IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

KENT S. WHEELER,

Respondent.
_____/

Supreme Court Case
No. 80,689

The Florida Bar File
No. 92-70,263(11N)

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" and Kent S. Wheeler, will be referred to as "Respondent". The following abbreviations will be utilized:

RR - refers to Report of Referee

T - refers to the transcript of final hearing held on November 1, 1993 before the Referee.

D - refers to transcript of Respondent's testimony in the Davis, Shenberg trial, introduced as Florida Bar exhibit 2.

C - refers to transcript of Respondent's testimony in the Castro, et. al. trial (the record was supplemented with this transcript).

TABLE OF AUTHORITIES

STATEMENT OF CASE AND FACTS

Respondent has provided this Court with a partial account of the events which ultimately resulted in this disciplinary proceeding. The Bar takes issue with some of the versions of the facts set forth by the Respondent.

Among the events reported, Respondent states in his brief at page seven (7) that:

> 1991, March: Judge Davis using the leverage of his patronage solicites (sic.) a $500.00 loan from Respondent. Once the loan is received Davis makes clear that it will be paid back through court appointments (RR. 3-4). Respondent is disgusted with himself and ends the unlawful compensation scheme (RR. 4).

This version of the facts relates to Respondent's claim in the hearing before the Referee (T. 31) and in the Argument portion of his brief (at page 21) that he did not know that the loan was a payment for appointments until after the loan was made.

The Bar included in the record before the Referee the Respondent's testimony in the trial of former Judge Phil Davis and several other defendants in The United States v. Harvey Shenberg, et. al., U.S.D.C., Southern District of Florida, Case Number 91-0708-CR-GONZALEZ. Respondent's testimony at that trial was quite different.

Respondent and William Castro, the intermediary between Respondent and Gelber had discussed the possibility of Respondent getting court appointments from Davis (D. 1456). Castro would receive a percentage of the fee received by Respondent (D. 1467).

When approached by Davis for a "loan", Respondent knew that the "loan" was not legal (D. 1503). He knew that he would not be paid back (D. 1505, 1506).

Respondent was cross-examined by Judge Phil Davis at the criminal trial. In response to a question propounded by Davis, Respondent stated:

> "I considered it by giving you five hundred dollars and that you were going to pay me back with a court appointment (D. 1506).

Respondent also advised his therapist that he knew that Davis would not pay him back, and that Davis told him at the time of the loan:

> "I will do well for you in the future." (T. 58, 70).

Furthermore, Respondent did not end the unlawful compensation scheme immediately. According to his testimony at the federal trials, Respondent accepted appointments weeks after the $500.00 payment (D. 1455) and his reluctance to deal with Davis stemmed from paranoia (D. 1454) regarding Davis' "big mouth". (C.119).

Respondent also states:

> 1989, December, or 1990, January: When Respondent complains to Castro that Judge Gelber has not fulfilled his expectations of court appointments, Castro tells Respondent that Gelber will do so only in exchange for kickbacks of twenty per cent of the monies earned. Respondent hesitates but agrees and improperly compensates Gelber through Castro until March, 1991 (RR. 3)." Emphasis supplied.

See page seven (7), brief of Respondent.

The Bar would submit that the word "hesitates" is misleading. Respondent did not hesitate to engage in the corrupt arrangement. Rather, he hesitated to agree to pay Gelber 25% of the fee rather

than 20%. (D. 1479).

Respondent also included a discussion of potential mitigation factors in the chronology. He states that in 1989 he was "devastated" by the dissolution of his marriage. To the extent that the use of the word "devastated" suggests a determination of a serious mental deficiency by appellant's expert or the Referee, it is misleading and incorrect. There was no finding of that nature.

There are also some significant omissions. The Bar supplemented the record with the transcript of another trial at which the defendant had testified, particularly to demonstrate a lack of candor. The trial was The United States of America v. Castro, et. al., United States District Court, Southern District of Florida, No. 91-0708-CR-GONZALEZ.

Respondent did not tell the truth in a financial document that he had filled out on May 31, 1989 in order to purchase a house. In addition to outright mistatements, he advanced questionable claims. In the document Respondent Wheeler claimed a gross monthly income of TWELVE THOUSAND FIVE HUNDRED DOLLARS ($12,500.00) per month in 1989 when he had sworn that his net income for the year was only TWENTY FIVE THOUSAND DOLLARS ($25,000.00) (C. 157, 158). He admitted that his statement on the form that he had been in practice for ten (10) years was false. (C. 159).

Respondent also admitted that statements on the form to the effect that he had been an Assistant State Attorney for three and

one half years and that he had earned THIRTY-FIVE THOUSAND DOLLARS ($35,000.00) per year were untrue. (C. 172). Respondent also admitted that in another application, to purchase a car, the statement that he earned ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000.00) per year was incorrect. (C.174).

At the Castro trial questions were also raised regarding Miami Heat tickets used as a business deduction and deducting the cost twice on income tax returns (C. 80, 87, 93). Further, Respondent admitted sending a letter containing untrue information on behalf of a woman he had lived with. (C. 191-193). The letter falsely stated that the lady had been a tenant who had paid rent to him. (C. 192-193).

SUMMARY OF ARGUMENT

The disbarment recommendation is eminently correct. In this case, the nature of the crimes and their effect upon the entire community was a paramount consideration. Serious crimes have resulted in disbarment for periods up to twenty (20) years. Respondent received only a basic five (5) year disbarment.

Furthermore, the Respondent's mental state was of little significance in regard to potential mitigation. His own witness testified to the existence of nothing more than a normal range of neuroses and no pathological condition. The Respondent's state of mind does not compare with cases in which other Respondents suffered from insanity or serious drug additions, and, therefore, mitigation was found. Furthermore, there was no evidence that the mental state affected Respondent's freedom of choice or that it should have been given any weight in view of the nature of the crimes.

Respondent submitted a number of additional arguments regarding mitigation for the first time in this brief. Obviously, they are inappropriate for consideration at this time. They include "extortion", a spotless disciplinary record, the duration of the proceedings, and a career of short duration.

He reiterates his marital difficulties and emotional problems but demonstrates no significant omissions in the Referee's Report. Respondent also stresses his "voluntary" cooperation with the

authorities and the Bar. However, it is obvious that he made a deal with the federal authorities to stay out of jail and had an obligation to testify fully to those authorities, as well as the Bar, once he had obtained immunity.

ARGUMENT

I. THE REFEREE PROPERLY RECOMMENDED DISBARMENT FOR RESPONDENT'S SERIOUS CRIMINAL MISCONDUCT. (RESTATED)

Respondent entered an unconditional plea of guilty to all charges brought by The Florida Bar. Respondent's brief disputes the referee's recommendation of disbarment.

Respondent's argument must be viewed in the context of his admitted participation in an extraordinary course of criminal conduct. He participated in a scheme whereby Circuit Court Judges were given kickbacks in return for Special Public Defender appointments. The unfolding of the scheme received a tremendous amount of publicity in Dade County, thereby raising serious questions about the integrity of the judicial system. Respondent has also admitted to crimes other than bribery, including income tax evasion (failing to declare income received from private clients) (T. 16). In other words, Respondent sought a double bonus from his corrupt activities. He received financial rewards through appointments and at least some of the money used for kickbacks was obtained tax free. Respondent also admitted to mail fraud in connection with the kickback scheme (T. 15).

After hearing all of the evidence, the Referee stated in his final report that:

> Respondent knew what he was doing when he agreed to participate in the bribery scheme with Judge Gelber. Similarly, his loan to Judge Davis was made with full knowledge the funds would be repaid through the guise of

> court appointments as an Special Public Defender. This type of conduct is so terribly destructive to the fundamentals of judicial fairness upon which democracy is predicated, it can neither be tolerated nor forgiven! No matter how one analyzes the schemes involving Judges Davis and Gelber, Respondent contributed to turning the criminal justice system in the Eleventh Judicial Circuit into a racketeering organization. The stain cast by this judicial disgrace has fallen upon the fabric of every robe worn by every Judge in the state of Florida! How much greater damage could be done to the Bench and Bar? (RR 12).

With the foregoing in mind, this court should note that the Respondent received the absolute minimum period of disbarment, i.e., the minimum five year period prior to potential readmission provided by Rule of Professional Conduct 3-7.10(a). Many attorneys guilty of serious crimes have been disbarred and prevented from applying for readmission for much longer periods, e.g., fifteen and twenty year periods, as contrasted with the five year disbarment of the Respondent. See The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988).

In The Florida Bar v. Newhouse, 539 So.2d 473 (Fla. 1989) Respondent Newhouse was disbarred for misappropriating thousands of dollars from a number of files and failure to maintain minimum trust account records. Newhouse was found to be in violation of a number of Rules under the former disciplinary rules governing The Florida Bar. Newhouse had previously received a public reprimand in The Florida Bar v. Newhouse, 498 So.2d 935 (Fla. 1986) and had been disbarred for a period of ten (10) years in The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988). In the latest case, cited above, Newhouse was given an additional twenty years for his conduct.

Respondent's participation in the bribery and corruption scheme is equivalent to that of Newhouse insofar as it is conduct which undermines faith in the legal system as a whole. He was also guilty of income tax evasion, which alone would warrant discipline. Furthermore, Respondent should have comprehended that the crimes in which he participated would be far more widely publicized than many other crimes and would have a profound effect upon the public perception of the legal system and lawyers. As this Court stated in The Florida Bar v. Riccardi, 264 So.2d 5, 6 (Fla. 1972):

> "In determining appropriate disciplinary action, we must be primarily guided by the welfare of the public and the legal profession." (Emphasis supplied)

The implications of the Respondent's conduct in terms of undermining the legal system are readily apparent. In each instance, the same judge who received a contribution of 20% or 25% of the total attorney's fee was ruling in regard to that attorney and his client. Clearly, the predisposition toward favoritism or the possibility of the judge bending over backwards is inherent in that situation and gives a clear appearance of impropriety.

There are a number of other cases in which the disciplined attorney received a twenty year disbarment including The Florida Bar v. Travelstead, 435 So.2d 832 (Fla. 1983). Travelstead had conspired to import marijuana, failed to appear at a bail bond hearing and fled to escape prosecution. The same period of disbarment was applied in The Florida Bar v. Burns, 451 So.2d 479 (Fla. 1984). A fifteen year disbarment was granted in The Florida

Bar v. Lowe, 530 So.2d 58 (Fla. 1988). Lowe had been convicted of two counts of grand theft.

Accordingly, the choice before the Referee was not between a five year disbarment or a three year suspension but, rather, a far wider range of potential discipline. The reported crimes reported in the above referenced cases are obviously quite serious, as are those of the Respondent. None of those crimes, however, except perhaps, the ones committed by Newhouse had an effect upon public perception of the legal system comparable to those committed by the Respondent.

There are a number of bribery cases in which the courts have held that disbarment and not suspension was the appropriate remedy. The disbarment in these cases ranged from five years to life. The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991); The Florida Bar v. Riccardi, 264 So.2d 5 (Fla. 1972); The Florida Bar v. Morales, 366 So.2d 431 (Fla. 1978); The Florida Bar v. Rambo, 530 So.2d 926 (Fla. 1958); The Florida Bar v. Swickle, 589 So.2d 901 (Fla. 1991).[1/] Medina County Bar Association v. Haddad, 385 NE 2d 294 (Ohio, 1979).

This Court has stated that ".... any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties. State v. Calhoon, 102 So.2d 604 (Fla. 1958).

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[1]In the cases cited above the legal issue of the length of the proposed disbarment was not involved since the Bar did not seek a disbarment period beyond the mandatory minimum for readmission.

In Riccardi, supra., the Respondent was disbarred for conviction on the charge of bribery of an Internal Revenue Agent with intent to influence the Agent's determination of the current tax liability of a third person. Similarly, in the instant case, the Respondent paid monies to a sitting circuit court judge to influence the judge's decision to appoint Respondent as court appointed counsel for criminal defendants.

The Supreme Court in Riccardi stated as follows:

> In our view bribery is a particularly noxious ethical failure under the Code of Professional Responsibility, because it not only involves a breach of the individual attorney's public trust as a member of the legal profession, but also represents an attempt by the offending lawyer to induce a third party to engage in fraudulent and corrupt practices. Such conduct strikes at the very heart of the attorney's responsibility to the public and profession. We are, therefore, not inclined to leniency in bribery matters, absent mitigating factors in the individual case. See The Florida Bar v. Craig, 208 So.2d 78 (Fla. 1970). No such mitigating factors have been brought to our attention in the instant case.

Regardless of who originated the bribery idea, Respondent fully and knowingly participated in said scheme.

In Morales, supra., the Respondent was disbarred for attempting to extract a $10,000.00 "fee" to be used to reach and influence the judge or prosecutor concerning sentencing and for other misconduct. Further, in Rambo, supra., the Respondent was disbarred for delivery of a bribe to a county commissioner on behalf of a client.

Respondent's conduct in paying bribes and/or "loans" to circuit court judges and in effect sharing his fee with a judge erodes public confidence in the integrity of the judiciary and the

Bar. Respondent also engaged in tax evasion and testified at the Castro trial to other dishonest acts he committed. (T. 14-15, C. 157-161, 172, 174). Regardless of personal difficulties, Respondent knowingly engaged in an illegal scheme of kickbacks to a judge and gave a loan to another judge in exchange for court appointed cases. Such conduct cannot be condoned and disbarment is the only appropriate discipline for such criminal misconduct which brings the entire system of justice into disrepute.

Respondent, after five (5) years, can apply for readmission to The Florida Bar through the Board of Bar Examiners. The Referee's recommendation made it clear that he was recommending disbarment for the minimum period of five (5) years and that he could then have the opportunity to apply for readmission to The Florida Bar. (See RR. p. 12). Respondent in his brief tries to claim that the Referee in effect was recommending a five (5) year suspension. Such an interpretation is incorrect. A clear reading of the Referee's recommendation at page 12 of his report indicates he clearly recommended a five (5) year disbarment with the Respondent being eligible to apply for readmission after a period of five (5) years.

With the foregoing in mind, the Bar will address each of the four sub-arguments set forth by the Respondent.

A. RESPONDENT HAS FAILED TO PROVE THAT THE REFEREE'S FINDINGS REGARDING HIS MENTAL STATE AS A MITIGATION FACTOR WAS CLEARLY ERRONEOUS OR LACKING COMPETENT SUBSTANTIAL EVIDENCE.

Respondent does not take issue with the Referee's finding that "there is no evidence in the record to support a finding of exculpation based upon mental defect or mental deficiency." He has failed to establish any error in that regard, but argues nevertheless that his mental state should have been considered in mitigation.

The record, however, reveals no error on the part of Referee. Respondent contends that the Referee did not give sufficient consideration to the testimony of Dr. Rutchik, a therapist, who testified in his behalf. That argument is belied by extensive references to Dr. Rutchik's testimony in the Referee's report (RR. 5, 6, 7). However, despite extensive testimony regarding Respondent's therapy and the nature of some of his emotional problems, Dr. Rutchik testified that Respondent had no pathological problems (T. 67) and that the nature of his neuroses was within the normal range of such problems (T. 67).

Respondent has failed to overcome the presumption in favor of the Referee's finding. In fact, the cases cited by the Respondent are devoid of significance in regard to Respondent's emotional problems and his course of conduct. The very test suggested by Respondent from The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984), defeats his argument. In the Musleh case the Court based the mitigation due to mental condition on that Respondent's "severely limited ability to control his activity." (at 797). There is no testimony in this record including that of

Respondent's therapist which would mandate a finding of "severely limited ability to control his activity."

In fact, Respondent's reliance upon Musleh, borders upon absurdity. In the criminal trial which was the forerunner of the Bar's disciplinary proceedings, Musleh was found to be not guilty by virtue of insanity. It is no surprise that Musleh's mental illness was considered in mitigation. The issue raised was whether Musleh could form the requisite intent to commit the crimes of which he was accused. Respondent cannot possibly compare his history of emotional difficulties to that of Musleh. It would be incredible to conclude that Respondent's history of emotional difficulties as reflected in the record was proof of an inability to form the requisite for the crimes he committed.

As pointed out in another case cited by Respondent, The Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992), mental condition does not provide a basis for mitigation unless it is sufficient to establish evidence of lack of culpability. Respondent also relies upon The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988). The addiction to alcohol discussed in Hartman does not serve to illuminate the issue of mitigation in this case.

Furthermore, even if the Respondent had proved that his mental state was a mitigating factor, it need not have been given any weight by the Referee in view of the nature of the crime and the nature of the mitigating factors. The Florida Bar v. Smiley, supra; The Florida Bar v. Rendina, supra. As this Court stated in Rendina:

> ". . . we do not find the mitigating circumstances presented here adequate to override disbarment as a result of defendant's conduct in this case . . ." (At 316).

In addition, Respondent's entire motivation in seeking the assistance of Dr. Rutchik is undermined by his request to Dr. Rutchik for a letter saying that he had seen him in 1989. In fact, that had been a single visit for a marital matter. (T. 65, 77). Respondent, additionally did not begin to consult Dr. Rutchik regularly until after he was facing Bar discipline. (T. 40).

B. RESPONDENT FAILED TO DEMONSTRATE ERROR ON THE BASIS OF THE THEORIES OF "EXTORTION" AND "VOLUNTARY" COOPERATION.

Respondent offers (a) the "It wasn't my fault" theory, referring to the "involuntariness of the illegal conduct" and (b) the theory that he "voluntarily" cooperated with law enforcement authorities.

Respondent's description of his conduct borders upon additional proof of an ethical void. He categorizes himself as a victim of extortion. That issue was not presented for consideration by the Referee and is, therefore, not ripe for consideration by this Court. Dober v. Worrell, 401 So.2d 1322 (Fla. 1981). The issue was merely mentioned gratuitously by a witness. (T. 75). Furthermore, Respondent was not confronted with a genuine threat as required by F.S. 836.05. No one threatened to harm him physically or otherwise if he did not indulge in kickbacks for a financial profit. All he had to do was

say "no" to his office mate who was the intermediary in this bribery scheme. Respondent was not even directly confronted by Judge Gelber.

The only reasonable fear was that others might profit from kickbacks if he did not participate. He could have put that fear to rest by cooperation with the authorities at the very inception of the scheme.

Furthermore, Respondent cannot describe of the scheme as extortion when he complained to Castro about making campaign contributions and not receiving appointments in exchange. (T. 23-24). Also, there is a logical inconsistency between extortion and being unable to choose due to one's mental condition. Respondent as the protagonist of these events is in the best position to assert what actually took place. His use of inconsistent theories indicates the obvious, namely that he is grasping for straws.

Respondent's specification of his cooperation with the authorities as voluntary, is, of course, true in a very limited sense. However, as the Referee recognized, Respondent did so because he did not want to go to jail (T. 34). By being among the first to testify, appellant became a witness rather than a defendant. Respondent admitted that he entered into the immunity agreement because he basically knew he had engaged in crimes and wanted to get the best deal he could for himself. (T. 34).

In his own testimony, at this hearing before the Referee and at the federal trial, which was offered into evidence as Exhibit 2, Respondent testified that he sought legal counsel when he

learned that a search warrant had been served on Judges Gelber and Davis (T. 41; D. 1462). Federal agents visited with Respondent around the same time (D. 1463). Respondent was not providing any information until an immunity agreement was worked out. (D. 1464). Judge Gelber had already been indicted (D. 1488, 89) and had agreed to testify (D. 1489).

As the Referee found, Respondent cooperated with the government when he became "cognizant of his vulnerability". (RR. P. 4). Furthermore, after entering into the immunity agreement he was obligated to be truthful (T. 76).

Respondent relies upon authority in respect to this argument which does not remotely apply to these circumstances. In The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989), Diamond was convicted of fraud in a federal trial. However, in addition to other evidence in support of several substantial mitigating factors, the federal judge who tried the case testified that Diamond was never an active participant in the act of fraud. That same statement could not be made regarding the Respondent in this proceeding.

Respondent also argues that as in several cases which he cites, there was potential mitigation because there was no allegation of injury to any client or member of the public. The cases cited do not assert that broad legal principle. Further, Appellant is quite consistent insofar as he relies upon cases which pertain to a totally different situation. The majority of those cases deal with attorneys who misappropriated client funds

but voluntarily provided restitution. The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981); The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983); The Florida Bar v. Stark, 616 So.2d 41 (Fla. 1993); The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993). Another case cited by Appellant The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992) pertains to an unintentional use of client funds, i.e., sloppy trust accounting procedures.

Equally untenable is the principle advanced by Respondent to the effect that the absence of a conviction of a crime is ipso facto a mitigating factor. First, that assertion is illogical in view of this record. Respondent was not convicted of a crime only because he received immunity and the Referee found that Respondent knew what he was doing when he agreed to participate in the bribery scheme with Judge Gelber (RR. P.11).

The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) mentions that Respondent was not convicted of a felony but, rather, a misdemeanor. There is no similar evidence that Respondent would only have been convicted of a misdemeanor. In The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987), the written opinion provides no information in regard to why Respondent received a suspension after pleading guilty to a felony, but the decision would have to be related to the particular facts of the case.

C. RESPONDENT FAILED TO DEMONSTRATE A CLEARLY ERRONEOUS RULING BASED UPON THE MITIGATION FINDINGS.

Respondent claims that he should have received greater credit based upon mitigating factors. Those factors and their appropriate treatment by the Referee will be discussed below.

a. A "spotless" disciplinary record.

Respondent's career was of short duration. He was admitted to the Bar in 1983. Between 1983 and 1986 he was an Assistant State Attorney. (T. 13). Obviously, he had no private clients and the problems which frequently affect private attorneys (e.g. trust accounts, conflicts of interest, etc.) were not obstacles which Respondent had to face during that time. By 1988 Respondent was improperly seeking appointments as quid pro quo for campaign contributions. By 1989, he was engaging in the kickback scheme. Respondent's prior record is not analogous to cases such as Stark, supra., in which a 40 year unblemished record was considered as a mitigating factor. There is no demonstration of error in the Referee's conclusion that the Respondent's prior history was not a mitigating factor particularly in view of Respondent's argument in asserting another mitigating factor:

> Respondent was relatively new to the practice of law and newer yet to the private practice of law at the time the misconduct occurred. In late 1989 when the kickback scheme began, Respondent had been in private practice less than four years and had been a member of the Bar for six years. (Respondent's brief, p. 29).

b. Full disclosure and cooperation with the Bar.

Respondent's appearance before the Bar took place after he had an agreement to testify on behalf of the government in exchange for immunity. Obviously, pursuant to the immunity agreement he was required to disclose fully and cooperate with the

prosecution. (T. 76). He was on record as a witness on October 5, 1992 prior to any dealing with the Bar. Respondent was obviously not in a position to change his testimony and refuse to testify and cooperate with the Bar. Therefore, his cooperation is not a mitigating factor, particularly in view of the fact that he has attempted to provide the Bar with testimony which is less inculpatory than prior testimony of record regarding the loan to former Judge Phil Davis of FIVE HUNDRED DOLLARS ($500.00) to Judge Davis (T. 31, 32). As discussed above, he now seeks to argue that he was not aware that the loan was essentially a bribe for judicial appointments.

c. The duration of the disciplinary proceedings.

No argument or evidence was presented to the Referee to support the position that the duration of the proceeding should serve as a basis for mitigation. Therefore, that argument not only lacks support in the record, but is inappropriately raised on appeal. 3 Fla. Jur. 2d, "Appellate Review", S92; Dober, supra. Additionally, if this argument had been raised before the Referee, The Florida Bar would have presented documentation to establish the frivolousness of this argument.

d. Personal and professional detriment.

This argument was not presented in the Petition for Review and was not presented to the Referee. Therefore, it is not ripe for review.

e. Marital difficulties.

Respondent's marital problems and the ultimate dissolution of his marriage were not found to be mitigating factors by the Referee. Dr. Rutchik's testimony, discussed above, did not indicate a mental condition of great severity based upon the dissolution. At the very least, there was no testimony regarding a mental condition which could be considered as an excuse or justification for Respondent's conduct.

f. Emotional/psychological/mental problems.

This is a repetition of Respondent's sub-argument No. 1, discussed in detail above.

g. A career of short duration.

This argument was not presented to the Referee and, therefore, is not ripe for review. It is also largely inconsistent with seeking credit for an unblemished disciplinary history. The argument merely stresses the significant degree of corruption achieved by the Respondent in a short period of time. Further, as previously stated, the Referee can determine not to give weight to presented mitigating factors. See The Florida Bar v. Rendina, supra, and The Florida Bar v. Smiley, supra.

D. RESPONDENT HAS DEMONSTRATED NO BASIS OF ERROR BY REITERATING THAT HE HAS COOPERATED WITH LAW ENFORCEMENT AUTHORITIES AND THE BAR.

The Respondent has raised this same argument above. In reply, the Bar has pointed out the conditions which existed when the Respondent sought to cooperate with the prosecuting authorities and, subsequently, the Bar.

Essentially the plot had been uncovered, subpoenas were flying, Respondent had been interviewed by the FBI, and he feared that Davis and Gelber had been discussing the kickbacks. (T. 28). He was paranoid (D. 1454) and was afraid of going to jail. Respondent has not earned a great deal of credit for his cooperation under those circumstances. Additionally, Assistant United States Attorney Michael Patrick Sullivan testified that Respondent's testimony was important, but not pivotal, as to those who went to trial and plead guilty. (RR. 7).

Based upon the criteria stated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) for the protection of the public from corruption and as a deterrence to others, based upon the facts of this case of serious criminal misconduct and involvement in judicial corruption, Respondent must be disbarred.

CONCLUSION

For the foregoing reasons, The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact and impose disbarment for a period of five (5) years as discipline, and tax the costs of these proceedings against Respondent in the amount of $2,077.50.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the foregoing Answer Brief of The Florida Bar was mailed via Airborne

Express to **Sid J. White**, Clerk, Supreme Court of Florida, 500 So. Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy was mailed to **Kent S. Wheeler**, Respondent, via Certified Mail, Return Receipt Requested (Z 044 594 554), 2151 LeJeune Road, Suite 308, Coral Gables, Florida 33134; and to **John T. Berry**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 4th day of November, 1994.

Jacquelyn P. Needelman

JACQUELYN P. NEEDELMAN

APPENDIX

I. Report of Referee, Dated April 12, 1994.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

vs.

KENT S. WHEELER,
Respondent.
_____/

Supreme Court No. 80,689

TFB No. 92-70,263 (11N)

FINAL REPORT AND RECOMMENDATION OF REFEREE

The difficulty in life is the choice.

The Bending of the Bough
Act IV
George Moore (1852-1933)

It is always a sad and burdensome responsibility to render a decision which impacts directly upon one's right to practice and enjoy one's chosen profession. The choices a practitioner of the law makes must always be circumspect, insightful and ones which reflect respect for, and appreciation of, the privilege granted to those of us fortunate enough to have been admitted to the Bar. Unfortunately, for both Respondent and the profession, the instant matter reflects a failure of adherence to those qualities the people of this state have a right to expect, and to receive, from attorneys and judges.

Respondent, Kent S. Wheeler, has entered an unconditional plea of guilty to the following charges brought by the Florida Bar:

1. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice and commission of a crime.(Rules of Discipline 3-4.3 and 3-4.4)
2. A lawyer shall not engage in conduct that is prejudicial to the administration of justice. (Rule of

Professional Conduct 4-8.4(d)

TESTIMONY SUMMARY

Respondent, Kent S. Wheeler, was admitted to the Florida Bar in November, 1993. His first professional employment was as an Assistant State Attorney in the Eleventh Judicial Circuit. Respondent, in 1986, terminated his prosecutorial role and began the private practice of law by sharing office space with Mr. William Castro and others. His association with Mr. Castro continued for slightly in excess of five years.

As is not unusual for neophyte private practitioners of criminal defense law, Respondent solicited members of the judiciary for appointments as a Special Public Defender (hereafter SPD). Under the practice then in existence in Dade County and many other judicial circuits in this state, each criminal division judge had nearly unfettered discretion as to whom SPD appointments would be granted.

In 1988, County Court Judge Roy Gelber campaigned for election to the Circuit Court of the Eleventh Judicial Circuit. Mr. Castro solicited Respondent for contributions to Judge Gelber. To induce Respondent to part with his money, Mr. Castro advised Respondent he would receive SPD appointments if Judge Gelber was successful. Respondent gave Mr. Castro $1300 for the use and benefit of Judge Gelber. Although Judge Gelber's campaign was successful, the SPD appointments for Respondent were not forthcoming.

When Respondent lodged a complaint with Mr. Castro, Mr. Castro agreed to confer with Judge Gelber in reference to the matter. Shortly thereafter, Mr. Castro advised Respondent the appointments

would be made if Respondent would pay Judge Gelber 25% of the gross revenues realized thereby. Respondent rejected the 25% figure but he did not reject the principle. Mr. Castro supposedly conferred once more with Judge Gelber after which he advised Respondent Judge Gelber would accept 20%. Respondent agreed to the lesser percentage figure and SPD appointments began to come his way from the pen of Judge Gelber.

Respondent admitted paying for these SPD appointments on ten or fifteen occasions throughout 1990 and in the early part of 1991. At no time did Respondent deal directly with Judge Gelber. All messages were delivered to Respondent by Mr. Castro and all cash payments for Judge Gelber were delivered by Respondent to Mr. Castro.

Because he was having severe financial problems in 1990. Respondent mentioned to Mr. Castro his need for more SPD appointments. Mr. Castro volunteered to speak with Judge Phillip Davis in reference to matter, after which this Judge appointed Respondent as SPD in a few cases. Neither Mr. Castro nor anyone else propositioned Respondent for any commission to be paid Judge Davis in consideration of SPD appointments. Respondent's dealings with Judge Davis were direct and much less subtle.

In March, 1991, Respondent, while in the Gerstein Justice Building, was solicited by Judge Davis for a $500 "loan". Respondent met Judge Davis in his chambers the next day and delivered the requested sum. Upon receipt of the money, Judge Davis made it clear, without uttering the actual words, the money would be repaid through an increase in the number, as well as an

improvement in the quality, of SPD appointments. Respondent testified it was the encounter with Judge Davis which convinced him to withdraw from the unlawful compensation schemes with both Judge Davis and Judge Gelber.

The first week of June, 1991, began the public disclosure of the investigation of several attorneys and past and present members of the judiciary in reference to what is now known as "Operation Courtbroom". The probe by the United States into possible corruption within the ranks of the judiciary in the Eleventh Judicial Circuit was the subject of much discussion in all forms of mass communication in Dade County. Cognizant of his vulnerability, Respondent retained counsel and made a proffer to Federal prosecutors of what his testimony would be if he was given a grant of immunity from all criminal prosecution. His proffer was eventually accepted. Respondent testified before a Federal Grand Jury as well as in several trials in the United States District Court for the Southern District of Florida. The Florida Bar did not grant Respondent any form of immunity.

Testifying in his own behalf, Respondent stated he had never been involved in any type of unethical conduct or illegal acts prior to becoming involved with Judges Davis and Gelber. Whatever illegal conduct he engaged in - whether IRS fraud, mail fraud, bribery, or anything else - was connected exclusively with these two judges and Mr. Castro. Respondent submits his only reason for entering an unconditional, rather than a conditional, plea to the charges now made against him was "... to get this situation behind me. (He) wanted to resolve it and seemed like that was the most

straightforward way to do that."

Respondent, married in 1983, separated from his wife in 1989. The Final Judgment dissolving his marriage was entered January 8, 1990. The disintegration of his marriage had begun in late 1988 or early 1989, a period of time which coincides with the commencement of the bribery scheme with Judge Gelber. It is Respondent's opinion his emotional strength was sapped by his failing marriage. His always shaky self esteem, which had improved as a result of his marriage and the growth of his law practice, was undermined by what he perceived to be filial rejection. Like falling dominoes, his professional accomplishments diminished. As a result of this economic and emotional battering, he opted to "... just pay the judge to get business rather than go out and try to develop it...." He knew what he was doing was blatantly and fundamentally wrong.

Respondent realized he would, eventually, be called upon to testify in reference to his dealings with Judges Davis and Gelber and Mr. Castro. Rather than wait for the inevitable, he had his attorney initiate contact with the Federal prosecutors and the Florida Bar. Although he, as mentioned previously, furnished highly incriminating evidence against himself, only the Federal government gave him immunity.

In an effort to rehabilitate himself, Respondent has engaged in psychological counseling, reduced his basic cost of operations in both his professional and private lives, has worked in charitable matters related to Hurricane Andrew and has rendered pro bono legal assistance in the field of immigration law. The Florida Bar does not contest Respondent's positive assertion he has never

mismanaged or misused trust account funds, not even when his financial problems were at their peak.

Respondent submits he has reached a point in his life, and in his emotional growth, which permits him to understand why he made dramatically wrong choices in reference to the patently unlawful compensation schemes. Similarly, he feels the aggressive psychotherapy in which he is now engaged has enabled him to overcome the impulses which drove him to destroy himself, both as a person and as a member of the Bar. Respondent accepts responsibility for contributing to a major reduction of the confidence level of the general public in the judiciary and the legal profession as a whole.

Respondent presented Allen Rutchik, Ph. D., a clinical psychologist. Dr. Rutchik first saw him as a patient on June 28, 1989. This visit was prompted by Respondent's need to discuss his then pending marital problems. Respondent next consulted with Dr. Rutchik on March 6, 1992, after he was deeply involved in the matters which now bring him before the Bar. After determining Respondent was sincerely motivated to resolve his psychological problems and not just use him as "... a kind of a foil for a legal situation...", Dr. Rutchik accepted him as a patient. Respondent continues in weekly therapy, which Dr. Rutchik describes as "very productive".

After explaining to the Court the underlying basis for Respondent's psychological difficulties, Dr. Rutchik expressed his opinion concerning his patient's current emotional profile. Respondent evinces regret, not at having been exposed as being a

part of a scheme which corrupted the judiciary and the legal profession, but at having become involved at all. According to Dr. Rutchik, Respondent is "... a person of basic integrity who does not wish to do wrong and (does) not wish to do harm." His act of coming forward with evidence which incriminated himself as well as the other actors in this sad drama was motivated by "... the discordance between his basic personality structure, i.e., an honest person with a very strong conscience and the awareness what he did was outside the realm of his normal activity. (C)onfession was designed to alleviate and expiate the guilt."

Michael Patrick Sullivan, for twenty-two years a Federal prosecutor, testified in lieu of Assistant U.S Attorney John O'Sullivan, and Assistant State Attorneys Larry Lavecchio and Dennis Badard. Respondent, through his attorney, initiated a meeting with these people within a few months after the Courtbroom search warrants were executed. Mr. Sullivan was assigned the task of presenting Respondent's testimony at trial. Respondent was deemed by Mr. Sullivan to have been completely candid at all times and to have testified honestly at trail. Respondent's testimony was important, but not pivotal, as to those who went to trial and as to Judge Gelber, who pled guilty and cooperated with the government's prosecution.

Steven Bustamante, an Assistant State Attorney in Dade County since 1986, was a prosecutor in Judge Gelber's division from a date preceding the issuance of the "Courtbroom" search warrants in 1991 until July, 1993. In his dealings with Respondent, the latter gentleman was always courteous, professional and straightforward in

his court dealings. Except for the issues presently before the Court, Mr. Bustamante had never known Respondent to be anything other than a competent, honest person and attorney.

Arnaldo Suri is a long time personal and professional friend of Respondent. Their friendship began when they both served as Assistant State Attorneys in Dade County in 1984, and has continued to the present day. For a short period of time Respondent and Mr. Suri were partners in the private practice of law. After Respondent's activities and subsequent cooperation with the prosecuting agencies became public knowledge, Respondent told Mr. Suri the details. Mr. Suri opined Respondent's involvement in the Gelber and Davis schemes was "aberrational" as he knew him to be a fine lawyer and honest person.

Juan Dejesus Gonzalez is another attorney who has known Respondent since the days when they were both prosecutor's in Dade County. Further, Mr. Gonzalez and Respondent engaged in the private practice of law as partners. He perceives Respondent to be "... a very honest, upstanding individual who (he) is proud to call (his) friend". The involvement of Respondent with Judges Gelber and Davis was, in the opinion of Mr. Gonzalez, "(t)otally out of character for (Respondent)" who was an otherwise "... very honest individual".

Circuit Court Judge Phillip Bloom, pursuant to subpoena, testified by means of conference telephone. Judge Bloom had presided over criminal cases in which Respondent was the prosecutor. He deemed Respondent to be a person of high ethical values, personally and professionally. His opinion of Respondent

changed only slightly upon learning of his admission of his involvement in the "Courtbroom" cases. Judge Bloom deemed the charges against Respondent to be most egregious.

Gary Kollin, an attorney whose principal office is located in Broward County, knows Respondent on both professional and personal levels. Except for the matter at hand, Mr. Kollin knows Respondent to be honest and ethical as a person and as a professional. In spite of Respondent's admission of guilt in the present instance, Mr. Kollin still would have no reason to disbelieve or distrust him.

Osvaldo Soto is an attorney who has known Respondent for about ten years. Mr. Soto testified as to pro bono work Respondent has done, both prior to the revelation of the instant matter and thereafter. In his considered opinion. Respondent's involvement in the Gelber and Davis matters was totally out of character.

Eduardo Osvaldo, an attorney, met Respondent when the witness was an intern in the Dade County prosecutor's office. The witness had an unspecified problem with the Florida Bar and Respondent represented him in the matter for three years, pro bono and without reimbursement for actual expenses. Mr. Osvaldo feels a deep sense of obligation towards Respondent. He believes any good he might do as an attorney and citizen will be as a result of the positive role model Respondent furnishes him. He agrees Respondent's conduct was a serious deviation from ethical conduct, but feels he (Osvaldo) has learned from it as well.

ANALYSIS

Especially because Respondent entered an unconditional plea of guilty to all charges brought by the Florida Bar, his guilt is established beyond and to the exclusion of every reasonable doubt. Even if he had not entered a guilty plea in these proceedings, the Court is satisfied he would have been found guilty thereof. Only the determination of punishment remains to be resolved.

Until he became enmeshed in the bribery scheme concerning Judges Davis and Gelber, Respondent had comported himself in keeping with the principles of ethics which should be second nature for an attorney. He gave generously of his professional talents on a pro bono basis, he represented his clients skillfully and zealously, and he treated all, friends and adversaries alike, with courtesy and compassion. When his marriage failed and his law practice began to falter, Respondent chose to follow a criminal path totally unacceptable in an orderly society.

It is clear Respondent's unethical and unsavory choices were, at least in part, motivated by his psychological weaknesses. His inability to deal effectively with the conflicts between his parents, and between himself and his parents, were contributing factors to his downfall. The fact Respondent has entered into a course of psychotherapy designed to teach him to understand himself, his conflicts and his motives in order to become a more positive person is admirable.

The fact remains, however, there is no evidence in the record to support a finding of exculpation based upon emotional defect or

mental deficiency. Respondent knew what he was doing when he agreed to participate in the bribery scheme with Judge Gelber. Similarly, his loan to Judge Davis was made with full knowledge the funds would be repaid through the guise of court appointments as an SPD. This type of conduct is so terribly destructive to the fundamentals of judicial fairness upon which democracy is predicated, it can neither be tolerated nor forgiven!

No matter how one analyzes the schemes involving Judges Davis and Gelber, Respondent contributed to turning the criminal justice system in the Elevententh Judicial Circuit into a racketeering organization. The stain cast by this judicial disgrace has fallen upon the fabric of every robe worn by every Judge in the state of Florida! How much greater damage could be done to the Bench and Bar?

This Court expressly finds:

1. Jurisdiction is vested by stipulation and by law.
2. Respondent is guilty of all charges and specifications.
3. Respondent's conduct was most egregious.
4. Respondent's conduct was an aberration from his normal disposition, i.e. ethical and honest conduct in dealing with the bench, the Bar and the general public.
5. Respondent has voluntarily cooperated with state and Federal prosecutors in all matters in which he is capable of rendering assistance. His testimony before Grand and petit juries has been significant and of

great value in the prosecution of corrupt judges and attorneys.

6. Respondent has, at his own expense, become actively involved in psychological treatment designed to furnish him a constructive method of dealing with personal and professional conflicts. Further, Respondent's mental health care program, more likely than not, will create within him a strong foundation upon which to build a better life.

RECOMMENDATION

For the reasons set forth above, it is recommended Respondent, KENT S. WHEELER, be disbarred. Because Respondent played an important and cooperative role in the prosecution of Judges Davis and Gelber and Mr. Castro, he should not be totally denied the opportunity to demonstrate his fitness to re-enter the honored rolls of those to whom the privilege of practicing law in Florida has been granted. The undersigned firmly believes Respondent is remorseful and has embarked upon a path of life which should lead him to become a constructive citizen and attorney once again. Therefore, Respondent's disbarment should be fashioned in a manner which will allow him, after five years, the opportunity of obtaining readmission to the Florida Bar.

DONE and RECOMMENDED in Chambers, at Ft. Lauderdale, Broward County, Florida, this 12 day of April, 1994.

J. Leonard Fleet
Judge, Circuit Court

cc: Jacqueline Needleman
Theodore Klein