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IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 80,689

FLORIDA BAR CASE NO. 92-70,263 (11N)

THE FLORIDA BAR,

Complainant

-vs-

KENT S. WHEELER,

Respondent

ON PETITION FOR REVIEW OF
FINAL REPORT AND RECOMMEDATION OF REFEREE

INITIAL BRIEF OF RESPONDENT

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FLORIDA STANDARDS FOR IMPOSING LAWYER DISCIPLINE

INTRODUCTION, REQUEST FOR ORAL ARGUMENT, AND STATEMENT OF THE CASE AND FACTS

This is an orignal proceeding in the Supreme Court of Florida (before a Referee), pursuant to Rules 3-7.6 and 3-7.7, Rules Regulating The Florida Bar. The Referee held a disciplinary hearing on November 1, 1993, and issued his report on April 12, 1994, recommending disbarment," fashioned in a manner which will allow (Respondent), after five years, the opportunity of obtaining readmission to the Bar" (RR.12). Respondent sought review.

The parties are referred to throughout as follows: The Respondent is KENT S. WHEELER, a member of the Florida Bar. The Complainant is THE FLORIDA BAR. The symbol "RR" will be used to designate the Final Report and Recommendation of Referee, and the symbol "T" will be used to designate the transcript of the disciplinary hearing. All emphasis is supplied, unless otherwise indicated.

Oral argument is requested in the instant case by Respondent.

Respondent accepts the Referee's version of the facts as presented in pages 1 through 9 of the Final Report and Recommendation of Referee (RR.1-9), with those exceptions or additions noted in the Argument. For purpose of faciliting the use of this brief, a chronology of material events is provided, as follows:

1983, November: Respondent becomes a member of the Bar and an

Assistant State Attorney (RR.2).

1986, April: Respondent enters private practice (RR.2), sharing space with Attorney William Castro and others (RR.2)

1988: County Court Judge Roy T. Gelber runs successfully for the Circuit Court. His intermediary, Castro, promises court appointments to Respondent for campaign contributions which are made (RR.2).

1989: Respondent's marriage of six years disintegrates. Final Judgment of dissolution is January 8, 1990. Respondent is devastated and his practice and finances suffer drastically (RR.5).

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).

1990, late in the year: Respondent decides to leave the office he and Castro share. To encourage him to stay, Castro persuades Circuit Court Judge Phillip Davis to appoint Respondent to several cases. No improper compensation is made or discussed (RR.3).

1991, March: Judge Davis using the leverage of his patronage solicites 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).

1991, June: Search warrants are served on Gelber, Davis, and

others (RR.4). In June or July, 1991, Respondent makes a proffer of testimony to prosecutors and is given use immunity (RR.4).

1991, September: Respondent testifies before the investigating Grand Jury and contacts Bar counsel (T.32,121).

1992, March: Respondent begins psychotherapy with Dr. Allen Rutchik (T.45).

1992, October: Bar files its Complaint. Respondent testifies in United States v. Sepe, Shenberg, Davis, and Goodhart (Bar Exhibit 1, Transcript of testimony).

1993, November: Referee holds Respondent's disciplinary hearing and Respondent testifies in United States v. Castro et al (Bar's Supplemental Exhibit).

1994, April: Referee issues his Final Report And Recommendation Of Referee, recommending disbarment, "fashioned in a manner which will allow him, after five years, the opportunity of obtaining readmission to the Florida Bar." (RR.12).

1994, May: Respondent testifies for the Bar at disciplinary hearing of Phillip Davis (see Bar's Motion to Strike).

POINT ON APPEAL

Whether the Respondent who has an otherwise spotless disciplinary record should be suspended or disbarred when he was approached by a circuit court judge offering in exchange for kickbacks court appointed work which he accepted at a time when his emotional strength was at low ebb due to a failing marriage, came forward and voluntarily cooperated with prosecutors and the Bar, gave testimony of great value and substantial assistance in the prosecution of corrupt judges and attorneys, became actively involved in ongoing mental health treatment and rehabilitation, and demonstrated remorse for his actions and good reputation for character and professional ability amongst the Bench and Bar.

SUMMARY OF ARGUMENT

Respondent's argument is divided into four sections and is prefaced with a brief introduction. The sections are roughly based on The Florida Standards For Imposing Lawyer Sanctions, Standard 3.0. Section 1. discusses the Respondent/lawyer's mental state, and argues that while the M'Naughton test was correctly applied, Respondent's psychological, emotional, and marital problems were not adequately factored as mitigating circumstances. Section 2. discusses both the duty violated and injury caused by Respondent's misconduct. Its principal thesis is that the kickback scheme was authored by a circuit court judge who effectively extorted Respondent to pay for court appointments, and that Respondent's voluntary cooperation with law enforcement and substantial testimony of great value to the prosecution, must be considered in evaluating and ameliorating the misconduct. Section 3. argues that the referee failed to properly note or adequately factor a number of mitigating factors, including: an otherwise spotless disciplinary record, cooperation and disclosure with the Bar, delay in disciplinary proceedings and time to reflect on the misconduct, personal and professional detriment and hardship, emotional and marital problems and other important mitigating factors. Section 4. argues that suspension is the proper sanction when Respondent has chosen to voluntarily approach and cooperate with law enforcement, both in order to reward the choice and for sound policy reasons.

ARGUMENT

Disbarment is too harsh a sanction when the Respondent, who has an otherwise spotless disciplinary record both before and after the instant matter, was approached by a circuit court judge offering in exchange for kickbacks court appointed work which he accepted (RR.3) at a time when his emotional strength was at low ebb due to a failing marriage (RR.5,10), came forward and voluntarily cooperated with prosecutors and the Bar (RR.4&11), gave testimony of great value and significance in the prosecution of corrupt judges and attorneys (RR.12), became actively involved in ongoing mental health treatment and rehabilitation (RR.12), and demonstrated remorse for his actions (RR.12) and good reputation for character and professional ability amongst the Bench and Bar (RR.7-10).

The Final Report and Recommendation of Referee despite making and implying the above-referenced factual findings, fails to give proper weight and analysis to its findings and recommends "disbarment", but writes in conclusion, "The undersigned firmly believes Respondent is remorseful and has embarked on 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." (RR.12).

The Referee uses the phrase, "opportunity of obtaining readmission", rather than what disbarment would actually mean under Rule 3-5.1(f), Rules Regulating The Florida Bar: an opportunity to

apply for readmission after five years. The Referee is either mistaken about an important consequence of disbarment, or he is recommending a hybrid form of discipline, in effect a five year suspension, which is prohibited by Rule 3-5.1(e), Rules Regulating the Florida Bar. Whichever interpretation is preferred, the Referee's choice of language makes plain that he believes a discipline less extreme than disbarment as contemplated in Rule 3-5.1(f) is appropriate and indicated in the instant matter.

A referee's findings of fact carry a presumption of correctness and will be upheld on review unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896, 898 (Fla. 1986). With a few exceptions and some additions, as noted below, Respondent accepts the factual summary contained in the Final Report and Recommendation of Referee (RR.1-9). However, Respondent is more critical of the Referee's analysis in four aspects. The Florida Standards For Imposing Lawyer Sanctions, an amended version of the ABA Standards, was adopted by the Board of Governors of the Florida Bar in 1986 to supply Bar counsel, referees, and this Court, with a format for Bar discipline cases. In the Preface and in Standard 3.0, the factors to be considered are given: "(a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors."

Respondent submits that the Referee's analysis of these relevant inquiries was incorrect. This brief adopts the format

suggested by the four factors of Standard 3.0 as its organizing principle. "Duty violated" and "injury caused" are addressed jointly below in the second part of the argument. The fourth section of Respondent's argument will focus on the issue of proper discipline, an issue to which this Court takes a broader approach in its scope of review of the Referee's recommendation. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989).

1. THE REPORT CORRECTLY APPLIES THE M'NAUGTON RULE, BUT INCORRECTLY FAILS TO FIND AND CONSIDER THE RESPONDENT'S MENTAL STATE--PSYCHOLGICAL PROBLEMS AND A TRAUMATIC, CONTEMPORANEOUS DIVORCE--IN MITIGATION

The report fails to appropriately consider the Respondent's mental state. The facts of Respondent's emotional weakness, psychological problems, and failing marriage, are fairly presented by the report (RR.5-7), and the Referee correctly uses the M'Naughton test and concludes that, "there is no evidence in the record to support a finding of exculpation based upon emotional defect or mental deficiency" (RR.10-11).

But it is clear from the case law that an analysis of whether an attorney meets the test for criminal insanity is not the only criteria to be applied to determine his mental state in disciplinary proceedings. The Florida Bar v. Condon, 632 So.2d 70 (Fla. 1994); The Florida Bar v. Graham, 605 So.2d (Fla. 1992); The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984); The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983); The Florida Bar v. Moran, 273 So.2d 379 (Fla. 1973); The Florida Bar v. Parsons, 238 So.2d 644

(Fla. 1970).

The proper approach is instructed in Musleh at 797, in which the referee found that the attorney's insanity-based acquittal on federal charges of transporting and selling stolen securities, was not dispositive of the Bar proceedings and found by clear and convincing evidence that his mental state did not absolve him of responsibility for his misconduct. The referee did explicitly and correctly find the attorney's mental disorder to be a mitigating factor and was upheld in this approach, as was his recommendation of a ninety day suspension.

This Court's rationale for a short suspension for very serious misconduct was, "While we recognize the gravity of respondent's misconduct, we consider in mitigation his severely limited ability to control his activity. We cannot see how greater deterrence or protection of the public will be achieved by a lengthy suspension of one who, until this episode, had an unblemished record and who has now, with the help of ongoing medical assistance, returned to his former level of conduct and practice." Musleh at 797.

The instant Report's analysis (RR.10-11) states that Respondent's behavior was, "at least in part, motivated by his psychological weaknesses. His inability to deal effectively with his conflicts between his parents, and between himself and his parents, were contributing factors to his downfall." (RR.10). Earlier, the Report notes that the Respondent's disintegrating marriage and its dissolution coincided with the commencement of the illegal compensation of Judge Gelber (RR. 5).

In The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), for example, the respondent's misconduct in pocketing client's cost money, child support, and closing proceeds, was mitigated by marital and drug/alcohol problems. A two year suspension was imposed. But here in the instant matter the Referee incorrectly subsumes and discounts material facts--marital discord and divorce and mental suffering--within his analysis under M'Naughton.

Tellingly the rehabilitative effect of the course of psychotherapy to which Respondent has committed since March, 1992, is found to be a mitigating factor (RR.12), and of course this Court has stated that, "Disbarment is an extreme penalty and should be imposed only in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Davis, 361 So.2d 159,162 (Fla. 1978).

However, the report never finds, as it should under the case law, under the facts as it develops them, and by pure logic (after all, what would be the benefit of psychotherapy for a mentally healthy individual?), that Respondent's psychological problems and failing marriage are also mititgating factors. Depression and anxiety have been recognized by this Court in a misuse of trust funds case--one of the most serious offenses a lawyer can commit--to be properly considered as mitigating factors. Condon at 71.

The psychological profile of the respondent in Perri, another misappropriation of client funds case resulting in suspension, is not so different in degree and nature of the problem--major difficulties in interpersonal relationships and expectations--from

the instant matter. There the respondent had a, "compulsive personality disorder" causing him to try to fulfill, "almost in an egomaniacal [sic] way, the expectations of other people." Perri at 829.

Here per Dr. Allen Rutchik, a clinical psychologist since 1970 who at the time of the hearing had seen Respondent weekly for a year and a half (T.44), "very faithfully and very productively" (T.45-46), the Respondent's, "thematic problem is very low self-esteem and a great fear of rejection and a consequent fear of being with people," (T.48), due in part to unresolved conflicts between Respondent and a domineering, critical mother and a passive, emotionally unavailable father (T.50-55). Dr. Rutchik went on to state that Respondent suffers from repression of feelings and assertiveness (T.48), terrific procrastination (T.48), pointless internal guilt over feelings (T.48), neurosis and fear of people (T.52-54), and irrational feelings of worthlessness (T.66). Further: that these irrational feelings were deepened by his separation in mid-1989 and divorce in January, 1990 (RR.5), and that Respondent was particularly vulnerable given his personality structure to Judge Gelber's solicitation (T.56).

Respondent's psychologist also indicates that, "very nice progress" has been made in therapy in understanding and dealing with psychological issues and interpersonal relations (T.59). Respondent has, "seen his background for what it really was and understood that the humiliation and bad feelings that he suffered and the self-worth problems that he had were not a consequence of

his own inadequacy but a consequence of his mother's unfortunate reaction to him and reflected more the fact that it was her problem rather than his. He has grown less self-conscious, I think more assertive. He is less afraid of rejection. His relationships have improved dramatically and, in gerneral, he feels much freer and is not nearly as careful and guarded as he has been all of his life." (T.59). Dr. Rutchik predicted that as a result of therapy and growth, Respondent, "would be a much better practicing attorney...his interpersonal relationships would be facilitated...(and) he would be much freer no matter what he did and if he chose to be a practicing attorney, he would be much better at it than before." (T.61).

The Referee, however, reports little of these findings, although from his comment, "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" (RR.6), it appears that the Referee has no quarrel with the psychological findings, but prefers to focus on the issues of Respondent's remorse--regret at having become involved at all, not just at exposure (RR. 6,7)--and motivation for coming forward with incriminating evidence--"discord within 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." (RR.7).

2. THE RESPONDENT WAS EXTORTED AND SHAKEN DOWN BY SITTING JUDGES, HE WRONGFULLY ACCEPTED THE PROPOSITION, BUT LATER VOLUNTARILY APPROACHED LAW ENFORCEMENT AND CONTRIBUTED SUBSTANTIALLY TO THE PROSECUTION. BOTH THE INVOLUNTARINESS OF THE ILLEGAL CONDUCT AND SUBSTANTIAL AND VOLUNTARY COOPERATION WITH LAW ENFORCEMENT SHOULD BE FACTORED IN EVALUATING DUTY VIOLATED AND INJURY CAUSED

The Final Report And Recommendation of Referee notes the entry of an unconditional guilty plea to the charges that the Respondent violated Rules 3-4.3, 3-4.4, and 4-8.4(d), Rules Regulating The Florida Bar:

> The Commission by a lawyer of any act that is unlawful or contrary to honesty and justice and commission of a crime. 3-4.3 and 3-4.4
> A lawyer shall not engage in conduct that is prejudicial to the administration of justice. 4-8.4(d)

and accurately describes the conduct (RR.2-4), but both errs and omits in its analysis of the duty violated and injury suffered. The Referee found Respondent's conduct to be, "most egregious", but, "an aberration from his normal disposition, i.e. ethical and honest conduct..." (RR.11). The Referee failed to include, factor, and appropriately consider in his analysis, the following points of significance.

Respondent originally was promised court appointments by Judge Gelber's intermediary to induce legal campaign contributions (RR.2). Political connections were frequently the criteria for distribution of court appointments in Dade County, Florida, per the testimony of Florida Bar member Arnaldo Suri (T.89-93). Impropriety within the legal community in which respondent practices though it does not absolve improper conduct is properly viewed as a mitigating factor. The Florida Bar v. Machin, 635 So.2d 938 (Fla.

1994).

Respondent's initial involement with Gelber was legitimate, This indicates that Respondent did not intend or desire to procure appointments illegally. Like the lawyer disciplined in The Florida Bar v. Fertig, 551 So.2d 1214 (Fla. 1989), Respondent's initial involvement with the dominant figure--Judge Gelber in the improper compensation scheme--was unknowing. Circuit Court Judge Roy T. Gelber had unfettered discretion to award appointments. He proposed the kickback scheme insisting on receiving kickbacks from attorney's pay for appointed work (RR.2).

Assistant United States Attorney Michael Patrick Sullivan, a twenty-two year career federal prosecutor, who represented the government in the first Courtbroom trial testified that in his opinion Judge Gelber had extorted Respondent and others who wanted court appointments (T.75). Thus a sitting circuit court judge led Respondent and others into criminal misconduct.

In The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989), a three year suspension case in which the attorney respondent had been convicted and sentenced to prison for mass consumer fraud, this Court recognized the propriety of receiving the trial judge's testimony on relative culpability. In the instant matter Respondent was immunized and never charged, therefore the prosecutors were in the best possible position to determine degrees of culpability.

The prosecutor's opinion that Respondent was extorted into the judge's scheme should be given its full weight under these facts and the case law. So should his opinion be given full weight that

Respondent had been completely candid at all times (RR.7) and that, "(the prosecution) probably would of obtained most of the information that (the Respondent) gave us eventually but he provided us with it early and that led to, you know, gaining quite a bit of information that we never had up to that point." (T.77)

State prosecutor Steven Bustamante testified from personal observation and knowledge that Respondent was highly professional and competant in his representation of the defendants he was appointed to represent in Judge Gelber's courtroom and others (RR.7,8&T.80,81). One might well expect the reverse: that Respondent's attitue towards the indigent defendants he had to pay Gelber for the privilege of representing might well have been careless and less than professional.

The testimony of members of the Bar, Attorneys Arnaldo Suri, Juan DeJesus Gonzalez, Gary Kollin, Osvaldo Soto, and Eduardo Soto (mistakenly called Eduardo Osvaldo in the Report) and Circuit Judge Phillip Bloom (RR.8-10), that Respondent is an able attorney of generous and compassionate character, further supports the premise that even while emotionally at a low point in his life, Respondent performed his work well. In fact for three years before and during the pendency of the kickback scheme, Respondent represented Eduardo Soto pro bono, without reimbursement for actual expenses, before the Board of Bar Examiners (RR.9, T.146-147). The Referee's finding that Respondent is an able and gernerous attorney (RR.10) is amply supported by the record.

Judge Gelber never ruled for Respondent in any manner that was

not called for by law and no money was ever paid to obtain a particular ruling or outcome (Bar's Exhibit 1, The Florida Bar's Complaint, Exhibit A, Item 5.I.). This very important factor distinguishes this case from active interference with the process of justice which occurred in the cases such as The Florida Bar v. Leon, 510 So.2d 873 (Fla.1987) and The Florida Bar v. Merkle, 498 So.2d 1242 (Fla. 1986), in which monies were paid to improperly alter criminal sentences.

Respondent voluntarily withdrew from the kickback scheme (RR.4; The Florida Bar's Complaint, Paragraphs 15 and 16). Respondent voluntarily approached both federal prosecutors and Bar counsel (Bar Exhibit 1, The Florida Bar's Complaint, Exhibit A, Item 5.J.; RR.4,11).

One significant error made in the Referee's Report pertains to the shake down incident with Circuit Judge Davis. In accurately describing Judge Davis' solicitation of a $500.00 loan from Respondent in the section summarizing testimony (RR.3), the Report correctly states that only after receiving the money did Judge Davis make it known that he intended to repay by exercising his appointment power (RR.3; T.25-27). But later in its analysis section, the Report attempts to buttress its recommendation. It contradicts itself and incorrectly states, "Similarly, his loan to Judge Davis was made with full knowledge the fund would be paid through the guise of court appointments..." (RR.11). The Report does correctly state that Respondent testified that his experience with Judge Davis which convinced him to withdraw from the unlawful

compensation scheme (RR.4; T.27,31).

Respondent was neither arrested, nor charged, nor convicted of any crime. There is no allegation of injury to any member of the public or client caused by Respondent's conduct, a very important consideration per the case law. 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. Neu, 597 So.2d 266 (Fla. 1992); The Florida Bar v. Stark, 616 So.2d 41 (Fla. 1993); The Florida Bar v. Marcus, 616 So.2d (Fla. 1993). There isn't even an allegation that Respondent's bills to the County for services rendered were excessive. No detrimental effect on clients is important for sound policy reasons, it is this Court's duty to protect the public. The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla.1984)

Justice Ehrlich points out in his dissent in The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987), the fact that a lawyer is convicted or not convicted of a crime is a factor worthy of consideration. The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), also supports this proposition: Lord who failed to file Form 1040 for twenty-two years pled to federal misdemeanors. In Lord The referee's report noted ten mitigating factors which were approved by this Court in its review, one of which was that Lord had not been convicted of a felony and only had to serve eighty-one days incarceration as a condition of probation.

The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), is a similar case to the instant matter. Pettie's conduct was very serious, participation in a conspiracy to import 15,000 pounds of

marijuana; but he was not prosecuted or disbarred. He was suspended for one year when this Court overruled the recommended discipline of disbarment, because Pettie voluntarily initiated contact with law enforcement, cooperated with authorities, suffered severe economic loss, closed his law practice, admitted his wrong, and risked his life to help further the investigation. Pettie at 738.

Respondent's case is especially similar to Pettie in its mitigating elements: initiation of contact with law enforcment (RR.4&11; T.127-129), voluntary and substantial cooperation with law enforcement and the Bar (RR.12, T.75-77), a sharply reduced practice (RR.5) and the knowledge of eventual cessation of law practice for at the least some substantial period of time, candid admission of wrongdoing, and assistance including public testimony on several occasions in the investigation of corrupt judges and attorneys (RR.12). Courtbroom Grand Jury: September, 1991 (T.32), United States v. Sepe, Shenberg, Davis and Goodheart, October, 1992 (see Bar's Exhibit 2); United States v. William Castro et al, November 1993 (Bar's Supplemental Exhibit); The Florida Bar v. Phillip Davis, May, 1994 (see Bar's Motion to Strike).

Respondent concedes he never felt his life was at risk. Courtbroom defense attorneys did cause a female undercover agent to seek out Respondent in a failed attempt to entrap and embarrass him. (See pages 237-253, 255-262, Excerpt of Testimony of Kent S. Wheeler, United States v. Castro et al, admitted to record by Referee's Order of Feruary 14, 1994, as Bar's supplemental exhibit). The words of the Pettie referee are appropriate and

timely in the instant matter, "Obviously law enforcement would favor a lighter discipline in order to encourage other attorneys who might be similarly situated to come forward." Pettie at 737.

3. THE REFEREE FOUND REMORSE, REHABILITATION, GOOD CHARACTER AND PROFESSIONAL ABILITY, VOLUNTARY COOPERATION WITH LAW ENFORCEMENT, SIGNIFICANT TESTIMONY OF GREAT VALUE, BUT THE EVIDENCE ALSO SUPPORTS FINDING IN MITIGATION: AN OTHERWISE SPOTLESS DISCIPLINARY RECORD THROUGH THE PRESENT, FULL DISCLOSURE AND COOPERATION WITH THE BAR, DELAY IN DISCIPLINARY PROCEEDING AND TIME TO REFLECT ON MISCONDUCT, PERSONAL AND PROFESSIONAL DETRIMENT AND HARDSHIP, EMOTIONAL AND MARITAL PROBLEMS, AND OTHER IMPORTANT MITIGATING FACTORS

The Final Report And Recommendation Of Referee--which properly found remorse (RR.12), rehabilitation in progress (RR.12), good character (RR.11), professional ability (RR.7-11), voluntary cooperation with law enforcement (RR.11), significant testimony of great value in the prosecution of corrupt judges and attorneys (RR.11-12), and that the misconduct was aberrant behavior (RR.11)--failed to find or emphasize a number of other, properly mitigating factors, to wit:

The Respondent's otherwise unblemished disciplinary record, both before and after the instant matter (RR.5-6, 11, records of this Court) is a key consideration in mitigating a lesser penalty. However, the Referee failed to expressly make this finding. Although such a finding is implicit in the finding that Respondent's conduct was aberrational, Respondent is entitled to the benefit of an explicit and accurate finding of an otherwise spotless record.

This Court has consistently held that lack of prior and subsequent discipline is important in the most serious cases in which a presumptive penalty of disbarment was reduced to a suspension. The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989): three year suspension for mass consumer fraud. The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983): six month suspension for failure to file tax returns for twenty-two years, Lord owed taxes on income of $545,000.00. The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984): two year suspension for theft and interference with the administration of justice.

Free and full disclosure to the Bar is indicated by the Florida Bar's Complaint, Exhibit A, Respondent's Unconditional Guilty Plea for Consent Judgment, Item 5.J., which shows that Respondent voluntarily approached and apprised the Bar of his misconduct. Free and full diclosure has been frequently held to be a mitigating factor, as has early admission of wrongdoing, The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983), and cooperative attitude toward Bar proceedings--herein evidenced by Respondent's free, full, and early disclosure and the making of an unconditional guilty plea. The Florida Bar v. Blessing, 440 So.2d 1275 (Fla. 1983); The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992).

Duration of the disciplinary proceedings and resulting time to reflect is a factor that should be found by this Court. Bar counsel was originally contacted by Respondent in September, 1991; The Florida Bar's Complaint was served October 28, 1992; The Referee's hearing was held November 1, 1993; Referee's Final Report And

Recommendation was issued April 12, 1994. The only delays attributable to Respondent are one continuance of the hearing before the Referee due to his counsel's scheduling conflict and a twenty-one day extension to file this brief.

Delay in disciplinary proceedings is recognized in several cases as inuring to the Respondent's benefit. The Florida Bar v. Kaufman, 347 So.2d 430 (Fla. 1977): when three years elapsed between filing of charges and oral argument, respondent's two year suspension changed to probation, because, "respondent has had time to evaluate his conduct and has experienced personal and profession detriment", during the three years. The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984): seventeen month delay in issuance of referee's report reduced one year suspension to thirty days. The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993): five years of tangled proceedings gave respondent time during which he experienced personal and professional detriment to evaluate his conduct. The Florida Bar v. Micks, 628 So.2d 1104 (Fla. 1993): unreasonable delay in disciplinary proceedings, a mitigating factor.

Respondent has had the time and opportunity of more than three years to reflect. During that time he has testified under oath before five different tribunals concerning the instant matters. He has suffered adverse publicity and interference with and investigation of his private life by Courtbroom defense attorneys. Loss of friends. Loss of clients. Loss of professional esteem. Loss of security. And faces loss of livelihood. (T.119-122).

Personal and professional detriment and hardships are independently recognized as mitigators. The Florida Bar v. Perri, 435 So.2d 827 (Fla.1983): loss of practice, reputation, security, family. The Florida Bar v. Lord,433 So.2d 983 (Fla. 1983): loss of position, actual and potential clients, professional esteem and embarassement. The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989), loss of professional esteem and personal embarassement. The Florida Bar v. St. Laurent, 617 So.2d 1055 (Fla. 1993): living under a cloud of proceedings for four years, held to be mitigating circumstance.

The Court's recognition that marital and family problems are impediments to the proper practice of law is of long standing. Justice Boyd was publically reprimanded for ex parte communications and destruction of evidence. In mitigation this Court found the Justice to be under extreme mental pressure due to the illness and death of his father, his own illness, and his re-election campaign. In Re Inquiry Concerning Judge Boyd, 308 So.2d 13 (Fla. 1975). This Court has recognized that marital problems are a mitigating factor in Bar discipline cases: The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988); The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992); The Florida Bar v. Stark, 616 So.2d 41 (Fla. 1993).

The Referee's Report (RR.5) reflects in its statement of facts that, "Respondent married in 1983, separated from his wife in 1989". Consulted a marriage counselor on June 28, 1989 (RR.6). The Respondent was solicited to kickback part of his court-appointment fees by Judge Gelber's intermediary in late 1989 or early 1990

(Florida Bar's Complaint, Paragraph 9, Exhibit A, Item 5.F.) Judgment of dissolution of marriage was entered January 8, 1990 (RR.5). Per the Report, Respondent's, "shaky self-esteem, which had improved as a result of his marriage and the growth of his law practice, was undermined", by the disintegration of his marriage. "Like falling dominos, his professional accomplishments diminished. As a result of this economic and emotional battering", Respondent wrongfully accepted Judge Gelber's proposition (RR.5), which came at a low point in his life. Based on the Report of the Referee an explicit finding of mitigation for family/marital difficulties is warranted and should be made or inferred by this Court in its review.

Similarly to marital woes, emotional/psychological/mental problems have been considered to be important mitigating factors in a number of Bar discipline cases. The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983): respondent converted $127,446.46 in client's funds over a twenty-seven month period, suspended for three years when diagnosed with a compulsive personality disorder which could be overcome by therapy. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984): transportation and sale of stolen securities, ninety day suspension due to mental illness, though referee found Musleh appreciated the criminality of his acts. The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988): conversion, emotional and substance abuse problems, two year suspension. The Florida Bar v. Marcus, 616 So.2d 975 (Fla. 1993): conversion of $39,000.00, substance abuse and treatment coupled with delay which gave Marcus

time to reflect and rehabilitate, resulted in three year suspension despite felony conviction. The Florida Bar v. Condon, 632 So.2d 70 (Fla. 1994): Depression, anxiety, and continuing treatment for same mitigated repondent's "egregious" behavior of trust money misuse and lack of cooperation with Bar auditors--eighteen month suspension. The case made for the inclusion of this mitigating element in the first section of this Argument is submitted. It strongly supports the proposition that psychological and emotional problems plagued Respondent. A finding should be made that doubt is cast on the intentionality of his misconduct or that the misconduct is mitigated in consideration of Respondent's mental health. The Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992).

Respondent was relatively new to the practice of law and newer yet to the private practice of law at the time the misconduct occured. 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 (T.13). Relative inexperience in the practice of law has been found to be a mitigating factor. The Florida Bar v. Fertig, 551 So.2d 1214 (Fla. 1989): "When the misconduct occured, Fertig was relatively new to the practice of law." In this case relative inexperience and emotional and marital problems in combination weakened Respondent who acquiesced to the shake down of two bullying and manipulative circuit court judges. A more experienced, self-confident, less distraught practitioner would have refused.

Several other factors (some previously discussed in the

section on duty and injury) are properly found in mitigation: Respondent was neither criminally charged, not convicted. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983): no felony conviction and short prison time, held a mitigating factor. Impropriety within the legal community where Respondent practices, The Florida Bar v. Machin, 635 So.2d 938 (Fla. 1994). Respondent was extorted by a circuit court judge who he had supported for election to kickback twenty per cent of his fees in order to receive court appointments. Legitimate initial involvement with Circuit Judge Gelber. The Florida Bar v. Fertig, 551 So.2d 1214 (Fla. 1989). There was no detrimental effect on clients. The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984); The Florida Bar v. Perri, 435 So.2d 827 (Fla.1983). Pro bono, community work, and status as a sole practitioner. The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992). Favorable evidence as to character and ability by members of the Bar. Lord, Diamond.

4. SUSPENSION IS THE PROPER SANCTION IN THIS MATTER BECAUSE WHEN RESPONDENT WAS FACED WITH THE CHOICE OF JOINING THE COVER-UP OR VOLUNTARILY APPROACHING LAW ENFORCEMENT, HE MADE THE RIGHT MORAL CHOICE. POLICY DICTATES THAT THIS COURT ENCOURAGE LAWYERS WHO IN THE FUTURE FIND THEMSELVES IN SIMILAR POSITIONS TO COME FORWARD AND AID THE CAUSE OF LAW AND JUSTICE

The Report's recommendation of discipline is too extreme given the above cited circumstances and case law. Because it is ultimately responsible for an appropriate sanction, this Court's scope of review is somewhat broader when a referee's recommendation

of discipline is reviewed. The Florida Bar v. Inglis, 438 So.2d 854 (Fla. 1985); The Florida Bar v. Anderson, 538 So.2d 852,854 (Fla. 1989); The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994). Although, it is also said that a referee's recommendations come with a presumption of correctness. The Florida Bar v. Roberts, 626 So.2d 658 (Fla. 1993).

However, in the instant case the recommendation is an incorrect one for an intrinsic, purely legal reason. The Referee has effectively recommended a five year suspension which is improper under the applicable Rules Regulating the Florida Bar, Rule 3-5.1 (e) and (f). "Respondent's disbarment should be fashioned in a manner which allows him, after five years, the opportunity of obtaining readmission to the Florida Bar" (RR.12).

This Court has stated in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970), that the purposes of attorney discipline are three:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Analysis under the Pahules model has become important in many bar discipline cases. The respondent's professional career often hangs in the balance of the analysis. Musleh at 797, Lord at 986, Hartman at 608.

The first prong of Pahules is concerned with the effect of the imposed discipline on society. This Court has a duty to protect the public from unethical conduct. In the instant matter, the injury caused by Respondent's conduct is not quantifiable. In fact, no member of the public, no client of Respondent, was injured. The Respondent's representation of the indigents he represented was competant and professional (T.80-81) in the opinion of the attorney in the best position to know, his adversary.

The real damage of misconduct of the sort admitted by Respondent is intangible, not readily measurable; its severity is determined by perception and point of view. As the Referee puts it, Respondent's conduct contributed to, "a major reduction of the confidence level of the general public in the judiciary and the legal profession as a whole." (RR.6). Certainly, the public has a right to expect honesty in its court system; certainly, justice was for sale in certain courtrooms.

Respondent was not interested in buying justice, but due to his fragility he did accept the judge's offer to buy work. He came to reject that course and rejected the importunities of others to engage in a cover-up of the scandal (T.131,132). When he came forward and contacted the prosecutors, he had no assurance that immunity and non-prosecution would be the result. He testified publicly about what he did and what he knew (T.127-129; Bar's Exhibit 1 and Supplemental Exhibit). He asked the question: why did I need to rely on a corrupt judge for work? And sought the answer in psychotherapy and personal growth (T.45, 117).

This Court cannot change history. The Courtbroom scandal unfortunately happened, and the court system must engage itself in the process of prevention of unethical behavior in the future. In this regard it is of no snall importance that Respondent's disciplinary record is otherwise spotless, and that members of the Bench and Bar testified that Respondent is an able, effective, honest attorney (RR.7-10). The Referee found that, "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 to an attorney. He gave generously of his professional talents on a pro bono basis, he represented his clients skillfully and he treated all, friends and adversaries alike, with courtesy and compassion" (RR.10).

The Referee explicitly found, "Respondent has, at his own expense, become actively involved in psychological treatment designed to furnish him with a constructive method of dealing with personal and professional problems. Further, Respondent's mental health program, more likely than not, will create within him a strong foundation upon which to build a better life" (RR.12). Under these facts, the public would be better served by a suspension, rather than disbarment. Respondent is a qualified and able lawyer who will serve the public well in the future. After all he has been through, the risk of injury to the public by recurrent unethical behavior is extremely minimal.

Pahules' second prong is concerned with fairness to the respondent. The sanction must be sufficent to punish the breach of

ethics and at the same time encourage reformation and rehabilitation. Pahules at 132. It is submitted that a strong case is made herein for the proposition that Repondent has embarked upon and pursued, and continues to pursue, the path of reformation and rehabilitation. He has suffered personal and professional detriment. He had time and took the opportunity to reflect and learn and grow. A suspension would punish Respondent's misconduct and, in a sense, reward his efforts to redeem himself.

The remaining question of prong two is whether a suspension adequately punishes the misconduct. In The Florida Bar v. Riccardi, 264 So.2d 5, 6 (Fla. 1972), this Court wrote:

> 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...We are, therefore, not inclined to leniency in bribery matters, absent mitigating factors in the individual case. (Emphasis supplied.)

In the instant case it is undisputed that Respondent did not attempt to induce anyone to engage in illegal practices. Respondent was the one induced or extorted. He requested court appointment work from Circuit Court Judge Gelber who demanded kickbacks for the exercise of his discretion. He received legitimate court appointments from Circuit Court Judge Davis who used this as leverage to shake Respondent down for a "loan". Once Davis had the money, he told Respondent that he would pay him back through his office, and at that point Respondent began to reassess himself and

his conduct. Given the facts as found by the Referee and the opinion of the case prosecutor that Respondent was extorted, it is fair to say that this case does not fall under the rationale of Riccardi and similar cases in which the lawyer respondent initiated the illegal activity. The Florida Bar v. Rambo, 530 So.2d 926 (Fla. 1988); and The Florida Bar v. Rendina, 583 So.2d 314 (Fla. 1991). Nor is this a case like Rendina or Leon where payment was made or discussed to influence a reduction of sentence, which, "attacks the very core of our system of justice." Rendina at 316. It is a case in which money was illicitly paid to a public official at his insistence for work which Respondent was qualified to perform.

It is also a case in which Respondent realized the wrongfulness of his conduct and had a choice: he could continue to be a part of the problem (join the cover-up), or become a part of the solution (come forward and cooperate with law enforcement). To his credit Respondent chose the latter.

The Pettie Referee recommended disbarment because he concluded, "although it is appropriate and traditional that law enforcement might reward Mr. Pettie to whatever degree they see fit by refraining from prosecuting him criminally, there is a need to deter other attorneys who may be tempted to become involved in similar violations. I have therefore concluded that, commendable as his efforts on behalf of law enforcement have been, they cannot justify mitigation of disciplinary measures." Pettie at 737.

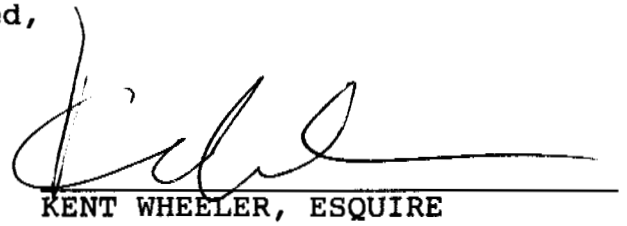
To Pettie's assertion of error that the referee's recommendation of disbarment was inappropriate, this Court,

"reluctantly agree(d)", stating, "(W)e believe that it is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution," Pettie at 738, quoting The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). It is believed that the Court's unstated rationale for taking Pettie's cooperation into account was twofold. First, the sanction was ameliorated to reward respondent for taking the right path, however belatedly.

Second, and more important from a policy standpoint, the Pettie Court took into account the certainty that someday other lawyers would find themselves in the same sort of dilemma as Pettie and ask themselves: should I cover-up or should I 'fess up? Towards resolving that very difficult dilemma with the correct moral choice, this Court offered encouragment and support with its wise discipline in Pettie. The encouraging and supportive response also correctly answers the above question, whether a suspension adequately punishes Respondent's conduct, as well as the third question--whether the judgment is severe enough to deter others from like violations--asked in the Pahules analysis. A substantial suspension will alert and inform those who in the future find themselves similarly situated to Respondent and the respondent in Pettie. The message: severe misconduct will not be tolerated or lightly punished, but voluntary cooperation with the justice system and hardship suffered in the cause of law and order will be rewarded.

CONCLUSION

The Referee's findings that Respondent is remorseful and actively engaged in rehabilitating himself fit into the case law which argues for a lighter sanction. "Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Davis, 361 So2d 159, 162 (Fla. 1978), quoted with approval in The Florida Bar v. Felder, 425 So.2d 528, 530 (Fla. 1982). Accord The Florida Bar v. Carlson, 183 So.2d 541 (Fla. 1966). To sustain disbarment there must be a showing that the person charged should never be at the bar. The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966); State ex rel. The Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954). Bar disciplinary proceedings are remedial, not penal. The Florida Bar v. Massfeller, 170 So.2d 834 (Fla. 1964). Based on the foregoing authorities, facts, and argument, it is submitted that the Referee's findings mandate a suspension, not disbarment. It is further suggested that to benefit the public this Court require that Respondent complete a large number of hours of pro bono legal work during the period of suspension through an approved pro bono program. Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a correct copy of the foregoing was mailed/delivered to Jacquelyn P. Needelman, Esq., Attorney for The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131, this 30th day of September, 1994.

KENT WHEELER, ESQ.