IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

Barry D. Schreiber,

Respondent.

Supreme Court Case
No. 80,857

RESPONDENT'S REPLY BRIEF

Respectfully Submitted,

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ARGUMENT IN REPLY

Respondent, having carefully reviewed Complainent's answer brief, finds nothing new, startling or creative. It would thus appear, that Respondent's initial brief would suffice to support his position. Nevertheless, in an effort to present the best possible defense this reply brief is submitted.

It is respectfully noted that Respondent does not have access to a law library containing the cases cited by Complainent, nor, except for excerpts, any of the rules or standards quoted. This reply brief has therefore been drafted sans case or precedent support and without the ability to critique Complainent's citations.

1. AS TO THE STATEMENT OF THE CASE AND FACTS it should be noted that Complainent does at the inception admit that its' complaint is based upon Respondent being charged with committing a criminal act. Thereafter, the balance of the narrative details the testimony before the referee at the hearing of March 31, 1993. (This same narrative was available to the Broward County Judge who chose not to find Respondent guilty). First Mrs. Wolowitz's own testimony and then that of her daughter. Mrs. Wolowitz's testimony has yet to be challenged and her daughter never testified. Heresay?!

As to the testimony of Assistant State Attorney Patricia Small, it is emphatically re-stated that Ms. Small was not present at the time Respondent offered his plea of 'nolo contendre'.

Indeed it was stated on the record before Judge Backman, by Respondent and his attorney, that Respondent was not admitting any facts but was only making a plea of convenience: to get the criminal case over in conjunction with the civil suit. It was on this basis the Judge accepted the plea.

As for the testimony of the biased brother-in-law, his "expertise" in distinguishing a slap from a kick was never established.

It is thus clear from Complainent's own version of the statement of the case and facts that 1/ the sole theory of the complaint was based upon Respondent being found guilty by a court of competent jurisdiction of having committed a crime and that 2/ the Complainent now attempts to base its case and urges the referee's report be accepted on the testimony elicited at the hearing of March 31, 1993. The Complainent can not have it both ways, unless it had originally drafted the complaint "in the alternative". But it did not!

2. Regarding Complainent's argument 1, it is crystal clear that the allegations of the complaint were not proved. Respondent pleaded 'nolo contendre' as a plea of convenience and in no way admitted to any of the allegations of the charges. The record before Judge Backman supports this. Additionally, the Judge withheld adjudication, sealed and expunged the record. Respondent has no criminal record and never committed a criminal act. The Florida Bar can not now claim that the testimony at the hearing of March 31, 1993 was sufficient to constitute a crime since its' complaint was not based on criminal conduct outside the definition of being

found guilty by a court of competent jurisdiction of having committted a crime. If not so, why did the Florida Bar argue the merits of the Ralph H. Martin Case? (page 50, Transcript of March 31, 1993 and page 13 of Respondent's initial brief). The Florida Bar made it a point to argue to the referee that Martin was convicted of a felony.

Respondent again urges the importance of the record being sealed and expunged. The Bar states that it successfully moved to unseal Respondent's record. But such unsealing was only for the purpose of the instant proceedings. Respondent's record is still sealed. And additionally, Complainent, by successfully unsealing Respondent's made it clear that their only theory of the case was based upon the Broward County Court's disposition of the case. Not on the testimony before the referee. The Florida Bar finally admitted that Respondent's record was indeed sealed and expunged! (page 11 Complainent's answer brief).

Most critical: In the Florida Bar's "wherefore" clasue in its motion to obtain documents it states,

> "Wherefore, the Florida Bar moves this honorable court to allow the Florida Bar to obtain documents from a sealed file in case number ....., in order to present evidence that Respondent has pleaded to a misdemeanor and has been sentenced accordingly" (emphasis supplied) (Exhibit B, Appendix, Complainent's answer brief).

[It is noted in passing, that Judge Backman ordered a hearing on the Bar's motion to unseal and ordered a telephonic hearing at the court's expense].

3. In reply to argument 2, no violation of Rule 4-8.4(b) was proven by Complainent. Respondent reiterates: his "nolo contendre" plea was a plea of convenience. No where does the record before the Broward Country Court substantiate otherwise. The Florida Bar states on page 12 of its answer brief that

> "the violence for which the Respondent was charged and the abuse of the Bar proceedings mark clear examples of professional misconduct in need of discipline".

Again Respondent was not found guilty of any criminal charges, adjudication was withheld and the record sealed and expunged. And indeed when was the Respondent formally charged, given due notice and the right to defend any abuse of Bar proceedings??

Referring to Florida Statute sec. 784.03, the record is void of any proof that Respondent intentionally committed any violence or intentionally caused any bodily harm. And it is equally clear, Respondent never was found guilty of ever committing a misdemeanor of the first degree.

And where does the record of the proceedings before the referee establish that any conduct by Respondent - criminal or otherwise - reflected adversley on his honesty, trustworthiness or fitness as a lawyer? Further, if as the Florida Bar states on page 12, paragraph 2 of its answer brief, ".... thereby committing a battery, a crime," then Respondent had to have been found guilty of such a crime. Clearly he was not.

As to Respondent's alledged violent behavior and his fitness to practice law, the Florida

Bar quotes out of context the one statement in the comments to rule 5.12. A complete reading clearly shows that even if Respondent was guilty of the acts complained of his conduct was not such as to subject him to prosecution by the Florida Bar. By no stretch of any legal principal or ethical standard did Respondent commit a criminal act that seriously reflected on his fitness to practice law. The record is devoid of any such evidence. Nor can any such assumption simply be made without proof.

4. Addressing argument 3, Respondent submits he is being punished for "severe financial hardship". Respondent notified the referee and the Florida Bar that he could not afford to place a long distance overseas call at his expense. The referee should have granted the requested continuance and/or possibly ordered Respondent to place such a call at a later time certain at Respondent's expense or be held in contempt. But to deny Respondent the right to be heard, the right to cross examine his accusers, or simple due process, is an affront to everything our legal system stands for. And regretfully the Florida Bar was a conspiritor in this travesty.

5. Replying to argument 4, Respondent reiterates his position as stated in his initial brief at page 25. If Respondent was guilty of having committed the criminal act complained of, then a 30 day suspension would have been appropriate. The Florida Bar only asked for a 30 day suspension (page 51, lines 3-10, transcript of March 31, 1993).

Respondent agrees with the Florida Bar's position as set forth in The Florida Bar v Jones, The Florida Bar v Riccardi, and standard 7.2 and 5.12 (page 15 of Complainent's brief). But

where in the record does it substantiate that Respondent engaged in conduct prejudicial to administration of justice which adversley reflects on fitness to practice law...? Or where in the record is it reflected taht Respondent knowingly engaged in conduct

> "that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public or the legal system?"

Or that Respondent knowingly engaged in "criminal conduct" (emphasis supplied) that "seriously reflects on the lawyer's fitness to practice..."?

As stated in The Florida Bar v. Riccardi,

> "The Supreme Court must be primarily guided by the welfare of the public and the legal profession."

Is this such a case to warrant a 120 day suspension and a retaking of the Florida bar examination? Tantamount to disbarment? This is not a case of aggravated battery or aggravated assualt as in The Florida Bar v. Routh (page 16 of Complainent's answer brief). Indeed, even if the Florida Bar had proved its case based on the complaint it filed, a maximum 30 day suspension with no other special disciplinary measures, would have been justified.

CONCLUSION - REQUESTED RELIEF

Respondent has always stood up for what he believed to be right. Never in all his years as a lawyer and public servant did he run from responsibility. If wrong, he admitted it. But here, Respondent must stand firm. No criminal act was ever committed and no intentional violation of Rule 4-8.4(b) ever occured. Nor did the Flordia Bar prove otherwise. Hence, the referee's report should be found to be erroneous, unlawful and unjustified.

It is therefore prayed that this Honorable Court reject the referee's report and dismiss the complaint filed against Respondent by the Florida Bar.

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Certificate of Service

I hereby certify that an original and 7 (seven) copies of respondent's reply brief was served/mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927 and a true copy was served/mailed to Randi Klayman Lazarus, Bar Counsel, The Florida Bar, 444 Brickel Ave, Suite M-100, Miami, Florida, 33131, this 13th day of October, 1993.

Barry D. Schreiber