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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 RECOMMENDATION OF REFEREE

REPLY BRIEF OF RESPONDENT

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original Reply Brief and seven copies of same were forwarded by overnight mail to the Clerk of the Supreme Court of Florida, and that correct copies of the foregoing were mailed to Jacquelyn P. Needelman, Esq., Attorney for The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 23rd day of November, 1994.

PREFACE

The parties are 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. The symbol "C" will be used to designate the transcript of The United States v. William Castro et al, and the symbol "D" will designate the transcript of The United States v. Harvey Shenberg, Phillip Davis et al; Respondent testified for the government at both trials. The symbol "AB" will be used to designate references to the Complainant's Answer Brief.

ARGUMENT AND REBUTTAL

1. DURATION OF PROCEEDINGS RESULTING IN TIME TO REFLECT ON MISCONDUCT AND RESULTING HARDSHIPS MANDATE SUSPENSION

The Answer Brief mistakenly takes the position that two, very important mitigating factors--lengthy duration of the disciplinary proceedings resulting in time to reflect on misconduct, and personal and professional detriment--were not presented to the Referee. Therefore, Complainant's thesis continues, these factors are not ripe for review. (AB.20) A central problem with this thesis is that there were delays subsequent to the disciplinary hearing, which was held November 1, 1993, more than two years after Respondent initially contacted the Bar. The Referee, for example, needed more than five months to pen and issue his twelve page report, dated April 12, 1994. (RR.12) Respondent first contacted the Bar in this matter on September 5, 1991. The Bar's Complaint dated October 28, 1992, was not filed for over one year while the Bar and Respondent attempted to reach a mutually agreeable result.

Who is to blame for delay(s), however, is really not determinative of this issue. The argument advanced by the Complainant ignores case law inconvenient to its argument which shows that delays which accumulate subsequent to the disciplinary hearing--which, try hard as one can, cannot be presented at the hearing--will be considered by the Supreme Court in mitigation. The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984); The Florida Bar v. Kaufman, 347 So.2d 430 (Fla.1984).

The real point herein is that when lengthy delay is coupled with time to reflect on one's misconduct and resulting hardship,

then an amelioration of penalty is proper. The Florida Bar v. Marcus, 616 So.2d 975 (Fla.1993); Kaufman. Respondent took the three years plus and counting--from the time he voluntarily began to cooperate with the corruption investigation--to reflect on what had happened, to ask himself why, and to work to change and grow as a man. The Referee's belief expressed in the conclusion of his Final Report and Recommendation that, "Respondent has embarked upon a path of life which should lead him to become a constructive citizen and attorney once again," (RR.12) perfectly fits and supports this contention.

Personal and professional detriment also support this contention, because hard times make one reflect. Crisis focuses one's mind. The Complainant does not contest this, but makes a procedural argument that a "detriment" claim should not be heard, because it was, "not presented in the Petition for Review." (AB.20) Not true. In fact, in paragraph 4, at line 5, "personal hardship" and "imposition of other penalties and sanctions" are cited in the Petition For Review.

The Complainant wanders even farther out in left field in maintaining that claims of personal and professional detriment were not presented to the Referee. (AB.20) Not true. To wit: Respondent agonizes over disbarment per his psychologist (T.62); Respondent is paying the price for coming forward per Attorney Arnaldo Suri (T.88); Respondent showed remorse and restraint in asking Judge Phil Bloom's help (T.109,113-114); Respondent testified concerning the destruction of friendships due to cooperation with law

enforcement (T.120.154); Respondent sold his home, shrank his practice, did (and still does) his own secretarial work, changed his car for a less expensive model, did more pro bono work (T.122).

Complainant, it can be safely assumed, does not really believe that twice testifying at high publicity trials and defending oneself against squads of defense attorneys and investigators is a pleasant experience. It's a hurtful, embarrassing time which damages one's personal and professional reputation and ability to earn a living. While Respondent does not say he ever feared for his life, the reality of such a course of testifying is that defendants are convicted (like William Castro) or acquitted (Philip Davis), but the enmity felt by a witness across the courtroom is real and frightening. Ample evidence of personal and professional detriment was presented to the Referee. A finding of mitigation in conjunction with the time to reflect resulting from the drawn out disciplinary proceedings is appropriate and warranted by past cases of this Court. The Florida Bar v. St. Laurent, 617 So.2d 1055 (Fla.1993); Marcus; Guard; Kaufman; Lord; Diamond.

2. THE REFEREE RECOMMENDED AN IMPROPER DISCIPLINE UNDER THE RULES, A FIVE YEAR SUSPENSION

The Referee, noting Respondent's cooperation and assistance to law enforcement, remorse, and path of rehabilitation, concluded, "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, Emphasis supplied.) Respondent's position is that the Referee was either recommending by the plain and everyday meaning of his word choice,

an (improper under the rules) five year suspension, or else was unaware of an important consequence of disbarment.

The Answer Brief responds that Respondent is off base and that it is "clear" that the Referee meant the standard five year disbarment under rule 3-5.1(f), Rules Regulating The Florida Bar. (AB.12) The Bar's argument in support of clarity is simple but goes straight to the heart of Respondent's point. To make it "clear" what the Referee meant, the Answer Brief simply inserts the words "to apply" in place of the Referee's inconvenient (from the Bar's point of view) words "of obtaining". (AB.12, cf.RR.12) Had the Answer Brief been a witness on cross, the follow-up question would have certainly been very clear to examining counsel: Do the verbs "apply" and "obtain" mean the same thing to you, Mr. Answer Brief? Of course they mean something quite different, is the answer, assuming the witness wishes to discontinue sounding foolish.

The plain meaning of the Referee's above-emphasized words is that five years time would be the right moment for Respondent to be once again at the Bar. The Referee took more than five months to carefully choose his words. It is plain from his words that he believed and stated that a lesser penalty than that described in Rule 3-5.1(f) was appropriate.

Three pages are spent in the Answer Brief in wistfully claiming that the Referee recommended the, "absolute, minimum period of disbarment" (AB.8-10), while other attorneys have been disbarred for longer periods. Ironically, the Answer Brief notes at the end of this litany, "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." (AB.10,n.1). Complainant doesn't come right out and say so, but it is the same in the instant case: the Bar never sought disbarment beyond five years at the hearing (T.6,165,168), or in any pleading, not even in the Answer Brief.

3. THE REFEREE FOUND THAT RESPONDENT'S BEHAVIOR WAS ABERRANT AND RECOGNIZED HIS MENTAL AND MARITAL PROBLEMS AS IN PART TO BLAME FOR HIS MISCONDUCT

The Referee expressly found, "Respondent has, at his own expense, become actively involved in psychological treatment..." which, "more likely that not will create within him a strong foundation to build a better life." (RR.12) Logic and common sense instruct that psychological treatment is needed only when problems exist in the psychological/emotional/family sphere of life. The Referee found that, "It is clear Respondent's unethical and unsavory choices were, at least in part, motivated by his psychological weaknesses." (RR.10) The Referee also recognized that Respondent's marital troubles and divorce coincided in time with the commencement of the kickback scheme. (RR.5)

Because the Referee believed and found in his Final Report and Recommendation that psychological and marital problems were in part to blame for Respondent's aberrant behavior, the instant case fits into a line of cases in which disbarment is excessive, because mental and emotional problems cast doubt upon the intentional nature of the attorney's misconduct. The Florida Bar v. Condon, 632 So.2d 70 (Fla.1994); The Florida Bar v. Graham, 605 So.2d 53

(Fla.1992): The Florida Bar v. Perri, 435 So.2d 827 (Fla.1983).

The Answer Brief quibbles over the Initial Brief's use of the term "devastated" in relation to his marital problems. In fact the Referee characterized, " The disintegration of his marriage...which coincides with the commencement of the bribery scheme with Judge Gelber..." as a period of, "economic and emotional battering." (RR.5) The Answer Brief suggests that the word, "hesitates" used in regards the Respondent's initial reluctance to pay for appointments is misleading (AB.2), and ignoring context and completeness, suggests that Respondent testified that his "hesitation" was simply a bargaining tool to lower Gelber's percentage. Reference to the page the Bar cited in support shows otherwise. Respondent who was on the short leash of cross stated he had a "number of misgivings", and that Castro told him that he, "would never have to meet Judge Gelber, that he would take care of everything," (D.1479) in order to induce Respondent to participate.

The Answer Brief repeats (AB.3-4) the failed, mainly unproven impeachment that the jury rejected at Castro's trial, and more importantly, the Referee rejected when he found, "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." (RR.11)

4. RESPONDENT IS ENTITLED TO CREDIT FOR AN OTHERWISE CLEAN DISCIPLINARY RECORD, BOTH BEFORE AND AFTER THE INSTANT CASE

The Answer Brief does not contest the uncontestable fact that the instant case is the only disciplinary case against the Respondent since his admission to the Bar in 1983. But it proceeds

to argue that because Respondent was an Assistant State Attorney between 1983 and 1986, problems, "which frequently affect private attorneys, were not obstacles which Respondent had to be face". (AB.19) Any former prosecutor or anyone with any idea of the types of problems which prosecutors have to face every day should be at the least flummoxed and flabbergasted, and more likely than not, stunned and amazed, to read this ridiculous argument. Prosecutors, who very often are just beginning their legal careers, as was Respondent in 1983, are actually often held to a higher ethical standard. See Rules Regulating The Florida Bar, Rule 4-3.8 Special Responsibilities of a Prosecutor.

The remainder of the Answer Brief's argument concerning the Respondent's disciplinary record is a reiteration of the instant charges and a set-up comparison with one case--the longest career marred by discipline that the case law could supply. The Florida Bar v. Stark, 616 So.2d 41 (1993). But the law is clear that the absence of prior disciplinary record and the absence of any disciplinary record subsequent to September, 1991, when Respondent brought the instant matter to the Bar's attention, is a significant and mitigating factor. The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989); The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984).

The Referee impliedly found the no other discipline factor when he found Respondent's conduct in the instant matter to be aberrational. (RR.11) However, when the Referee did not make an express finding of the absence of other discipline, both before and

after this case, which was supported by the testimony of Bench and Bar, was argued (T.160), and was uncontested, he erred.

5. RESPONDENT'S VOLUNTARY COOPERATION, TESTIMONY OF GREAT VALUE, AND MINOR ROLE FOR WHICH HE WAS SOLICITED, DISTINGUISH HIS CASE FROM CASES WARRANTING DISBARMENT

In The Florida Bar v. Riccardi, 264 So.2d 5, 6 (Fla. 1972), this Court stated that bribery is particularly distasteful, because it represents an attempt by the offending lawyer to induce a third party to engage in fraudulent and corrupt practices. In the instant case it is undisputed that Respondent did not attempt to induce anyone else to engage in illegal practices. Respondent was the one induced or extorted in the view of the prosecutor (T.75).

Given the facts as found by the Referee and the opinion of the prosecutor who was in the best position to evaluate culpability (T.75), 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. Nor is this a case like The Florida Bar v. Rendina, 583 So.2d 314,316 (Fla. 1991), where payment was to influence a reduction of sentence, which, "attacks the very core of our system of justice." Here money was illicitly paid to a judge at his insistence for work he controlled, which Respondent performed well. (T.80-81)

The most significant distinguishing factor separating the instant case is Respondent's voluntary cooperation with law enforcement. Respondent had his choice: he could have stonewalled, exercised his Fifth Amendment rights, and it is anybody's guess what that would have meant to the cases against Davis, Gelber, and

Castro. Likewise it's impossible to say what would have happened to Respondent. Would he have been indicted and convicted? not indicted? acquitted? would he have ever had a Bar disciplinary problem in the light of Spevack v. Klein, 385 U.S. 511, 87 S.Ct.625, 17 L.Ed.2d 574 (1967)? Truly, it is impossible to say. His choice for a number of reasons was to come forward and cooperate with law enforcement and the justice system.

The Answer Brief plays down Respondent's cooperation and assistance with the Bar, as well as law enforcement, but the Referee's explicit finding of, "voluntary cooperation...(and that Respondent's) testimony before the Grand and petit juries has been of significant and of great value in the prosecution of corrupt judges and attorneys," (RR.11) which is amply supported by the record, is decisive. The Answer Brief states, "Respondent was not convicted of a crime only because he received immunity and the Referee found that Respondent knew what he was doing..." (AB.18) This conclusion would certainly be surprising to observers of Judge Davis' acquittal (T.78-79).

On the other side of the coin Attorney William Castro was convicted. The Florida Bar v. William Castro, 637 So.2d 237 (Fla.1994), at a trial in which Respondent was a very important witness per the prosecutor (T.78). Respondent would have been a witness against Judge Gelber had Gelber not decided to plead guilty and cooperate as well, per Assistant United States Attorney Michael Patrick Sullivan (T.78). The point is that had Respondent not voluntarily come forward and testified truthfully, then things

would have been entirely different. Without the information the Respondent supplied, the investigation might well have been stopped short of the result it instead reached with Respondent's assistance and testimony.

As AUSA Sullivan stated, "Kent provided us with (information) early and that led to, you know, gaining quite a bit of information we never had up to that point. Whether we would have gained it without his assistance, maybe, maybe not." (T.77, Emphasis supplied.)

Respondent could have taken the other approach. Seven attorneys and three judges went to trial. Castro tried to persuade Respondent to stonewall the investigation (T.131-132,154-156). Respondent was aware that the government might never develop sufficient evidence to prosecute him. (T.126) Respondent had never had direct contact with Gelber, only with Castro (T.31). He knew the implications of a proffer: "You tell (the prosecutors) exactly what happened before you get any immunity...At that point you don't know if you're going to get immunity...(the prosecutors) could have said, look, we're going to charge you with a felony and we'll recommend...whatever they are going to recommend. There wasn't any upfront guarantee when I went to the prosecutors that I was going to get immunity, but I did so anyway." (T.128-129)

In The Florida Bar v. Pettie, the Supreme Court ruled that the referee's recommendation of disbarment was inappropriate given voluntary and significant cooperation with law enforcement in the matter that was the subject of discipline. This Court found it,

"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). The cases draw a distinction between cooperation before arrest and after. In cases like The Florida Bar v. Fertig, 551 So.2d 1213 (Fla.1989), Pettie, and the Respondent in the instant case, in which cooperation was early, it has been rewarded by this Court with suspension. Compare cases in which cooperation was post-indictment or half-hearted, The Florida Bar v. Insua, 609 So.2d 1313 (Fla.1992), The Florida Bar v. Cruz, 490 So.2d 48 (Fla.1986), which resulted in disbarment.

The Court rewarded the respondents in Pettie and Fertig individually for taking the right path. Of more critical importance was the policy reason: the Court knew that someday other lawyers would find themselves in the same sort of dilemma and would ask what to do? With it's use of discipline in Pettie and Fertig, this Court encouraged and supported law enforcement and the justice system. A substantial suspension in the instant case will alert and instruct those in the future who find themselves similarly situated to Respondent and the respondents in Pettie and Fertig. 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 justice will be rewarded.

The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983), doesn't simply "mention", as it is disingenuously put at AB.18, that Lord was convicted of misdemeanors. A mitigating basis--no felony

conviction and light sentencing--the Lord referee used was approved by this Court. No conviction is a better disciplinary case scenario, and thus is properly a mitigating factor. The Florida Bar v. Chosid, 500 So.2d 150 (Fla.1987); The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla.1984); Pettie.

6. THE ANSWER BRIEF'S CHARACTERIZATION OF RESPONDENT'S INTERACTION WITH JUDGE DAVIS IS INACCURATE

The Answer Brief which never mentions the Pettie case attempts to discredit Respondent by claiming that Respondent's testimony at Judge Phil Davis' trial changed at the hearing before the Referee. (AB.1) Not true. Defendant always testified consistently that Davis gave him court appointments gratis, that later Davis used this patronage as leverage for a loan, and that only upon receiving the loan money did Davis make it clear that his intention was to use his patronage to repay the loan. (D.1456,1501;T.31;C.112-113) This can be demonstrated by reading the Answer Brief's transcript references completely and in context, instead of the contrived, incomplete context in which they were presented. This offending portion of the Answer Brief is quoted verbatim below (AB.1-2):

> 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)... 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).

The first sentence is notionally correct, but very misleading

in juncture with the second, because it falsely implies that there was an arrangement by which Respondent paid Castro for work from Davis and that there was a kickback arrangement with Davis. Neither implication is true. In fact Respondent was specifically asked at the Davis trial whether there were any other payments or discussion of payments besides the loan to Davis, and he clearly answered under oath, "No, other than the five hundred dollars that we discussed, there was never any mention of a kickback." (D.1501, cf. T.29).

The context of the second sentence quoted above had nothing to do with court appointments, Respondent was testifying about lawful referral fees to Castro for private clients. (D.1467-1468) Respondent's above quoted statements that the loan was illegal and wouldn't be paid back except with patronage, were made on cross examination at Davis' trial in defense of his conclusion, that Davis' statement, "what do you want, a little one, a medium one or a big one" (D.1453-4, 1506), after receiving the loan money, meant that Davis intended to pay the money back via court appointments.

Respondent was defending a conclusion based on all the known facts after the entire episode had long since ended. The Answer Brief misleadingly plants the Respondent's testimony mid-time frame relating to the loan--at the moment of the shakedown, before the money was given, before Davis stated that he didn't intend to pay back the loan from his own pocket. Given this argument, it is strange that the Bar called Respondent to testify at Davis' disciplinary hearing (See Petition For Review, Item 10, and The

Florida Bar's Motion to Strike). If the Bar really believed that Respondent was deceptive regarding Davis, its reliance on his testimony was improper and surprising.

7. THAT THE RESPONDENT HAS BEEN ON THE PATH OF COOPERATION, MITIGATION, AND REHABILITATION FOR THREE AND A HALF YEARS, IS MOST IMPORTANT IN DECIDING THE PROPER DISCIPLINE

This Court has a duty to protect the public from unethical conduct. In the instant matter, it is undisputed that no member of the public, no client of Respondent, was injured. Complainant makes a claim that the case law does not support the "broad assertion" that lack of injury to any member of the public or client is mitigating. Its thesis is that the cases cited in support are distinguishable because the misconduct disciplined was in most cases attorney theft from clients. (AB.17) There are any number of cases which sensibly hold exactly that--it is a good thing that no one got hurt. Pettie, Pincket, Perri, Stark, Marcus. A lay person stumbling upon the Answer Brief might find it downright odd that The Florida Bar apparently is convinced that cases involving outright theft from clients, i.e. the public, aren't so very important. This Court has stated otherwise.

This Court's sanction under the peculiar facts of this case must be sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970). It is submitted that a strong case is made herein for the proposition that Respondent 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.

It is not only at Respondent that this Court must look in the instant case, but at future attorneys who have lost their way and at the law enforcement officials who must make cases through the devices the justice system provides: immunity, recommendations to the courts, lighter treatment for early cooperation and significant testimony. Under the principle of proportionality, Respondent's case fits most closely with Pettie and Fertig--suspension cases. Respondent has spent the last three and a half years in reestablishing his life under very difficult circumstances--on probation in a sense. He has done everything possible in the prescribed path of cooperation, mitigation, and rehabilitation. This path and the implication for the future ought to be strongly considered by this Court in arriving at the proper discipline.

CONCLUSION

Based on the foregoing authorities, facts, arguments, and rebuttal it is submitted that a suspension is the proper and right treatment in this particular disciplinary situation. It is further suggested that to benefit the public this Court require that Respondent complete one thousand hours of pro bono legal work, during and after the period of suspension through an approved pro bono program. Respectfully submitted,

KENT WHEELER, Pro Se