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.
_____/

REPLY BRIEF AND
ANSWER BRIEF ON RESPONDENT'S CROSS-PETITION FOR REVIEW

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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), (ROR-___).

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.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF NOT GUILTY AS TO SEVERAL INSTANCES OF RESPONDENT'S IMPROPER SOLICITATION ARE CLEARLY ERRONEOUS AND SHOULD BE REJECTED BY THIS COURT.

The respondent emphasizes the fact that, as The Florida Bar has readily acknowledged, this Court is reluctant to overturn a referee's findings of fact where they are based on competent and substantial evidence. However, the case at hand presents a unique scenario where the referee's conclusions of guilt do not comport with the facts and rules presented to the referee.

This Court has not hesitated to disapprove a referee's findings of fact and recommendations as to guilt where they are unsupported by the law and the facts, The Florida Bar v. Abney, 279 So. 2d 834 (Fla. 1973), The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983), and The Florida Bar v. Saxon, 379 So. 2d 1281 (Fla. 1980).

In Saxon, the referee concluded that the respondent's conduct was committed without an improper intent and ruled that this mitigated Mr. Saxon's conduct in attempting to give money to a judge the day after the judge had dismissed Mr. Saxon's client's criminal charges. This Court reviewed the referee's recommendations and rejected the referee's ruling that intent was required to prove the violation.

The Florida Bar is requesting this Court to make exactly this type of finding in regard to the case at hand. For example, in regard to the Austells, the referee's findings of fact describe an improper in person solicitation at the accident scene by an investigator of the respondent. Yet the referee concludes that because, "There is no evidence that the respondent caused, authorized, ratified or knew of the improper solicitation of the Austells by Mr. Beardslee." (ROR-5). Therefore, the referee found the respondent not guilty of violating R. Regulating Fla. Bar: 4-5.3(a) for failing to make reasonable efforts to ensure that his firm had in effect measures giving reasonable assurance that his nonlawyer assistants' conduct is 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 is compatible with the professional obligations of the lawyer; 4-5.3(c)(1) for ordering, or with knowledge of the specific conduct, ratifying the nonlawyer's conduct; and 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. However, the referee found the respondent guilty of violating 4-5.4(a) for improperly sharing his fees with a nonlawyer. Conveniently, the respondent never questioned why Mr. Beardslee was not listed as a witness on the accident report, despite the respondent's representation that Mr. Beardslee had told him that he came to know the Austells by

virtue of his disposition as a witness to the accident. Additionally, the record clearly indicated that Mr. Beardslee received a fee for his "investigation" of the case.

Rule 4-7.4(a) does not specifically require the respondent to have the specific intent, or to cause, ratify, or know of the improper solicitation. Further, it is the position of The Florida Bar that the respondent's office procedures in sharing fees with nonlawyers outweighs the respondent's purported lack of knowledge of the improper solicitation.

One must remember that throughout this time the respondent had in effect an improper fee sharing policy with his nonlawyer employees. Such a policy of improper fee sharing is banned by the rules because of the clear potential for abuse such as has taken place in this case. In other words, simply by virtue of having a policy of fee sharing the respondent invited his employees to maximize their profits by encouraging them to bring in more clients. Further, the allegations that the respondent sought to place a lien for his attorney's fees upon termination of his representation by the Austells, as well as his failure to report the unlawful solicitation of the Austells by Mr. Beardslee, further establishes that a not guilty finding is erroneous in regard to the conduct at hand. Thus, The Florida Bar is actually requesting this Court to overturn the referee's conclusions in this instance rather than the actual findings of

fact.

Intent is not a required element of proof for a violation in regard to solicitation. This Court has found proof of intent only necessary in regard to the disciplinary rules when dishonesty, misrepresentation, deceit or fraud is charged, The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). Otherwise, it would be an all too convenient defense to allow respondents to assert that they had no knowledge and intent to violate an ethical rule. Each member of The Florida Bar "...is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court.", The Florida Bar Rule of Discipline 3-4.1. Thus, the respondent's claims of his lack of knowledge and intent to violate the other rules charged are likewise without merit.

With respect to the Schmidt incident, once again the respondent attempts to elude responsibility by claiming lack of knowledge of the alleged improper conduct by the investigator who approached Mr. Schmidt and suggested that he retain the respondent. Similar testimony was given by Ms. Weyrauch in regard to her alleged solicitation by the respondent's employee, Tom Hager. In regard to Karen Boehm, the respondent failed to rebut the allegations by Ms. Boehm that she was telephoned by someone from the respondent's firm who improperly attempted to solicit her personal injury case. Yet the referee failed to outline any grounds upon which her not guilty finding was based.

This is also true in regard to Donn Wolf and Donald DeCicco. By not specifying any reasons for the not guilty finding, the referee has caused a clear question to be present as to whether any basis exists for her findings. Point One of the Bar's Initial Brief is referred to for a detailed analysis of the basis upon which a guilty finding as to the respondent's improper solicitation is in fact justified.

The weight of The Florida Bar's evidence of improper solicitation demands further scrutiny.

POINT II

RESPONDENT'S MISCONDUCT WARRANTS NOTHING LESS THAN A THREE YEAR SUSPENSION AND PAYMENT OF COSTS.

As detailed in The Florida Bar's Initial Brief, the respondent was found guilty by the referee of improperly sharing fees with nonlawyer employees, selling cars to clients without the disclosure required in situations where an attorney is involved in a business transaction with his client, providing improper financial advances to clients, and seeking and collecting prohibited fees. Clearly, this multitude of misconduct calls for more severe sanctions than a public reprimand. None of these violations involved mere isolated instances of misconduct, but rather reflected a long and involved pattern of wrongdoing. The cases cited by the respondent in his Answer Brief are not on point insofar as they relate to isolated instances of misconduct rather than the facts of this case taken as a whole. This is not the type of case for which a public reprimand is adequate, The Florida Bar vs. Welty, 382 So. 2d 1220 (Fla. 1980).

The respondent's assertion that he had advanced monies to his clients for "humanitarian purposes" is sadly lacking in any understanding of the purpose of the rule prohibiting advances to clients. Clearly, such a practice has been consistently prohibited by this Court due to the clear potential for abuse by an attorney in "buying" clients. The same situation exists with

the respondent's practice of selling automobiles to clients. Car sales were just another method of making advances to clients since payment for the automobile was not due until settlement by the respondent of the client's case. There are certainly avenues available for one to vent one's humanitarian ideals without engaging in violations of the Rules Regulating The Florida Bar.

In regard to the respondent's citation of The Florida Bar vs. Gentry, 475 So. 2d 678 (Fla. 1985), it is irrelevant whether a ten percent fee or one-third fee was charged for recovering PIP monies. This violation exists and discipline is warranted. The respondent's removal of the PIP and the improper termination clauses in his contract is irrelevant since he did not do this until these proceedings were initiated by The Florida Bar. This is also true of his improper fee sharing with nonlawyers. The respondent's ceasing of his improper actions upon prosecution by The Florida Bar is merely a result of the prosecution, not a mitigating factor.

As detailed in The Florida Bar's Initial Brief, The Florida Bar also seeks an accounting and restitution of the improper fees taken by the respondent. Pursuant to Rule 3-5.1(h), the respondent should be made to account for each and every improper fee taken in regard to his: a) improper termination clause in his contract, b) his improper PIP fees, c) any or all cases earned through improper solicitation. Rule 4-1.5 (a) provides that an

attorney's fee is prohibited where it is obtained through improper solicitation.

Should the respondent be found guilty of solicitation, it is clear that even harsher discipline is warranted. As this Court recently noted in The Florida Bar vs. Weinstein, Case No. 78,966, 18 Fla. L. Weekly S507 (9/23/93):

> We moreover view Weinstein's in-person solicitation of a brain-injured patient in a hospital room, accompanied by lying to health-care personnel, as one of the more odious infractions that a lawyer can commit; his conduct brings his profession into disrepute and reduces it to a caricature. Disbarment is the appropriate sanction in the aggravated circumstances of this case.

POINT III

ON ANSWER TO RESPONDENT'S INITIAL BRIEF ON CROSS APPEAL

THE FLORIDA BAR'S CONDUCT IN THIS MATTER HAS BEEN COMPLETELY PROPER AND THE REFEREE'S FINDINGS TO THIS EFFECT SHOULD BE UPHELD.

The respondent contests the referee's finding that The Florida Bar did not act improperly by failing to require a perjury statement from every person who inquired of The Florida Bar in regard to the respondent's unethical solicitation. R. Regulating Fla. Bar 3-7.3(c) does indeed provide that all complaints, except those initiated by The Florida Bar, shall be in writing and under oath.

The bar's investigation was fully proper pursuant to this rule for two reasons. First, Mr. Chanfrau's and Mr. Tindell's initial contacts with The Florida Bar were inquiries, not complaints. Rule 3-7.3(a) clearly provides that initial inquiries regarding whether alleged conduct would constitute a violation of the Rules Regulating The Florida Bar must be screened by bar counsel prior to opening a disciplinary file. Thus, a two tier system is present requiring bar counsel to determine when it is appropriate to open a complaint upon an inquiry.

Rule 3-7.3(b) provides that an inquiry shall be considered as a complaint if bar counsel determines it necessary to pursue

the inquiry.

Rule 3-7.3(c) did not require Mr. Chanfrau's or Mr. Tindell's inquiries to be sworn, since these were only inquiries, not complaints.

At the time bar counsel determined that it was appropriate to open a complaint, affidavits of actual clients were available to bar counsel. Mr. Chanfrau's and Mr. Tindell's sworn complaints were unnecessary and immaterial because they were merely conduits of information with no direct involvement in the alleged misconduct.

Secondly, The Florida Bar was indeed the initiator of the complaint and thus was properly excluded from providing an oath pursuant to Rule 3-7.3(c).

Pursuant to The Florida Bar's investigation of these inquiries, it was appropriate to open the complaint against the respondent with The Florida Bar as the complainant due to the inquirers' lack of direct involvement and the number of alleged violations appearing to require further investigation. This is bar policy and is fully in accordance with the rules.

The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978) cited by the respondent, is not analogous to the case at hand. In Rubin,

The Florida Bar was found to have committed serious violations of procedures. Confidentiality was violated, which was in and of itself grounds for contempt under the existing rules. Further, a delay in the prosecution of the case was present as was a failure to timely file the appeal by the bar. Serious transgressions such as these are not present in the instant case, which has been brought in a fully proper manner.

The respondent's accusation of "selective prosecution" is also without a basis. The respondent cites a single isolated instance of the alleged technical violation of dicta in a civil case in regard to contact with a client. This conduct, even if true and provable does not compare to the pattern of transgressions committed by the respondent. Further, it is not an issue in this case.

The case at hand involves allegations of what is commonly known as "ambulance chasing". This serious charge reflects alleged actions which involve one of the most serious transgressions an attorney can make. Such allegations demand a full and proper investigation and prosecution, as has occurred in this case.

As clearly stated in the referee's order of February 1, 1993, the referee found absolutely no basis for any wrongdoing whatsoever by The Florida Bar in this matter. There is no reason

to dismiss this case. The Florida Bar has acted completely and wholly within the Rules Regulating The Florida Bar.

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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief has been furnished by Airborne Express to The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing Reply Brief has been furnished by Airborne Express to Mr. John A. Weiss, counsel for respondent, at Post Office Box 1167, Tallahassee, Florida 32301; and a copy has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 5th day of November, 1993.

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