

FILED

SID J. WHITE

APR 1 1993

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

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 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 Respondent'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 assistants 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).

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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 4 of 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.

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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

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); Rule 4-5.3(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).

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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

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).

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 investigator 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.

