IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Case No. 84,978
[TFB Case No. 95-31,050 (07C)]

IN RE: PETITION FOR REINSTATEMENT

OF JOHN D. RUE

_____/

THE FLORIDA BAR'S REPLY BRIEF

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SYMBOLS AND REFERENCES

In this brief, the respondent, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on May 2, 1995, shall be referred to as "T," followed by the cited page number.

The Report of Referee dated May 12, 1995, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached, (ROR-A-____).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The petitioner's exhibits will be referred to as Petitioner Ex. _____, followed by the exhibit number.

The petitioner was office manager for Allen A. Ziffra, P.A., during his suspension period. Prior to his suspension, this firm was Rue and Ziffra, P.A. This entity is referred to, throughout the brief, as "the firm."

SUMMARY OF THE ARGUMENT

The petitioner's Answer Brief is replete with rationalizations for the misconduct during his suspension alleged by The Florida Bar. These excuses for the misconduct range from placing the blame on "the firm," rather than accepting his individual responsibility, to stating he did not make the decision - he was unaware of it but told someone else to decide. Can this Court accept these justifications and find that a petitioner has proven that he has the highest standards of character where the petitioner has, with knowledge, allowed his name to be placed in several telephone book yellow pages advertisements throughout his area of practice during his suspension? The Florida Bar submits that the petitioner's conduct cannot be excused away. Only by denying reinstatement at this time can this Court send a message that advertising by suspended lawyers is indeed impermissible and that slick excuses will not justify less than ethical conduct.

ARGUMENT

In his Answer Brief, the petitioner argues that the bar's allegations of malfeasance on his part are without basis and accuses The Florida Bar of seeking "Draconian" discipline against him. The issue of whether or not the petitioner has engaged in misconduct sufficient to warrant denial of his reinstatement based upon his failure to prove sufficient rehabilitation to uphold the high standards of professionalism required by The Florida Bar and this Court is for this Court to determine. The facts are as follows:

The Florida Bar has alleged that the petitioner, Mr. John D. Rue, has violated rule 4-7.1 of the Rules Regulating The Florida Bar by making or permitting to be made a false, misleading, deceptive, or unfair communication about him or his services. Where full page advertisements were placed in telephone books throughout the petitioner's area of practice proclaiming the firm of Rue and Ziffra, P.A., to be a viable law firm offering the services of Mr. John D. Rue during the time that the petitioner was serving a ninety-one (91) day suspension, and where his Petition For Reinstatement had not even been filed, much less ruled upon, at the time the advertisements were placed, a violation of R. Regulating Fla. Bar 4-7.1 took place. Although

the petitioner makes much of the fact that he did not personally place the ads, but rather said he did not want to be involved when informed by Mr. Ziffra of Mr. Ziffra's contemplated action in placing the ads, the petitioner permitted, as specifically prohibited by R. Regulating Fla. Bar 4-7.1, a material misrepresentation of fact to take place:

> A lawyer shall not make or permit to be made a false, misleading, deceptive, or unfair communication about the lawyer or the lawyer's services. A communication violates this rule if it: (a) contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading.

See also rule 4-7.3(f):

> **Misleading or Deceptive Statements.** Any factual statement contained in any advertisement or written communication or any information furnished to a prospective client under this rules shall not:
> (1) be directly or impliedly false or misleading;
> (2) be potentially false or misleading;
> (3) fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading;
> (4) be unsubstantiated in fact; or
> (5) be unfair or deceptive.

See also rule 4-7.7(a):

> **False, Misleading, or Deceptive.** A lawyer shall not use a firm name, letterhead, or other professional designation that violates rule 4-7.1.

While the petitioner would have this Court believe that a firm is somehow a separate entity apart from the lawyer's own

status, the Rules Regulating The Florida have clearly been drafted to prevent such spurious claims. At R. Regulating Fla. Bar 4-8.6, the identity of a lawyer with a professional service corporation is noted. At 4-8.6(d), it is stated:

> A lawyer who, while acting as a shareholder, officer, director, agent, or employee of a professional service corporation engaged in the practice of law in Florida, violates or sanctions the violation of the Professional Service Corporation Act or the Rules Regulating The Florida Bar shall be subject to disciplinary action.

This rule, 4-8.6, is also at issue with respect to the fact that the petitioner has remained a director, on record with the State of Florida, of Rue and Ziffra, P.A. Rule 4-8.6 clearly prevents persons from serving as directors or officers of a professional association unless they are legally qualified to render legal services in this state. It is clear that this is also a violation of Florida Statutes section 621.10. In fact, the statute provides that a professional service corporation is subject to being judicially dissolved if it fails to enforce compliance with the statute by requiring a shareholder who has become legally disqualified from rendering professional services to sever all employment with and financial interest in the professional service corporation. Further, if such noncompliance is made known to the Department of State, it shall certify the

noncompliance to the Department of Legal Affairs for appropriate action to dissolve the corporation. See also R. Regulating Fla. Bar 4-8.6(g) which states:

> **Removal of Shareholder upon Disqualification.** Whenever a shareholder of a professional service corporation becomes legally disqualified to render legal services in this state, the professional service corporation shall take steps to achieve the immediate removal of the shareholder from the professional service corporation.

The petitioner failed to comply with this requirement and at the time of final hearing on his Petition For Reinstatement remained a principal in the professional association. The petitioner blames this on an oversight. The bar submits that his continued advertising under the name of Rue and Ziffra, P. A., required him to be a principal in the professional association in order to comply with the Florida Statutes.

Any statement by this Court which indicated continued advertising after a suspension of ninety-one (91) days or more would be tolerated by this Court would no doubt be greeted with delight by errant attorneys subjected to discipline for their wrongdoing. Such a statement would, however, be a slap in the face to those attorneys who strive to make a living while complying with the many requirements of this Court as set forth in the Rules Regulating The Florida Bar. It would also be an

affront to the members of the public, whom this Court has the solemn duty to protect.

> ....if the discipline does not measure up to the gravity of the offense, the whole disciplinary process becomes a sham to the attorneys who are regulated by it. The Florida Bar v. Wilson, 425 So. 2d 2, 4 (Fla. 1983).
>
> The law is not a business, - it is a profession, a noble one, with standards in certain respects different from those applicable to business, which standards it is the duty of the bar to uphold. State v. Murrell, 74 So. 2d 221, 226 (Fla. 1994).
>
> The right to practice law is conferred or withheld on the basis of factors not customarily considered in the licensing of tradesmen or businessmen. Because of a lawyer's interaction with the public, a wide range of factors may be considered in determining whether an individual shall be allowed to enter or resume this profession. An attorney once removed or suspended must demonstrate rehabilitation, and the burden of doing so requires more than recitations of intent and contrition. The Florida Bar in re Reuben, 323 So. 2d 257, 258 (Fla. 1975).

As this Court asks in the case of In re Stoller, 36 So. 2d 443 (Fla. 1948) at 445:

> Measured by the foregoing test, has petitioner rehabilitated himself? The answer must be found in his conduct during disbarment, the reasons for which, if important at all, are only incidental at this time. Does he show penance for the acts for which he was disbarred? Does he realize that the practice of law is a highly respectable profession, the main business of which is administrating justice, or does he think of it as a trade for the practice of tricks or an avenue to short circuit those who seek his counsel? Have adequate sanctions been exacted? Is he in accord with the thesis that character is more important than money

> and that the administration of justice should reflect democratic ideals rather than smack of totalitarianism?

Since January 28, 1995, the petitioner has allowed full page ads to be run in many telephone books throughout his area of practice. At the final hearing in the underlying discipline case, it was acknowledged that the petitioner's firm generated eighty (80) to eighty-five (85) percent of its clients through such types of advertising. The petitioner's conduct in allowing these ads to be placed is scandalous and he should be disciplined for this. Advertising is a major fact of life with many law firms and has a significant impact on the public. A clear message must be sent informing attorneys that their duties of ethics in this regard must be of the highest nature.

The petitioner's attitude toward running the telephone book ads is all too indicative of his attitude toward the practice of law - if the ads had not been placed, the firm would have missed a whole year of advertising in the telephone books. The fact that the petitioner would even offer this argument is all too sad an indicator that his practice of law is not a profession, it is a mercenary endeavor designed to enrich him personally no matter what the cost to the public or the profession.

> We cannot condone placing money and the things money can buy above ethics and integrity. The Florida Bar v.

Jahn, 559 So. 2d 1089,1090 (Fla. 1990).

In regard to continued advertising after the petitioner's suspension, the bar has also noted another full page advertisement in the Flagler County Directory and Shopping Guide which was scheduled to run in the beginning of January, 1995. Although this ad was placed well prior to the petitioner's suspension, the petitioner made absolutely no attempt to retract the advertisement. While he makes much of the fact that the bar's investigator learned that retractions of advertisements were prohibited, the relevant fact is that the petitioner made no attempt to contact the publisher and inquire about retracting the ad, T-111-112.

The bar has also taken issue with the petitioner's conduct during his suspension when he acted as the narrator for several television commercials. During the ads, he stated, "We represent motorcycle riders who have been injured by the carelessness of others." While the rules do permit a nonlawyer to make such narratives in television ads, this was a special case in which the petitioner's voice was well known to the community, particularly to bikers, and it was unrebutted at the final hearing that the petitioner's voice was in fact distinctive and he was well known in the community. The petitioner, in his

Answer Brief, claims that the use of the word "we" is "commonplace in advertising." The bar suggests that the ideals of professionalism have higher standards for advertising than exist for peddlers of nonlegal goods and services. Rules 4-7.1 and 4-7.3(f), as noted above, prohibit deception in advertising.

The final advertising issue relates to the unrebutted fact that after the petitioner requested and obtained a suspension more immediate than originally imposed by the Court, advertisements using his name continued to be disseminated until the middle of November, 1994, although his immediate suspension was effective October 26, 1994. While the petitioner's Answer Brief is replete with excuses for the continued advertising, the fact remains that a responsible attorney would have been aware he could not possibly cease using his name in ads quickly enough to comply with the terms of the suspension order and the rules without the lead time usually granted by this Court to close out a law practice. Therefore, a reasonable attorney would not have requested this Court impose an immediate suspension. A vacationing attorney, as the petitioner readily admits he was, is not the same thing as an attorney who has already wound down his practice. It is for this reason the Court grants a thirty (30) day for suspended attorneys to wind down their practice. The

impact of the petitioner's continued advertising after his suspension is impossible to measure. While the bar has acknowledged from the outset that it has no evidence of the petitioner's practice of law while suspended other than his continued advertisements, the fact that his name continued to be proclaimed as a member in good standing through these advertisements unquestionably had a great impact upon the public, as that is the purpose of these ads.

Additionally, the bar presented evidence at the final hearing that the entity of Rue and Ziffra, P.A., retained control over the firm's office and trust bank accounts until shortly before the reinstatement final hearing, T-23. Such conduct is a further violation of rules 4-8.6(e) and 4-8.6(g) and is further proof that the petitioner did not take the discipline imposed by this Court in the serious manner required. While once again the petitioner dismisses this as an inadvertent error, the bar asks, how many of these inadvertent errors are permissible from an attorney who is seeking to prove that he has rehabilitated himself and is ready to embrace the practice of law in a wholly ethical manner?

The bar also presented evidence at the final hearing regarding a newspaper story about the firm's participation in a

"bike week" charity event, Bar Ex. 3. While, in his Answer Brief, the petitioner dismisses the fact that the reporter referred to the petitioner as the "founding partner" of the firm and never mentioned his suspended status, the bar would note that the article primarily regards the petitioner. By failing to clarify the status of his suspension, the petitioner again permitted his status to be misrepresented to the public.

Also at issue is the petitioner's attitude toward The Florida Bar. This Court requires that an attorney prove he harbors no malice or ill feeling toward those, who by duty, were compelled to bring about the disciplinary proceeding. During the final hearing, the petitioner testified he felt he had been singled out for prosecution by the bar. Yet, in his Answer Brief, the petitioner appears to deny having feelings of malice toward the bar while at the same time continually accuses the bar of engaging in misconduct. The petitioner appeared to do the same thing at final hearing:

> **Petitioner's Counsel**
> Question: Okay. Do you think -- did you think it was appropriate for the Bar to object to your initiating the suspension immediately?
>
> **Petitioner**
> Answer: Well, I was a little set back on it because when I talked to you it was something that is very rarely ever done and I didn't understand why.

Petitioner's Counsel
Question: Have you expressed concern that perhaps The Florida Bar is treating your case differently than others?

Petitioner
Answer: Well, I don't know a lot about these procedures, but through my discussions with you and what I have experienced, I've been concerned about it, yes, T-75.

The petitioner then went on to discuss the fact that his counsel had sent strongly worded letters to The Florida Bar regarding the bar's treatment of the petitioner. The petitioner admitted he was not knowledgeable enough to be able to form the strong opinions that were expressed in some of those letters. He reiterated the fact that he did not feel any animosity toward the bar nor did he harbor any bad feelings toward it, T-76. It is clear the petitioner has expressed ambivalent feelings here. He believes he has been improperly targeted and yet he deserved the discipline.

The petitioner also makes much of the fact that he voluntarily authored letters to insurance defense firms, insurance companies and area judges with whom his firm regularly dealt to inform them of his suspension despite the fact that the bar did not require him to do so. While the bar acknowledges that these letters informing these entities and persons of his

suspension were not required by The Florida Bar, the bar also notes the self-serving function of these letters, which appear to inform those against whom the firm litigated that the firm was still going strong:

> The events that led to Mr. Rue's discipline, for which he accepts all responsibility, will have no affect on the firm's continued representation of our clients before the court. Petitioner's Ex. 5.

The petitioner acknowledges that the Report of Referee erroneously failed to include the two year probationary period upon reinstatement that this Court's original suspension order imposed.

The bar prefers to take the high road rather than succumb to the petitioner's inappropriate and barbed attacks permeating his Answer Brief. However, the bar would briefly note for the record the following: the bar refers the Court to the Statement of the Case in the bar's Initial Brief which clearly indicates the bar has not caused any undue delay. The bar's Statement of Facts in its Initial Brief is not in any way an improper argument but rather contains a statement of the facts involved in this case. The bar acknowledged at the outset that the petitioner had complied with some of the areas required to demonstrate rehabilitation. What is at issue are the facts discussed herein.

The bar did not base its opposition to the petitioner's reinstatement on any pre-formed bias but rather upon the advice of staff counsel and the Board of Governors of The Florida Bar after discovery indicated the potential problems with the petitioner's reinstatement. This procedure is required by the rule 3-7.10(n)(4).

In sum, the petitioner's Answer Brief is replete with excuses for the misconduct cited by the bar at final hearing and overlooked, without explanation, by the Report of Referee. The petitioner's excuses range from an explanation that the new telephone book ads had to be run despite his suspension or the firm would have lost money, to the excuse that the firm placed the ads, not the petitioner individually. Can this Court accept these rationalizations and find that the petitioner is a fully rehabilitated attorney? The bar submits that these excuses are inappropriate and are a sad commentary.

> We have many times announced our conviction that a lawyer is charged with a great public responsibility of aiding in the administration of justice and as one court has so apply said that a lawyer should view his work "not as mere money getting but as a service of the highest order, not as a mere occupation but as a ministry", State v. Dawson, 111 So. 2d 427, 432 (Fla. 1959).

It is apparent that the referee misapprehended or overlooked

the above evidence in evaluating the petitioner's fitness for reinstatement as a member of The Florida Bar. As this Court has done in such cases as The Florida Bar in re Inglis, 471 So. 2d 38 (Fla. 1985), this Court should not accept the referee's recommendations as to reinstatement and should deny reinstatement at this time.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendations, and deny the petitioner's Petition For Reinstatement at this time. The Florida Bar further prays that the petitioner's cost deposit of $750.00 be applied toward the bar's costs in this matter, which currently total $1,125.20, and that petitioner be assessed the remaining costs.

Respectfully submitted,

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By: _____
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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Reply Brief have been furnished by regular U. S. mail to The Supreme Court of Florida, Supreme Court Building, 500 Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Mr. John A. Weiss, counsel for respondent, at 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida, 32308; and a copy of the foregoing has been furnished by regular U. S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 14th day of August, 1995.

Jan Wichrowski

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