IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellee, v. C. RANDALL SAYLER, Respondent-Appellant.	Supreme Court Case No. 89,493 The Florida Bar File No. 96-50,917(17B)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar". C. Randall Sayler, Appellant, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF CASE AND FACTS

The respondent failed to include a statement of facts in his "brief" and therefore the bar is obligated to set forth the facts of this case.

On December 9, 1996, the bar filed its one count complaint against the respondent. After numerous dilatory tactics by the respondent, this matter came on for final hearing on October 10, 1997.

The referee's well reasoned findings of fact are fully supported by the record and the bar adopts same as its statement of facts. They read as follows:

> 1. Respondent represents Daniela Sayler, his wife, in a workers' compensation case styled Daniela Sayler v. Jotun-Valspar Marine Coatings, et al., which at the time of the final hearing was still pending.
>
> 2. Joan I. Valdes, the bar's complaining witness, represents Jotun-Valspar.
>
> 3. The above referenced litigation is a highly contested case in which both attorneys have made a myriad of allegations against one another.
>
> 4. At one point, respondent stated he filed a formal written complaint alleging favoritism by state employees for the Valdes firm. Also, at one point in the litigation, Valdes accused respondent of stalking her and has made her, in her own words, "fear" of respondent known to the bar, the court pleadings over the workers' compensation case, and to the respondent himself.
>
> 5. On or about October 16, 1996, respondent sent a letter to Valdes which

referenced the recent murder of an attorney who represented employers and servicing agents in workers' compensation cases. [Exhibit A attached] (See Appendix A)

6. In the letter, respondent quoted the news headlines used in the Palm Beach Post to announce the story and attached a printout of the subject articles. A copy of said letter and the attachment was admitted as The Florida Bar Exhibit A.

7. The respondent maintained that the newspaper articles were relevant evidence in the Sayler case because they demonstrated the abuse of workers' compensation claimants' rights. Though the respondent specifically wrote in his cover letter of October 16, 1996, "We are offering this evidence to support that there is a general public perception...that certain servicing agents and their defense counsel have employed unfair tactics to save money at the expense of injured workers."

8. This Referee finds by "clear and convincing" evidence that the Palm Beach Post articles had no specific bearing upon the Sayler case. Respondent, when he sent said letter, knew or should have known that Valdes had misgivings about respondent and even felt frightened of him. And that the action of the respondent exacerbated this situation by his, at times, inappropriate and unprofessional actions.

9. Respondent has failed to provide any acceptable explanation as to why he sent the letter in question as to its direct relationship to the Sayler case. Rather his focus during the trial was to attempt to impeach Valdes. Though Valdes could have handled this situation differently, I do not find that the testimony and evidence presented by respondent in any way affects Valdes' credibility.

10. Respondent knew or should have known that the letter, with the attached articles,

would only embarrass, frighten or otherwise burden Valdes. The respondent, in his memorandum of law, submitted by fax on November 20, 1997, 20 days after the deadline, states the following:

> "The Florida Bar claims, however, an unprecedented special privilege to spare Florida defense lawyers from being confronted with truthful critical speech because it, or the speaker is 'feared.'
>
> " 'Fear', as we know, is often a code word for economic, political or religious prejudice. And those guilty of wrongdoing or falsehoods may well 'fear' the truth. There is no authority for the proposition that peaceful, truthful speech may be constitutionally punished because someone claims to 'fear' it.
>
> "The First Amendment of the United States Constitution guarantees to all persons freedom of speech. 'All ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of public opinion--have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests.' Roth v. United States, 354 U.S. 476, 484, 1 L.Ed. 1498, 1507, 77 S. Ct. 1304 (1957)."

This Referee finds that the actions by the respondent are not absolutely guaranteed nor protected by the First Amendment of the United States Constitution.

Based upon the foregoing the referee found respondent violated Rules 3-4.3 [The commission by a lawyer of any act that is unlawful

or contrary to honesty and justice may constitute a cause for discipline.]; 4-4.4 [In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or knwoingly use methods of obtaining evidence that violate tew legal rights of such a person.]; and 4-8.4(d) [A lawyer shall not engage in conduct that is prejudicial to the administration of justice.] of the Rules Regulating The Florida Bar. As a consequence of these violations the referee in his report, dated December 1, 1997, is recommending that the respondent be publicly reprimanded, placed on six (6) months probation with Florida Lawyers Assistance, Inc. monitoring of counseling, and be required to complete a Practice and Professionalism Enhancement Program. The respondent is appealing the determination of guilt and presumably the sanction.

SUMMARY OF ARGUMENT

This is a case about a lawyer who went too far and does not acknowledge that he did so. The most telling statement from the report of referee is: “I am equally concerned that the respondent believes, and I accept him at his word, that he has done no wrong.” In fact, the respondent incorrectly asserts that he has a First Amendment privilege that allowed him to send a letter to opposing counsel, which letter he knew would cause her to be even more afraid of the respondent because she already believed (and respondent knew of this belief) that the respondent was stalking

her. The respondent, in his brief, makes no attempt to refute the referee's finding that this letter was sent for an improper purpose - intimidation and harassment.

This Court has not been reluctant to discipline lawyers who have made intemperate remarks against the judiciary. Nor has the Court shied away from disciplining lawyers who have mailed letters that have no purpose other than to humiliate or disparage another person.

The respondent's conduct in mailing a letter to the defense counsel in his wife's workers compensation case, with attached articles about the cold blooded murder of one workers compensation defense attorney and the wounding of another, is outrageous and should not be countenanced. This conduct warrants at least the referee's recommendation of a public reprimand, completion of a Practice and Professionalism Enhancement Program, and a six month Florida Lawyers Assistance probation period.

ARGUMENT

I. WHETHER THE RESPONDENT SHOULD BE PUBLICLY REPRIMANDED FOR SENDING A LETTER TO OPPOSING COUNSEL WHICH LETTER INTIMATED A THREAT OF BODILY HARM.

At issue in this appeal is whether a lawyer has a First Amendment privilege in sending a threatening letter to opposing counsel, which letter was meant to intimidate and scare her. Despite the respondent's protestations to the contrary, there is no such privilege.

It is well settled that a referee's findings of fact and guilt are presumed to be correct and the appealing party has the burden to demonstrate that these findings are "clearly erroneous and lacking in evidentiary support". The Florida Bar v. Canto, 668 So.2d 583 (Fla. 1996); The Florida Bar v. Porter, 684 So.2d 810 (Fla. 1996). The respondent has not met his burden.

A. The violation.

The focus of this case is on an October 16, 1996 letter that the respondent sent to his opposing counsel, Joan Valdes, who was defending the workers compensation case brought by the respondent on behalf of his wife. However, it is also important to review the relationship between counsel prior to the letter to truly understand respondent's motives in sending his October 16, 1996 letter.

Valdes testified at trial that she believed the respondent was stalking her. See TT37-40. This belief was predicated, in part,

upon a disturbing incident at the workers compensation courthouse in Miami, wherein someone had been making inquiry about Valdes and when asked to identify them self, that individual took some court docket sheet and fled the scene. TT37-39. This individual was later identified as the respondent, because he was detained by the security at the courthouse upon his next appearance at the courthouse. TT39. This incident, and others, formed the basis of Valdes' original complaint to the bar. This complaint was initially resolved by the grievance committee with a recommendation of diversion which was rejected by the respondent. TT46. Shortly after this rejection, the respondent forwarded his October 16, 1996 letter to Valdes. TT 46.

Respondent's October 16, 1996 letter was couched in terms of his seeking a stipulation as to several newspaper articles. At first blush, this may have appeared reasonable. However, as the referee found, the articles "had no specific bearing upon" the workers compensation case. RR3. The articles concerned the September 19, 1996 murder of a workers compensation defense attorney and the wounding of a second lawyer by a dissatisfied workers compensation claimant. See TFB Exhibit A and TT47-48.

Valdes testified at trial that she believed the letter was in retaliation for having filed her bar grievance and that she "took

it as a death threat". TT p.48, l.11-13. She explained that she took this letter as a death threat[1]:

> . . . because of all the things that had happened up until then. I mean, I he had followed me around in the division, not identifying himself, he just hadn't acted as an attorney acts. I mean, nobody ever did that to me before, and frankly I was scared of him because I thought he was lurking around some corner.
>
> Also he dropped things off at my office. I'd get mail delivered to me without stamps on them and people would say, some guy dropped this. And it was from his office, and he would just run out. So it all had the same pattern. TT p. 48, l.15 - p. 49, l.1.

Perhaps the most shocking part of the testimony at trial was what was not said. The respondent never offered an explanation for why or how this letter related to the then pending workers compensation action. RR.3. Thus, without such an explanation in the record, respondent can not contest that the letter had a bearing on the workers compensation case and that it was anything other than an improper attempt to harass and intimidate opposing counsel who he knew, by virtue of her complaint to the bar, was already personally afraid of him.

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[1] In The Florida Bar v. MacGuire, 529 So.2d 669 (Fla. 1988), a lawyer was disbarred for being convicted of a felony for making verbal and written threats to kill the then governor, Bob Graham.

B. The First Amendment Defense.

The respondent asserts that his October 16, 1996 letter is protected free speech. While the referee specifically considered this argument and found that ". . . the actions by the respondent are not absolutely guaranteed nor protected by the First Amendment of the United States Constitution" (RR4), it is important to analyze just what the respondent seeks to label free speech. In the instant case, The Florida Bar is not disputing the Palm Beach Post's rights to publish the subject newspaper article, nor is the bar attempting to curtail the respondent's right to read said articles or even discuss them in whatever forum. The bar only takes issue with the respondent's use of the articles to harass and intimidate an opposing counsel and it is the bar's position that harassment and intimidation of opposing counsel under these circumstances is not constitutionally protected speech.

Among other cases, the respondent points to Nodar v. Galbreath, 462 So.2d 803 (Fla. 1984) to support his claim that his letter was constitutionally protected speech. In Nodar, a parent made remarks about a certain teacher during a school board meeting, and under the facts and circumstances present in that case it was found that the parent's statements were conditionally privileged ant that the parent lacked malice when he stated that the teacher was unqualified. The Court goes on to explain that:

> Where a person speaks upon a privileged occasion, but the speaker is motivated more by

> a desire to harm the person defamed than by a purpose to protect the personal or social interest giving rise to the privilege, then it can be said that there was express malice and the privilege is destroyed. Id. at 811.

The respondent in this case has been unable to explain how his letter "protects (a) personal or social interest giving rise to (a) privilege". In fact, all the respondent does in his brief is list a series of instances where public figures or other individuals (such as a teacher) were found not to be unfettered and free from public criticism[2]. Respondent's letter, however, is not criticism.

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[2] The respondent also asserts that this prosecution has violated the due process and equal protection clauses of the Fourteenth Amendment and cites to Schware v. Board of Bar Examiners, 353 U.S. 232, 1 L.Ed. 2d 796, 77 S. Ct.752 (1952) [Applicant to bar denied due process when confidential evidence used as grounds for nonadmission to bar.]. Respondent does not explain how this occurred. While Schware stands for the proposition that a state may not exclude a person from the practice of law in a manner that contravenes the Fourteenth Amendment, it bears no relationship to this

It is an implied threat (whether he ever intended to act on the threat is immaterial) and his testimony at trial, as well as his argument in his brief, fails to dispel this fact.[3]

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case.

[3] The First Amendment does not protect those who make intemperate, harassing or inflammatory remarks about opposing counsel or others. Such conduct has consistently been found to warrant discipline. See The Florida Bar v. Wasserman, 675 So.2d 103 (Fla. 1996); The Florida Bar v. Uhrig, 666 So.2d 887 (Fla. 1996); Landry v. State, 620 So.2d 1099, (Fla. 4th DCA 1993).

The respondent's reliance on The Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997)[4], is likewise misplaced. In Martocci, the Court affirmed a referee's finding of no violation of R. Regulating Fla. Bar 4-8.4(d)[5] when the lawyer made three distinct offensive remarks to opposing counsel after a deposition. Basically the Court found this name calling to be unprofessional, but not warranting a disciplinary sanction and noted that they found:

> . . . the conduct of the lawyers involved in the incident giving rise to these proceedings to be patently unprofessional. We would be naive if we did not acknowledge that the conduct involved herein occurs far too often. We should be and are embarrassed and ashamed for all bar members that such childish and demeaning conduct takes place in the justice system. Id. at 1360.

The respondent's conduct is much worse than name calling and is similar to that found in The Florida Bar v. Uhrig, 666 So.2d 887 (Fla. 1996). In Uhrig, the Court found that the respondent's

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[4] Respondent contends that the undersigned had an absolute obligation to provide the referee with the Martocci opinion because he believes this case is controlling precedent. The bar disagrees with this proposition and our argument is set forth above on why Martocci (oral comments in the heat of battle) and this case (retaliatory threatening letter) is more like Uhrig (insulting letter to opposing party). Merely because a respondent (or the bar for that matter) believes that a particular case is controlling, does not make it so. It is also important to note that Martocci was handed down on October 2, 1997, and that the bar presented no oral argument on guilt at the October 10, 1997 trial.

[5] The respondent has been found guilty of this charge as well as R. Regulating Fla. Bar 3-4.3 and R. Regulating Fla. Bar 4-4.4.

letter “was devoid of any purpose other than humiliation and disparagement.” Id. at 888. The referee, in this case has a similar finding when he noted that “Respondent knew or should have known that the letter, with the attached articles, would only embarrass, frighten or otherwise burden Valdes”. RR3. The respondent has failed to dispute this finding. Thus the referee’s finding of guilt must be upheld.

C. The Sanction.

The respondent has made no argument on the appropriate level

of sanction[6], however, it is evident that the recommended public reprimand, with the probationary terms, is an appropriate sanction for this case.

The Florida Bar would further direct the Court's attention to the abundant case law which states that making intemperate remarks about the judiciary warrants discipline, usually in the form of a public reprimand. See The Florida Bar v. Tindall, 550 So.2d 449 (Fla. 1989); The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988) cert. denied 109 S.Ct 369 (1988); The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982); The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981); The Florida Bar v. Shimek, 284 So.2d 686 (Fla. 1973); The Florida Bar v. Stokes, 186 So.2d 499 (Fla. 1966).

Although respondent attempts to make a distinction between harassment of the judiciary and harassment of opposing counsel, the bar submits that both actions are two sides of the same coin. Aside from the immediate harm caused in the particular proceeding, both impugn the integrity of the Court system and dishonor the profession of law. In fact, in The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958), Calhoon used an argument that respondent

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[6] As such the bar considered that the respondent believed that if found guilty, the sanction would be a correct and fit punishment. However, in an abundance of caution the bar will support the referee's recommendation.

also is attempting to put forth. In arguing mitigation for his actions, Calhoon asked the Court to consider the atmosphere and feelings about judges which prevailed during the time he made his statements, just as respondent in the instant case states that the articles were used to simply show how some people feel about defense attorneys in workers' compensation cases. The Court in Calhoon specifically rejected this argument, and this Court should also reject respondent's explanation. The Court in Calhoon stated that the prevailing public sentiment should not be considered in mitigation of respondent's actions. In fact, the Court found to the contrary. The Court stated:

> On the contrary it appears to us that if the Bench and Bar of the area were being assaulted from all angles, with or without justification, it would be the duty of the lawyer above all others to exercise every measure of care and caution to avoid creating any justification for the suspicions. . . . If there be any substance to the contention with reference to the attitude of the public during the period involved, we think the lawyers of the area were charged with an even greater measure of responsibility than is usual in order to re-establish public confidence in the legal profession and the administration of justice.

Calhoon at 608.

Aside from the ample case law which calls for a public reprimand, the Florida Standards for Imposing Lawyer Sanctions also show public reprimand to be the proper discipline in this case.

The Court should consider the following standards when deciding upon appropriate discipline:

> 7.3 Public reprimand is appropriate when a lawyer negligently engages 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.

The referee has made a reasoned recommendation as to the appropriate sanction and the Court should adopt same.

CONCLUSION

In disciplinary proceedings the punishment imposed on attorneys for their transgressions must serve three purposes.

> 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.

The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988) *citing* The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970).

The bar submits that respondent must receive a public reprimand, and the recommended probationary terms for his conduct. Respondent’s conduct is unworthy of an officer of the Court. When one resorts to sending veiled threats in an attempt to gain an advantage in a proceeding, it denigrates not only respondent himself but the profession as a whole.

WHEREFORE, The Florida Bar, appellee, respectfully requests the Court to uphold the referee's findings of fact and guilt and to further sanction the respondent with a public reprimand, attendance at a Practice and Professionalism Enhancement Program, and placement on six months probation with the requirement of a Florida Lawyers Assistance, Inc., evaluation and treatment if required.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing answer brief of The Florida Bar has been furnished via regular U.S. to C. Randall Sayler, respondent, at 1871 Hendersonville Rd. 106, Asheville, NC 28803; and to John A. Boggs, Staff Counsel, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this _____ day of March, 1998.

_____
KEVIN P. TYNAN