on two occasions after his release from the hospital Mr Bucher visited his home and suggested that he consider hiring the Respondent to represent him. (TR-93-95[2/15/93 vol.I). During this time Mr. Schmitt had become concerned about the manner in which his case was being handled by Mr. Tindell, and a family friend also recommended the Respondent. (TR-98[2/15/93 vol.I). It was Mr. Schmitt's understanding that Mr. Bucher had his own business and was not an employee of the Respondent. (TR-99-100[2/15/93 vol.I). Mr Bucher testified that he visited Paul Schmitt after the accident at the request of one of Schmitt's fellow officers. (TR-176[2/18/93 vol.II). Mr. Schmitt expressed dissatisfaction with the delay in obtaining a resolution of his case. (TR-178[2/18/93 vol.II). Mr. Bucher gave Schmitt the

names of three lawyers, including that of the Respondent, should he wish to get another opinion. (TR-179[2/18/93 vol.II). There is no evidence that Respondent caused, authorized, ratified or even knew about any contact between Bucher and Schmitt.

b. Beth Ann Weyrauch is a former police officer with the City of Edgewater who was injured in the line of duty. (TR-85[2/16/93 vol.I). She sought workman's compensation benefits and eventually had her employment terminated due to the injury. (TR-85[2/16/93 vol.I). She was represented by attorneys Charles Tindell and Tom West from January, 1990 until August, 1991. (TR-84;86[2/16/93 vol.I). She was reinstated as a civilian employee, but was again terminated because she lied during an investigation concerning concerning the giving of information to Kenneth Bucher that is not ordinarily made available to non-law-enforcement people. (TR-91-92[2/16/93 vol.I). She testified that a Mr. Tom Hagar, who was employed by the Respondent as a legal assistant, approached her at the police department in June or July, 1991 and urged her to fire Mr. Tindell and hire the Respondent to represent her in her suit against the City of Edgewater concerning her first termination. (TR-85-87[2/16/93 vol.I). This witness was found not to be credible and there is no evidence that the Respondent was involved in any solicitation by Mr. Hagar

if it did occur. It was clear from all of the evidence that Respondent's practice is limited to personal injury work and that he would not have undertaken a labor law case. (TR-272[2/18/93 vol.II).

c. Elizabeth and Richard Austell were involved in an accident while operating a motorcycle in Daytona Beach on March 3, 1988. (TR-11[2/15/93 vol.I). At the scene of the accident, the Austells were approached concerning the need for an attorney by a Mr. Don Beardslee who at the time had an investigative firm named "Fact Finders." (TR-14-15[2/15/93 vol.I; TR-238[2/18/93 vol.II]). Mrs. Austell realized the day after the accident that she had significant injuries and called Mr. Beardslee. (TR-15-16[2/15/93 vol.I). Mr. Beardslee came to the home at which the Austells were staying with a contract hiring the Respondent to represent them. (TR-16; FL. BAR Ex. 2). There is no evidence that the Respondent caused, authorized, ratified or knew of the improper soliciation of the Austells by Mr. Beardslee.

d. Karen Boehm was injured in a motorcycle accident on April 4, 1989. (TR-75[2/15/93 vol.I). Sometime after she was released from the hospital she was given a message by her mother-in-law to call the Respondent's office because they had pictures of her

accident. (TR-77-78[2/15/93 vol.I). When she called and informed the secretary that she was already represented by an attorney, she was told they could not help her. (TR-77[2/15/93 vol.I). She does not know how her mother-in-law received this message or who conveyed it. (TR-78[2/15/93 vol.I).

e. During the Bar's investigation, Mr. Walter Taylor, the Bar's investigator assigned to this matter, received information that a tow truck company known as Arrow Wrecker Service was distributing the Respondent's business cards. (Tr-60[2/17/93 vol.I]). Mr Taylor interviewed the owner of the business who told him that a former truck operator had some of the Respondent's business cards in the cab of his truck, but that the man's name and current whereabouts were unknown. (TR-63[2/17/93 vol.I]).

f. In the course of the investigation, Mr. Walter Taylor spoke to a Mr. Hugo Levi who was involved in a motorcycle accident. He related that when he went to M.A.S. Appraisal in Port Orange he was told there would be no appraisal fee if he used the Respondent's law firm. (TR-65[2/17/93 vol.I]; FL.BAR Ex. 44). There was no other evidence that Respondent obtained referrals from this company. (RESP EX. 10).

3. Paragraph 6 of the Complaint alleges that the Respondent paid his investigators a percentage of fees generated by the investigator's solicitation of cases. There was no credible evidence presented to support this allegation.

4. Paragraphs 7 and 8 of the Complaint allege that the Respondent paid his other non-lawyer employees a percentage of the fees generated on cases they worked on and advanced loans to them against future such fees, and that these payments were connected to improper solicitation of clients by the employees. With the exception of the Austell matter previously commented on in paragraph 2c, there is no evidence the Repsondent's employees improperly solicited clients. There is also no evidence that the Respondent made loans to his employees against the anticipated generation of fees in the future. However, the evidence establishes, and Respondent admits, that the "bonuses" he paid his legal asistants in 1990 and 1991 consisted of a percentage of the fee received. (TR-248[2/18/93 vol.II]; FL BAR EX. 41).

As to Count II

5. The evidence establishes and Respondent admits

that as alleged in paragraphs 11, 12, and 13 that he advanced to clients monies for living expenses, and that he made 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. (FL BAR EX. 42, 43).

Case No. 80, 207

As to Count I

6. Karen Douglas was involved in an automobile accident on October 4, 1990. (TR-158-159[2/16/93 vol.II). With her permission, Karen's husband, Paul Douglas hired the Respondent to represent her, and signed the contract with Respondent. (TR-160-162[2/16/93 vol.II; FL BAR EX 32.). Mrs. Douglas never signed the contract and neither she nor her husband received a copy of it until several weeks after it was executed. (TR-162[2/16/93 vol.II). The evidence does not indicate that the Respondent as a course of conduct failed to obtain client signatures or provide copies of contracts to clients. It is the referee's opinion that the failure in the Douglas matter was an oversight and did not adversely affect Mrs.

Douglas' rights.

7. Paragraph 3 and 4of the Douglas contract provide:

> 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 the 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. (FL BAR EX. 32

8. Paragraph 11 of the Douglas contract provides:

> 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 litigated I agree to pay $150.00 per hour, regardless of the outcome. (FL BAR EX. 32).

However, the Referee does not find these provisions were used against the client in punitive or coercive adversely affected her legal rights or that the Respondent failed to handle her

claim in an improper manner.

As to Count II

9. The Bar failed to prove by clear and convincing evidence the allegations of paragraphs 11, 13, 14, 15, 16, 17 and 18. (Paragraph 12 does not allege any misconduct).

As to Count III

10. The evidence failed to establish that Respondent offered to sell Mr. Douglas an automobile. The car sales to other clients were charged in Count II of Case No. 79, 522 and are set out in FL BAR EX. 43.

Case Nos. 79,522 and 80, 207 NOTICE OF INCLUSION

AS TO PARAGRAPH 1

11. Donn Carl Wolf was seriously injured in a motorcycle accident on April 8, 1990. (TR-110-112[2/15/93 vol.II). As to the Bar's allegations of improper solicitation, the referee

believes and the record supports Respondent's contention that Mr. Wolf hired Respondent to represent him of his own initiative. Respondent visited Mr. Wolf in the hospital on April 18, 1990 in response to a telephone call from Mr. Wolf which Respondent returned on April 16, 1990. (TR-276-290[2/18/93 vol.II]; RESP. EX 7, 8 and 9). The contract for representation was signed on April 18, 1990. (TR-288[2/18/93 vol.II]; FL BAR EX 9). When Mr. 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 Mr. Wolf but by a friend on his behalf. (TR-146-147[2/15/93 vol.II]; TR-8-9;17-18[2/18/93 vol.I]).

AS TO PARAGRAPHS 2, 3, 4, 5 AND 7

12. The record fails to establish these allegations by clear and convincing evidence.

AS TO PARAGRAPHS 6 AND 8

13. These paragraphs were stricken by the Bar.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the

Complaints and Notice of Inclusion I make the following recommendations as to guilt or innocence:

Case No. 79,522

As to Count I

I recommend that the Respondent be found NOT GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-4.2; Rule 4-5.3(a); Rule 4-5.3(b); Rule 4-5.3(c)(1); Rule 4-7.4(a); Rule 4-8.4(a).

I recommend that the Respondent be found GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-5.4(a)

As to Count II

I recommend that the Respondent be found GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-1.8(a) and (e).

Case No. 80, 207

As to Count I

I recommend that the Respondent be found NOT GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-1.5(F)(2); Rule 4-1.5(F)(4)(c).

I recommend that the Respondent be found GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-1.5(A); Rule 4-1.5(F)(4)(b).

As to Count II

I recommend that the Respondent be found NOT GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-1.3; Rule 4-1.4(b); Rule4-5.3(a), (b), and (c); Rule 4-5.5(b).

As to Count III

I recommend that the Respondent be found NOT GUILTY of the following alleged violations of the Rules of Professional Conduct:

Rule 4-1.7(b); Rule 4-1.8(a); Rule 4-1.8(a)(1)-(3).

Case Nos. 79,522 and 80,207 NOTICE OF INCLUSION

I recommend that the Respondent be found NOT GUILTY of each of the alleged violations.

IV. Recommendation as to Disciplinary Measures to be Applied. I recommend that the Respondent receive a public reprimand and be placed on probation for a period of 6 months during which time he be required to complete an ethics course approved by the Court.

V. Personal History and Past Disciplinary Record. After finding of guilty and prior to recommending discipline, I considered the following personal history and prior disciplinary record of the Respondent:

Age: 51

Date Admitted to Bar: 1974

Prior disciplinary convictions and disciplinary measures imposed therein: None

Other personal data: Has been active in a variety of local charitable and civic organizations

VI. **Statement of Costs and Manner in Which Costs Should be Taxed.**

A.	Grievance Committee Level	$ 167.18
B.	Administrative Costs	$ 500.00
C.	Referee Level	
	(1) Transcript	5,456.85
	(2) Travel	315.24
D.	Other Costs	
	(1) Investigator	5,456.85
	(2) Witness Fees	2,070.20
	(3) Copies	33.00
	(4) Research	327.15
	(5) Postal Service	3.00
	(6) Copies of Records	119.94
	TOTAL	14,559.32

It is apparent that other costs may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the

Respondent, EXCEPT that the Respondent be charged only one-half of the expense for the investgator expenses and transcript cost based upon the findings of NOT GUILTY as to the bulk of the charges herein.

Dated this 30th day of March, 1993.

Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been furnished by regular U.S. Mail to Jan Wichrowski, Bar Counsel, 880 North Orange Avenue, Orlando, Florida 32801-1085; to John A. Weiss, Counsel for Respondent, Post Office Box 1167, Tallahassee, Florida 32302-1167; and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 30th day of March, 1993.