IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,
Complainant,

vs.

Frank Schaub,
Respondent.

CONFIDENTIAL

Case No. 79,759

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee, by order of Court entered May 8, 1992, to conduct disciplinary proceedings herein according to the Rules of Discipline, hearing was held on September 14, 1992.

The following appearances were entered:
For the Florida Bar: David R. Ristoff, Esquire
For the Respondent: Pro Se

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: Having considered all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. The Respondent, serving as State Attorney for the Twelfth Judicial Circuit, prosecuted the case, State V. Nowitzke, before a jury in the Circuit Court, Manatee County, between October 26 and November 12, 1987. The Defendant was indicted for two counts of First Degree Murder and one count of Attempted First Degree Murder and defended on the basis of insanity. The Defendant was found guilty on all counts and sentenced to death. The Supreme Court of Florida reversed the convictions and sentence and remanded the cause for a new trial, basing the reversal primarily on prosecutorial misconduct on the part of the Respondent which led to the admission of irrelevant and deliberately misleading evidence. (Nowitzke v. State, 572 So.2d 1346 (Fla. 1990); See Repondent's Response to Request for Admissions #2-6).

2. A psychiatrist, Dr. Tanay, was called to testify as an expert on behalf of the defendant. During cross-examination, the Respondent illicited testimony from the witness that a Dr. Szasz, a non-testifying expert, had classified Dr. Tanay as a "hired gun". (See Respondent's Response to Request for Admissions #8-10; Bar's Exhibit #1 pgs. 107-113, R16-20; Nowitzke v. State R2317-2327).

3. During his summation to the jury, the Respondent argued that "Then we heard from I think someone Dr. Szasz called the hired gun...". (See Nowitzke v. State R3175; Bar's Exhibit #1 pg. 116).

4. The Respondent, during his cross-examination of Dr. Tanay, accused the witness of charging $600 per hour for his deposition testimony, suggesting to the jury that the $1800 bill submitted was only for a three hour deposition. The

itemized bill, of which the Respondent possessed a copy, was in fact for twelve hours work in the case at $150 per hour. (See Respondent's Response to Request for Admissions #13-14; Bar's Exhibit #1, pgs. 117-129, R21 & 26; Nowitzke v. State R2392-2397).

5. Throughout his cross-examination of Dr. Tanay the Respondent insulted the witnesss, ignored the trial court's rulings on defense objections and inserted his personal opinions on psychiatry and the insanity defense into his questioning. (Nowitzke v. State R2182-95 and 2242-2422).

6. The Respondent, during cross-examination of another defense expert, Dr. Vaughn, improperly illicited testimony concerning the average time someone committed to a hospital as criminally insane might remain confined. (See Bar's Exhibit #1, pg. 143-146, R pg. 22; Nowitzke v. State R2595-2599).

7. The Respondent admits knowing his line of questioning of Dr. Vaughn was improper under Florida law. (R32, 39-40).

8. In rebuttal of the defense experts, the Respondent offered the testimony of a neurosurgeon, Dr. Padar, who testified that the Defendant had no organic brain damage (an issue never raised by the defense), and further solicited from Dr. Padar an opinion that he found no evidence that the Defendant was insane at the time of the commission of the crimes. Respondent further argued during his summation that Dr. Padar, "the only genuine scientist" to testify, found that the Defendant was sane. (See Respondent's Response to Request for Admissions #18 & 19; Bar's Exhibit #1, pg. 156-161, R22 & 39, Nowitzke v. State R2895-2912.

9. The Respondent was fully aware that the expert he offered, Dr. Padar, was totally unfamiliar with the definition of insanity under Florida law. (See Nowitzke v. State R2911 & 2914; R33).

10. The Respondent offered the testimony of a police detective, Roy Hackle, to demonstrate the propensity of drug addicts to steal from their families to support their habits and commit homicides in connection with narcotics dealings. (See Bar's Exhibit #1, pg. 171-174, R22-23; Nowitzke v. State R2700-2704.

11. The Respondent's strategy throughout the course of this case was to discredit the science of psychiatry and to persuade the jury to disregard Florida law as it relates to the insanity defense. (See Nowitzke v. State R2252-2262 and 2329-2331; Bar's Exhibit #1, pgs. 124-140, R21).

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: As to the entirety of the complaint, I make the following recommendations as to guilt or innocence:

I recommend the Respondent be found guilty, and specifically that he be found guilty of the following violations of the Rules Regulating The Florida Bar:

1. Rule 4-3.1: (a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law) in that Respondent sought to persuade a jury to disregard a fact (organic brain damage) never placed in issue.

2. Rule 4-3.3(a)(1): (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal) in that Respondent made material misstatement as to the fees charged by a defense expert, presented testimony of his own expert as to the Defendant's sanity knowing that his witness was totally unfamiliar with the definition of insanity under Florida law and represented to the jury that his expert was the "only genuine scientist" to testify on the issue of the Defendant's sanity.

3. Rule 4-3.3(a)(4): (if a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures) in that Respondent made no effort to correct his misrepresentation that the defense expert had charged $600 per hour, even though he had in his possession an itemized statement controverting this suggestion.

4. Rule 4-3.4(e): (a lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevent or that not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of an accused) in that Respondent illicited testimony about the opinion of a non-testifying expert as to the credibility of a defense witness, knowingly illicited irrelevent and improper testimony concerning average length of stays in hospitalization of persons acquitted by reason of insanity, presented expert testimony directed to disprove a fact not in issue (lack of organic brain damage), offered irrelevent testimony concerning the propensity of drug addicts to commit larceny and homicide and repeatedly make personal observation about the credibility of Dr. Tanay, the validity of the insanity defense and the guilt of the Defendant.

5. Rule 4-4.4: (in representing a client a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third party..) in that Respondent used his cross-examination of Dr. Tanay to personally insult the witness and his professsion.

6. Rule 4-8.4(c): (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) in that the Respondent knowingly misrepresented the fees charged by a defense expert and offered rebuttal testimony of an expert witness as to the issue of Defendant's sanity fully knowing the witness was unfamiliar with the M'Naughton Rule.

I further recommend that the Respondent be found guilty of violation of the Oath of Attorney, in that, based on the above cited conduct he argued matters "not fairly debatable under the law of the land" and sought to "mislead the judge and jury by artifice of law and fact.

As to the Bar's allegation that Respondent violated Rule 4-3.3(a)(2) I recommend a finding of not guilty.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the Respondent receive a public reprimand and he be required to appear in person to receive the Court's admonishment.

While the standards would clearly support a suspension, as requested by the Florida

Bar, it is my considered opinion that it would be of little significance to impose a 30 day suspension upon a lawyer who has retired from practice, already been suspended for non-payment of Bar dues for 3-4 years and is likely already suspended for failure to comply with C.L.E. requirements. Due to this Respondent's history of elected public office in our profession, a reprimand, received in person and published, would seem a far more significant rebuke for his serious misconduct.

V. Personal History and Past Disciplinary Record:
After finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 71
Date Admitted to Bar: August 19, 1949
Prior Discipline: None
Other Personal Data: Served 12 years as a Circuit Court Judge and 18 years as State Attorney, all in the Twelfth Judicial Circuit

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

Grievances Committee Level:

1. Court Reporter Expense:
   Mary Frances Schultz
   October 28, 1991

Appearance fee	$ 72.50
Transcript	268.60
Postage	2.90

2. Bar Counsel Travel Expense:
   David R. Ristoff (10-28-91)

90 miles x .32	28.80
Tolls	2.00
Parking	1.00

Referee Level:

1. Court Reporter Expense:
   Sclafani Williams Court Reporters, Inc.
   September 14, 1992

Appearance Fee	47.50
Transcript	210.00
UPS Service	9.00

2. Bar Counsel Travel Expense:
   David R. Ristoff (9-14-92)

100 miles x .33	33.00
Tolls	1.50
Administrative Costs pursuant to Rule 3-7.6(k)(1)	500.00
TOTAL	$ 1,176.80

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

Dated this 19th day of October, 1992.

CHARLES B. CURRY, Circuit Judge
Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Certified Mail to: David R. Ristoff, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 and Frank Schaub, Respondent, Route 2, Box 4-C, Highlands, NC 28741.

Hilda King
Judicial Assisant