IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant/Cross Appellee, Case Nos. SC96087
SC97020

v. TFB File Nos. 1998-00,548 (03)
1998-00,860 (03)

JOHN L. SCOTT,

Respondent/Appellee/Cross Appellant.

_____/

CROSS INITIAL BRIEF/ANSWER

John L. Scott, Respondent
P.O. Box 475
Branford, Florida 32008
(386) 935-0559
Florida Bar No. 206911

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Cross Initial Brief/Answer of Respondent/Appellee/Cross Appellant is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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PRELIMINARY STATEMENT

Complainant/Appellant/Cross Appellee, **The Florida Bar**, will be referred to as such, or as the Bar. The Respondent/Appellee/Cross Appellant, **John L. Scott**, will be referred to as Respondent, or as Mr. Scott throughout this brief.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate subtitle, page number, and paragraph number. The word page shall be abbreviated as **p**. and the word paragraph shall be abbreviated as **par.**

References to the transcript of the hearing before the Referee shall be by the symbol **TR** followed by the appropriate volume and page number, and the word volume will be abbreviated **vol**. and the word page will be abbreviated **p.**

References to exhibits shall be by symbols **CX** or **RX**, corresponding to Complainant's exhibit or Respondent's exhibit, respectively, and followed by the number given to the exhibit by the Referee followed by the appropriate page

number.

References to specific pleadings will be made by title.

STATEMENT OF THE SUMMARY OF PROCEEDINGS

The Respondent agrees with the Statement of Proceedings contained in the RR with the exception of the following:

A. The Referee neglected to mention that a final hearing was scheduled prior to June 29 and 30, 2000 and had to be continued because the Bar attempted to introduce an expert witness in the case with only about a week to go before the previously scheduled hearing. This of course forced the Respondent to file a Motion to Strike the introduction of said expert witness because of the obvious lack of opportunity for discovery. It also caused the Referee to have to continue the case to June 29, 2000 and this cost the Respondent additional attorney's fees and expenses.

B. The Referee neglected to mention that the hearing was continued until August 29, 2000 because the Bar took up until approximately 3:30 p.m. on the afternoon of June 30, 2000 to rest their case thus leaving the Respondent no time to present his entire case. This delay caused by the Bar also created additional attorney fees and expenses for the Respondent.

C. In the Statement of Summary Proceedings the Referee also neglected to mention the Motion For Directed Verdict in Case # SC-97,O20, the contempt

case, based on the unlawful nature of the Order of Contempt, and also failed to mention that he never ruled on same. (TR, vol. IV, p.494-524)

STATEMENT OF THE FINDINGS OF FACT

II. FINDINGS OF FACT IN THE RR.

II.- A.

The Respondent agrees with the Jurisdictional Statement stated in the RR.

II.- B.

The Respondent agrees with the statement made in the RR.

Case No. SC96,087

II.- B. COUNT 1, PAR. 1

In par. 1 the Referee erroneously assumed that the Respondent met G. L. in late September of 1997 because of the date of the Consent To Termination Of Parental Rights of September 30, 1997. The Respondent actually met with G. L. in August, 1997 to discuss her Consent To Termination of Parental Rights. This timing is important because in his entire RR the Referee neglected to mention the Respondent's testimony that the Respondent had a brief sexual encounter with G. L. between the August, 1997 consultation and the early part of October, 1997 which did not violate any rules of the Florida Bar. (TR, vol. IV, p.718)

The Referee also erroneously stated that the Respondent advised G. L. to consent to termination of parental rights when in actuality the Respondent only

discussed the legal consequences of such an act and the decision was made completely by G. L..

II.- B. COUNT 1, PAR. 2

The Referee erred in stating that the Respondent asked G. L. to get a neck brace, see a doctor for a prescription, and get medical records, accident reports, and repair estimates. The Referee neglected to mention that the Respondent refused to take the case because G. L. was wearing a neck brace when she got to the office and then admitted to him that there was nothing wrong with her neck. The Referee also neglected to mention that the Respondent's secretary erroneously had G. L. to sign a Contract For Representation before the Respondent had even discussed the matter with G. L.. As a result the Referee erred in stating that the Respondent was acting as G. L.'s attorney when in fact the Respondent flatly refused to represent G. L. in an attempt at fraud. The Referee also neglected to mention the Respondent's testimony that the November 11, 1997 date on the Non-Representation letter to G. L. probably contained a typographic error and should have been dated October 11, 1997 (TR, vol. V, p.724 - 726)

II.- B. COUNT 1, PAR. 3, 4, AND 5

The Referee neglected to mention that there were two meetings with G. L. and E. L. in the Respondent's office on October 22, 1997, one in the morning and one in the afternoon. The Referee further neglected to mention that at the meeting in the morning the Respondent met with both G. L. and E. L. alone. The Referee neglected to mention that G. L.'s original complaint mentioned only the afternoon of October 22, 1997 (CX 10). The Referee further neglected to mention the testimony of three separate witnesses, Geneva Wildman, Stephen Michael Short, and Linda Short and the affidavit of Ernest Wildman and specifically the testimony of the Respondent's secretary, Robin Tidwell, that G. L.'s complaint could not possibly have been true because the Respondent only met G. L. in the front of his office, by the secretary's desk and in front of other people on the afternoon of October 22, 1997. (TR, vol. IV, p.532-600) The Referee also neglected to mention that even though the stains on a blouse (not necessarily the blouse G. L. was wearing on October 22, 1997) were confirmed to be semen (CXs 5 and 7), said semen was never related by DNA analysis to the Respondent.

II.- B. COUNT 1, PAR. 8

The Referee neglected to mention the Respondent's credible testimony that there had been a prior sexual act between G. L. and the Respondent at a time when the Respondent did not represent G. L. and which violated no Bar Rules and that when G. L. was discussing prior sex, the Respondent obviously thought she was referring to the non-representative occasion when the Respondent did not represent Ms. L.. (TR, vol. V_, p.720-723) Therefore, of course there had been sex between them in the past which possibly could have resulted in Ms. L.'s mind in a lower fee, however, Respondent can not be held responsible for what is in the mind of an admitted, long term schizophrenic who also admits to not taking her medicine. In addition the tapes make clear that the Respondent refused to lower his fee except for the logical explained reason that he was doing a very similar case at the same time which would include many of the same Court dates, research, etc.

II.- B. COUNT 1, PAR. 9,10, AND 11

Concerning the Respondent's question in par. 9 and his response, "I think you can", the Respondent asks the Court to recall that the Respondent has admitted to a prior nonsexual interlude with G. L. and to recall that on the two tapes combined there are at least forty gaps in places where the conversation is unintelligible. It violates the "clear and convincing evidence" rule to assume that this

statement reflects Respondent's desire for G. L. to perform a sexual act at that particular time. The Respondent would also ask the Court to consider the fact that G. L. knew she was on tape and speaking to police officers at whose request she had come into the Respondent's office to discuss sex. Specifically in regard to par. 11 the statements G. L. made in reference to the Respondent's sexual readiness were being made specifically to tape and knowingly recorded. This also includes the statements that she made included in par. 11 to her husband as they drove away.

It is extremely important that the court understands that the Bar exhibits referred to in Count 1, Par. 9, 10, and 11, are a transcript of tapes prepared by the local Bar Grievance Committee investigator in the presence of G. L. and undoubtedly with her help. In the Respondent's twenty-five years of the practice of law, it is unprecedented to him that a transcript of a tape would be made in the presence of, with the cooperation of, and perhaps subject to, the suggestions of an alleged victim.

II.- B. COUNT 1, PAR. 12

In par. 12, the Referee neglected to mention that the Respondent was charged only with solicitation of prostitution rather than any kind of more serious type sexual battery or exposure. This was a result of an extremely thorough

investigation, including the interviewing of many people in the area and people who were present, etc. by two police officers, one of which was a captain in charge of the Suwannee County Sheriff Department's Detective Division and the other of which was an FDLE agent of long experience. In regard to the pre-trial diversion agreement, the Referee neglects to mention the Respondent's unrefuted testimony that he drafted the agreement himself and only mentions the statement in quotations, ("discussions of a sexual nature took place between himself and the victim in regard to the legal fees to be charged by John Scott, the Defendant.") Of course they did, the tapes reveal clearly that G. L. was soliciting the Respondent to lower the Respondent's fee for either a current sexual favor or one which occurred in the past when the Respondent did not represent Ms. L.. The tapes also clearly reveal, regardless of the Referee's previous comments as to the Respondent being equivocal, that the Respondent refused to lower his fee. Par. 12 also neglects to mention FDLE agent McDaniels' equivocation in his testimony as to whether or not this was a solid case of solicitation and Assistant State Attorney Johnson's equivocation and statements to the effect that the decision to make the charge was made at a higher level and that the case probably could not be supported before a jury. (TR, vol. II, p. 275-283 and TR, vol. II, p. 395-401)

II.- B. COUNT 2, PAR. 13 AND 14

The Respondent agrees with the Referee's assessment of the Respondent's denial of trying to entice G. L. to have sex with the Respondent or the Respondent's indication of willingness to have sex with G. L. on either October 28, 1997 or October 31, 1997 and the Respondent vehemently denies exposing himself to G. L. on October 31, 1997. The Referee is indeed correct as when he states that the Respondent has, as he phrases it, had the opportunity to recant his testimony.

The Respondent did so then and does so now deny either soliciting G. L. for sex or indicating a willingness to engage in sex with G. L. on those dates. The Referee has confused the loose and vulgar talk contained on the tapes, spoken by a man who was at that time suffering from the awful disease of alcoholism, a disease recognized by the American Medical Association, with a solicitation or expression of willingness to engage in sex with G. L.. The Referee also seems to have ignored the fact that the tapes indicate clearly that G. L., upon the inducement of two police officers, was actually soliciting the Respondent for sex in return for a lower fee. The Referee also does not seem to understand that to certain men a license to practice law is not worth telling a lie. The Referee has also ignored the fact that the Respondent was conversing with a woman with whom he had a prior sexual encounter, at a time when he was not

representing her. The Referee also seems to have neglected to consider the Americans With Disabilities Act of 1990, 42-U.S.S.C., §12111.

II.- B. COUNT 2, PAR. 15

In par. 15 the Referee was certainly correct in stating that the Respondent asserted conflicts, inconsistencies, and deficiencies in the Bar's evidence, the numerous nature of which the Respondent has attempted to point out in this document. However, the Referee is incorrect in his analysis of the principal thrust of the deficiencies of the Bar's evidence. (1) and (2) of par. 15 of the RR contain merely speculations as to the possible motivations G. L. might have had for her false accusations which the Respondent presented in his written final arguments following the trial. First, if the Referee had taken the time to research the disease of Schizophrenia as I had requested in my final arguments, as contained at the Encarta encyclopedia web site located at

(http://www.encarta.msn.com/find/concise.asp?ti=761552061&sid=4#s4)

he would have discovered that the Respondent's two suggested motivations are not inconsistent at all. For example the first three symptoms of schizophrenia, given in the reference provided, are; hallucinations, delusions, and bizarre behaviour. Secondly, the Referee keeps referring to Ms. L throughout the RR as emotionally unstable, emotionally disturbed, etc. The truth is that G. L., by her own

admission in her deposition, is a diagnosed schizophrenic of long duration who refuses to take her medicine as prescribed by her treating psychiatrist. Furthermore, G. L., by her own admission and according to the testimony of Officer Crutchfield at the trial, has regular conversations with her deceased mother, her deceased brother and the devil. (TR, vol. I, p.15) Ms. L. also has an extensive criminal record, including the importation from Mexico of a large quantity of marijuana, breaking and entering, and battery. (RX 1)

Case No. SC 97,(020)

II.- C. PAR. 17

The Referee neglected to mention that the Respondent's secretary spoke with Judge Kennon's Judicial Assistant at least three times on February 9 and February 10. (TR, vol. III, p.480-486)

II.- C. PAR. 19

The Referee neglected to consider that the unrefuted testimony of the Respondent revealed that the Respondent did not stay at the emergency room in Jacksonville, Florida because it was extremely crowded , involved a long wait, he knew no one in Jacksonville, his daughter did not know where he was, and that his medical doctor was located in Gainesville, Florida. (TR, vol. V, p.635-636 and TR, vol. V, p. 650-651) In addition the unrefuted testimony of the Respondent was that

he did seek medical attention on the afternoon of February 9, 1999 but did not stay at the emergency room in Jacksonville, Florida because of the reasons stated herinabove.

II.- C. PAR. 20

The Referee apparently forgot the unrefuted testimony of the Respondent which revealed that he did not have a working fax machine at that time and that he did not have email capabilities. The Referee also neglected to mention the unrefuted testimony that Judge Kennon had a jury trial scheduled for February 9, 1999 and thus was personally unavailable or that the Respondent left for Gainesville on February 10, 1999 in an extremely ill condition. (TR, vol. V, p.637) The Referee also neglected to mention that the Respondent had an inexperienced secretary who could not do a Motion For Continuance without considerable help from the Respondent, or that the Respondent's new office computer did not have the form loaded at that time (TR, vol. V, p.648-650 and TR, vol. V, p. 679) The Referee further neglected to include the unrefuted testimony that Motions For Continuance are commonly submitted after the fact in the Third Judicial Circuit. (TR, vol. V, p.684-685) Also that after staying in the emergency room ward of the North Florida Regional Hospital on February 10 and February 11, 1999, that the Respondent called Judge Kennon's office on Friday February 12, 1999, Monday February 15,

1999, Tuesday February 16, 1999, and Wednesday February 17, 1999 in order to speak with Judge Kennon personally and finally quit calling after the Judge's Judicial Assistant kindly told the Respondent that the judge refused to speak with the Respondent.(TR, vol. V, p.642 and TR, vol. III, p. 474-475)

II.- C. PAR. 21

The Referee erred in his incorrect assumption that the Respondent was at home at 9:00am on February 10, 1999 as the Respondent has repeatedly testified that it took him approximately two hours to make the normally one hour trip to the hospital because of his illness. He is correct in his summary of the Discharge Diagnoses but apparently ignored Dr. Mudra's deposition which was placed into evidence by the Respondent. (TR, vol. IV, p.501-509)

II.- C. PAR. 22

The Referee neglected to mention that the Order Of Contempt (CX 39) failed to state whether the Contempt was civil or criminal. Also when a man is ill enough to spend two days in the emergency room of a hospital he could obviously not be intending to violate a Court Order or commit an act serious enough to warrant a vindication of the Court's authority.

The Referee further neglected to mention the Respondent's testimony as to why he abandoned the appeal, i.e., that while the Respondent considered Judge

Kennon's order to be both illegal and unfair, and that while the Respondent considered an appeal to be likely successful, the Respondent felt that such an appeal would only have served to embarrass Judge Kennon and further reduce his authority.

III. RECOMMENDATIONS AS TO GUILT IN THE RR.

III. COUNT 1- CASE NO. SC96087

The Referee erred in finding a violation of Rule 4-8.4(b) because the clear and convincing evidence of the case reveals that the Respondent did not expose his sexual organs, or commit sexual battery, since two experienced police officers thoroughly investigated the facts, and as a result the Respondent was only charged with a weak case of solicitation of prostitution.

The Referee erred in finding a violation of Rules 4-8.4(d) in that there is absolutely no evidence indicating that the administration of justice was prejudiced in anyway, especially since G. L. testified that she told Judge William R. Slaughter II on October 23, 1997 (the day following the alleged attack in the Respondent's office) that she wished the Respondent to be her lawyer in her Department of Children and Families case.

The Referee erred in finding a violation of Rules 4-8.4(i) since there is no credible evidence that the Respondent engaged in sexual conduct with a client

during a lawyer-client relationship other than vulgar sexual talk committed by the Respondent, based on a prior sexual relationship in a non-representative capacity and committed while the Respondent was suffering from the ravages of alcoholism.

III. COUNT 2 - CASE NO. SC96087

As to Count 2 of case number SC96087, the Referee erred in finding a violation of Rules 4-8.1(a) and 4-8.4(c) because the Respondent did not knowingly at anytime engage in false statements, dishonesty, fraud, deceit, or misrepresentation but has maintained consistently throughout all the proceedings in this case that he never sexually battered G. L., exposed himself to G. L., or solicited sexual favors from G. L., but used embarrassing, vulgar language based upon a prior non-representative sexual relationship and a temporary lapse in judgment due to the consumption of alcohol.

III. CASE SC97020

As to case number SC97020, the Referee erred in finding the Respondent guilty of a violation of Rules 4-3.4(c) and 4-8.4(c) because of the reasons given hereinabove in the Respondent's response to par. 22.

As to case number SC97020 the Referee erred in finding a violation of Rules 4-8.4(d) because the unrefuted evidence indicates that the actual trial took place approximately two weeks later, that the empaneled jury was voir dired by the

Respondent and indicated no aggravation or inconvenience as to the approximate two week delay, that the Respondent did a very good job in the representation of his client in that two very serious charges were reduced by the jury to two lesser charges and that the new trial judge, the Honorable William Randall Slaughter II, after closing arguments and before the jury returned, even congratulated the Respondent on doing a very good job in conducting the trial and presenting his case. (TR, vol. V, p. 652)

IV. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS IN THE RR.

IV.- A.

The Respondent has no objections to the contents of IV.- A. of the RR except the apparently gratuitous mention of a minor misconduct in 1992 since it is the Respondent's understanding of the Rules that a minor misconduct is irrelevant if it is over seven years old.

IV.- B.

The Respondent has no objections to the mitigating factors stated by the Referee in IV.- B. of the RR except the now twice stated minor misconducted discussed hereinabove. The Respondent does have an objection to what seems to be the Referee's rather light or trivial treatment of the disease of alcoholism.

Alcoholism, as defined and designated by the American Medical Association, is a deadly disease and is certainly now treated, in the Americans With Disabilities Act of 1990.

IV.- C.

The Respondent has several objections to the aggravating factors discussed by the Referee in IV.- C. of the RR. In the first part of this section on Aggravating Factors, the Referee actually states that the Respondent, "just does not get it.". The Referee further states that, "It was not so much a question of whether he was ill on the 10th or whether he had a good reason for not appearing for trial..." It is unimaginable to the Respondent that it would not be important to the Referee whether the Respondent was ill or had a good reason for not appearing at trial. The Referee goes on further to say that the problem was the Respondent's, "...complete lack of courtesy, respect, and responsibility displayed and his cavalier and presumptive approach to the situation." The Respondent finds no place in the record where there is any indication of a lack of courtesy, respect or responsibility. By "cavalier and presumptive approach" the Respondent can only assume the Referee is referring to his unrefuted testimony that Motions For Continuance are commonly granted after the fact in the Third Judicial Circuit when an emergency or an unforeseeable situation arises. In the first part of IV.- C. the Referee discusses

the Respondent's reaction of resentment at having his integrity questioned. The Respondent does not believe that he exhibited any unusual resentment at all, but of course there would be some slight resentment when the Respondent's unrefuted testimony revealed that he had never missed a trial or even been late to a trial in his previous twenty-five years of legal practice. (TR, vol. V, p.688) This fact had to be known to Judge Kennon since the Respondent had practiced before him personally as a County Court Judge and then as a Circuit Court Judge for that same twenty-five years. Even though the Respondent did not exhibit any unusual resentment , surely human nature would dictate that the Respondent would question the necessity of having the Contempt hearing in front of approximately two-hundred spectators and at least twenty of the Respondent's peers in the practice of law.

In the second part of IV.- C., Aggravating Factors, the Referee erred when he said that the Respondent implied to the Court on February 9, 1999 that he was having heart attack symptoms, that he was going to seek medical attention (which he did), that he was too ill to conduct a two day criminal trial on February 10, 1999. (TR, vol. IV, p. 501-509) Regarding the Respondent's attendance at a settlement conference on February 9, 1999 in Jacksonville, as stated earlier, the Respondent did seek medical attention thereafter. In the same paragraph the Referee next seems to ridicule the Respondent's statement that he "would have

been carried in on a gurney". In the Respondent's testimony at the trial the Respondent tried to express the importance of this conference. The conference was an attempt to settle a medical malpractice case which had been going on for several months. Mediation had been held previously which proved entirely unsuccessful. The Respondent's associate in the case had been appointed to the Florida First District Court of Appeals leaving the Respondent to carry on alone. The Respondent is not an experienced medical malpractice attorney which was why he had associated himself with Judge Browning in the first place. Both sides were dissatisfied with the mediation process. It had taken the Respondent several weeks to arrange the conference date on February 9 since there were two adjusters, three attorneys, two defendants and a plaintiff to coordinate. If the Respondent actually stated that his expert witness changed his opinion it was not the Respondent's intention to be quiet so dramatic, however the expert witness was vacillating and softening his position in regards to the probability of the Respondent's client's deceased husband surviving absent the doctor's negligence. Therein comes to play the particular facet of Florida law called the mortality fraction. Depositions in the case were scheduled to start shortly. If opposing counsel had discovered the Respondent's client's expert witness's weakening position there would have been no chance for a settlement. In addition the Respondent also had an ace up his

sleeve in that one of the doctors had signed a report about the deceased's medical condition approximately two years after the death of the deceased. Regardless of the Referee's intended ridicule when he stated, "This is what he considered a noble act". The Respondent considered it his duty to go to Jacksonville and attempt to reach a fair settlement for his client regardless of the state of his physical health. The Respondent could not then, and can not now, imagine having to explain to a grieving widow why she did not receive a fair compensation for the negligence of two doctors that resulted in the death of her husband because the Respondent was too ill to attend a simple settlement conference. In addition the Referee does not seem to understand the difference between a simple settlement conference for one hour and conducting the defense in a two day criminal trial. The settlement conference in Jacksonville resulted in a fair and just settlement for both sides. In short, not attending the one hour settlement conference in Jacksonville, Florida would have done irreparable harm to that malpractice client while attempting to conduct a two day criminal defense in the condition the Respondent was in, wherein a man's very liberty was at stake, could have done irreparable harm to the Respondent's criminal client. The amount of physical health necessary to accomplish the latter is incalculably more than to accomplish the former. (TR, vol. V, p.694-695)

In the third paragraph of IV.- C., Aggravating Factors, the Referee again ridicules the Respondent's apology to Judge Kennon and attempts to translate it's meaning. The Respondent went to Judge Kennon and apologized in the best way that the Respondent knew how. In fact the apology was a part of the ninth step of the twelve step program of Alcoholics Anonymous. It appeared to the Respondent that Judge Kennon was angry at him on the day of the show cause hearing for more than the Respondent's missing the trial. His demeanor was livid and even when the Respondent asked him to stay the payment of the one thousand dollar fine until the Respondent could file a Notice of Appeal or at least consider the appeal process, Judge Kennon informed the Respondent that if he did not pay the fine by the Friday of that same week the Respondent would be jailed. (CX 38)

(TR, vol. V, p.644) It seemed obvious to the Respondent, then and now, that there were other factors involved beyond his spending two days in an emergency room. The Respondent's apology was intended to include any and all ways in which the Respondent might have offended Judge Kennon, both known or unknown to the Respondent.

In the fourth paragraph of IV.- C., Aggravating Factors, the Referee describes G. L. as particularly vulnerable and states that she has a history of mental and emotional instability. Of course this must be true since she is an admitted

schizophrenic who refuses to take her prescribed medication. At this point it should be noted that the Referee apparently neglected to consider that the Respondent is not a trained psychologist or psychiatrist but is only a simple country lawyer with no training or skill in detecting schizophrenia or any other mental illnesses or unusual vulnerabilities. In fact the Respondent did not find out about Ms. L.'s serious mental disease of schizophrenia until her deposition was taken at a much later date after the charges were filed. Describing a person with schizophrenia, a very serious mental disorder, as mentally and emotionally unstable strikes the Respondent as a serious underestimation of the mentality of the type of client with whom the Respondent was trying to work. The Referee further describes Ms. L. as uneducated, unsophisticated and under great stress. There is no evidence or indication that Ms. l. was uneducated, unsophisticated, or unduly stressed. The Referee has apparently assumed this from the nature of the case, however he neglected to consider the fact that Ms. L. had already, on a previous occasion, voluntarily terminated parental rights to one child. The Referee's statement that the Respondent's graphic sexual comments and actions were a vile exploitation of her vulnerability seems to ignore the fact that there is no credible evidence of "actions". The Referee's characterization of the Respondent's conduct as intentional in that the only logical motivation for his actions was either a desire for perverse sexual

gratification or a sadistic exercise of power, is exceedingly melodramatic. The only credible evidence in the whole case were the tapes from October 28, 1997 and October 31, 1997, the flawed nature of which the Respondent has previously pointed out. In addition, the Referee completely ignores, the influence of alcohol, the fact that G. L. initiated the sexual nature of the conversation, and the fact that the Respondent had a previous sexual relationship with G. L. while in a non-representative capacity.

V. RECOMMENDATIONS AS TO DISCIPLINE IN THE RR.

V.- A.

In section V, the Referee states that he reviewed five cases, only two of which are Florida cases. The only problem with his case selections is that the factual situations involved in those cases has very little to do with what happened in the present case. The cases cited by the Referee are simply not on point. Furthermore, the cases from Georgia (In Re Lewis, 415 SE 2d 173), Missouri (In re Littleton, 719 SW 2d 772, and Rhode Island (Carter v. Kritz, 560 A.2d 360) were obviously decided under the Rules and traditions of the Bar Associations and Courts of those states, about which the Referee in the current case could know very little or nothing at all. In V. - A. the Referee recommends an eighteen month suspension followed by a two year probation under Florida Lawyers' Assistance.

The Respondent feels that this recommendation is extremely excessive based upon the following factors:

1 - The only credible evidence in the entire case indicates that the Respondent did use vulgar language in the presence of a client, the sexual nature of which was initiated by the client.

2 - RX 9, the psychological evaluation by Dr. Krop, a forensic psychologist, that indicates that the Respondent is not a sexual threat to anyone.

3 - RX 8, Mr. Ben Malinowski's polygraph report which was accepted into evidence by the Referee since Mr. Malinowski is a noted polygraph examiner and expert of some forty plus years of experience, and strongly indicates that the Respondent is telling the truth.

4 - The testimony of Geneva Wildman, Stephen Michael Short, Linda Short, and the Respondent's former secretary, Robin Tidwell, all of which indicate that G. L.'s initial complaint in this case and her steadfast account that she was attacked on the afternoon of October 22, 1997 could not possibly be true.

5 - The transcript of the deposition of the Respondent's physician Dr. Mudra, which indicates that the Respondent was indeed ill and in the hospital during the trial dates of February 10 and February 11, 1999.

V.- B.

The Referee ordered payment of the entire amount of the Florida Bar's costs. As previously pointed out the Bar itself caused significant delays which caused the Respondent to have to increase his own attorney's fees and expenses which the Respondent feels the Referee should have ordered to be determined and should have deducted the Respondent's payment of costs.

VI PAYMENT OF COSTS IN THE RR.

The Respondent has no comment on section VI of the RR except to the extent, as previously noted, that the excessive cost to the Respondent was caused by the Bar's two significant delays and should have been deducted.

SUMMARY OF ARGUMENT

The Referee's recommended discipline does not comport with prior decisions of this Court. The Findings of Fact of the Referee are erroneous and lack evidentiary support. The Referee's Findings of Fact violate the "clear and convincing evidence" burden of proof traditionally used in the state of Florida in Bar disciplinary cases. The Florida Bar v. Vining, 707 So.2d 670,672 (Fla. 1998)

ARGUMENT

A. SEXUAL MISCONDUCT CASES

The Respondent has reviewed the five cases cited and reviewed by the Referee in the RR, only two of which are from the state of Florida.

First it is the Respondent's opinion that using cases from other states is erroneous because the Referee could not possibly have a clear understanding of the Bar Rules, procedures and traditions which over several decades have accrued towards disciplinary proceedings in other states.

Secondly, the two Florida cases reviewed by the Referee, The Florida Bar v. Samaha, 557 So2d 1349 (Fla.1990) and The Florida Bar v. McHenry, 605 So.2d 459 (Fla. 1992), as well as the cases cited from Georgia (In Re Lewis, 415 SE 2d 173), Missouri (In re Littleton, 719 SW 2d 772), and Rhode Island (Carter v. Kritz, 560 A.2d 360), are not on point in that the factual situations therein are not the same as the clear and convincing evidence indicates the factual situations were in the present case.

In the present case the only clear and convincing evidence of conduct on the part of the Respondent is the vulgar language by the Respondent contained on the audio tapes of the conversation between the Respondent and G. L. on October 28, 1997 and October 31, 1997.

The Respondent will not go into all the ways in which the Referee has violated the "clear and convincing evidence" rule in the Findings of Fact contained in the RR. The Respondent does however request that the Court review carefully the Statement of the Findings of Fact contained in this brief in which the Respondent feels that he has fairly well documented the Referee's errors.

The essence of the Referee's errors may, however, be summarized as follows.

1. - The Referee has believed, on every significant point, the testimony of G. L. who is an admitted long term schizophrenic under psychiatric care who, in addition, refuses to take her prescribed medicines including but not limited to Thorazine. The Referee has ignored the testimony of the Respondent even though the Respondent has been an attorney in a small community for twenty-five years. Common sense would seem to dictate that a man could not survive and practice law in a community of approximately five hundred people in an extremely rural area for twenty-five years and be a liar. The Respondent offered ample evidence from respectable members of his community and rural area that he indeed has a reputation for truth and veracity. For example the essence of the Findings of Fact by the Referee in the sexual misconduct case is that the Respondent indeed committed sexual battery against G. L. This is contrary to the clear and

convincing evidence in several areas. First, the testimony of Robin Tidwell, Geneva Wildman, Stephen Michael Short, and Linda Short, the affidavit of Ernest Wildman as well as the credible testimony of the Respondent indicate that Ms. L.'s initial complaint that she was sexually battered on the afternoon of October 22, 1997 can not possibly be true.

Secondly the Referee has presumed to make a finding of sexual battery, sexual exposure, etc. when two experienced law enforcement officers, the Captain in charge of the Suwannee County Sheriff's Department detective division and an FDLE agent, as well as a combination of state attorneys including the lead prosecutor C. Nieto Johnson and Jerry Blair, the State Attorney himself and his chief prosecutor Bob Dekle, after much consultation could only arrive at a charge of solicitation of prostitution against the Respondent. In her testimony, Ms. C. Nieto Johnson, even admitted that the solicitation of prostitution charge was weak and probably could not be supported in Court, thus motivating her to enter into the pre-trial intervention agreement with the Respondent. In his testimony the FDLE agent, Robin McDaniels, admitted that he really did not hear the Respondent soliciting Ms. L. for sex but rather the reverse.

2. - The gist of the second major error the Referee made in his Finding of Fact was his interpretation of vulgar comments made by the Respondent in the

audio tapes of October 28, 1997 and October 31, 1997. The Referee interpreted this incorrectly as indicating "either a desire for perverse sexual gratification or the sadistic exercise of power and control over his client/victim". The Referee's interpretation erred in several ways as follows:

a - The Referee ignored the psychiatric evaluation by Doctor Krop which indicated that the Respondent is not a sexual threat to anyone or a sexual predator.

b - The Referee ignored the testimony and report of Mr. Ben Malinowski, a polygraph expert, (which the Referee accepted into evidence over the Bar's objection) that the Respondent was telling the truth.

c - The Referee ignored the evidence that there had been a prior sexual relationship between the Respondent and G. L. and at the time that it occurred the Respondent did not represent Ms. L.

d - The Referee ignored the clear and convincing evidence that Ms. L. was sent by two policemen with the purpose of initiating a discussion of sex and indeed did so.

e - Finally the Referee ignored the evidence that at the timeof the incident, the Respondent was suffering from the serious disease of alcoholism, drinking at that time approximately one quart of whiskey per day and that while

under that kind of influence the Respondent's normal inhibitions and sense of propriety would be reduced and thus he could more easily be led to engage in loose, vulgar conversation, especially with someone with whom he had a prior non-representative sexual relationship.

B. CASES INVOLVING LACK OF CANDOR AND FALSE STATEMENTS

In regard to the Referee's Count II of the RR involving the Respondent's statements under oath before the Grievance Committee, in deposition, and at the trial, the Referee basically found that the Respondent had lied about the solicitation of Ms. L. for sex while representing her and his willingness to engage in sex with Ms. L. while representing her. Of course these findings and charges are merely adjuncts to the Referee's erroneous Findings of Fact as to what really happened and do not stand alone. The Respondent has remained consistent throughout all of these proceedings to the effect that he did not sexually batter G. L., expose himself to G. L., solicit sex from G. L., or indicate a willingness to engage in sex with G. L. on either October 28, 1997 or October 31, 1997. Once again the Referee has made the same errors described immediately hereinabove. As ashamed as the Respondent is at the present time about his use of vulgar language with anyone, not just a client, surely the Referee should have

considered that a man suffering from alcoholism could easily be led by someone with whom he had a prior non-representative sexual encounter, into making loose, silly, and vulgar statements which do not indicate malevolent intent but only meaningless talk.

C. CONTEMPT CASES

The Respondent has found no Florida cases which relate to allegations of misconduct based on Contempt Of Court except for those cases cited in the Respondents Motion For Directed Verdict made at the trial level. (TR, vol. IV, p. 494-524) The gist of all the cases cited hereinabove is that the attorney must be found to have intentionally violated the Order of the Court in order to be found in criminal contempt. In his review of the Referee's Findings of Fact discussed previously herein, the Respondent has gone into great detail as to where the Referee erred in finding him guilty of the three Bar Rules violations he cited.

In short at the time of the incident, February 10 and February 11, 1999 the Respondent was fifty-two years old, he was a practicing alcoholic, and he had never paid any attention to his diet which consisted almost exclusively of animal fat. Whereas now the Respondent goes to the gym and works out an average of five times per week, at the time of incident he did not exercise at all. Even though the Respondent's heart attack symptoms turned out to be the result of

gastroesophageal disease he was very frightened and confused and thought at best he was facing bypass surgery. During the Bar trial the Referee asked the Respondent repeatedly what in hindsight, regarding the trial with Judge Kennon, would he have done differently. Under the circumstances the Respondent certainly might have done some things differently, however, considering the circumstances of the Respondent's illness, the Respondent feels that it is unfair for the Referee to question the judgement of a man in that condition. Considering the circumstances of that situation, it is erroneous to find that the Respondent intentionally violated a Court Order or intentionally showed disrespect to the Court. The Judge specifically erred in the following ways:

1 - The Referee states that it was "not so much a question of whether he was ill on the 10th or whether he had a good reason for not appearing for trial...". If the Respondent was actually ill and had a good reason for not appearing at trial, how could the Respondent have possibly intentionally violated the Order to appear at the trial on the 10th or intentionally disrespected the Court by not doing so.

2 - The Referee states further, under the section of Aggravating Factors, that the important issue to him was "the complete lack of courtesy, respect, and responsibility displayed and his cavalier and presumptive approach to the situation.". The Respondent can find no evidence that he showed a lack of

courtesy, respect or responsibility. The Respondent did the best he could, with his impaired judgement due to considerable illness, to convey to the Court that he was not physically able to conduct a two day criminal trial. By "cavalier and presumptive approach" the Respondent assumes that the Referee is discussing his unrefuted testimony that he had never missed or even been late to a hearing or trial in his twenty-five years of practice and that he presumed that Judge Kennon would have known this since the Respondent had appeared before Judge Kennon a great many times in those twenty-five years. By that language the Respondent further assumes that the Referee is referring to the Respondent's unrefuted testimony that in last minute emergency situations Motions For Continuance are commonly filed after the fact in the Third Judicial Circuit. The Referee also seems to have neglected to consider the unrefuted testimony of the Respondent that the Respondent had attempted to call Judge Kennon personally on the Friday, Monday, Tuesday, and Wednesday following the Respondent's two day stay in the hospital.

3 - The Referee further erred in his treatment of what he perceived as the Respondent's "...resentment at having his integrity questioned, at having the contempt hearing held in open court rather than in chambers, at having his integrity questioned.". The Respondent believes that the evidence reveals no undue or exaggerated resentment on his part, but certainly a man who had survived and

practiced law in a small town for twenty-five years could not have done so without having some integrity and a little bit of pride in maintaining that reputation for integrity.

4 - The Referee further erred in failing to consider that a trial was held approximately two weeks later and that the Respondent himself was the only one actually harmed by the delay. The same jury was voir dired and expressed no problem whatsoever with coming back two weeks later. The Judge and the prosecutor are paid a salary and must be there everyday anyway. The defendant certainly would not have wanted an attorney who was seriously ill to represent him in a serious criminal case. The Respondent had not only to expend his time by preparing completely again to try the case approximately two weeks later but also had to spend a considerable amount of his own money to resubpoena witnesses and to pay travel costs.

5 - The Referee also erred in overemphasizing and actually ridiculing the Respondent for going to Jacksonville for an approximate one hour settlement conference on the day before the trial was to begin. The Referee obviously did not consider the difference between attending a short settlement conference and conducting a two day criminal trial. In addition, he also did not consider that either as a man or an attorney, Respondent, whether or not his judgment was perfect, felt

like he was doing his duty in going to Jacksonville and successfully settling the case. The Respondent has given the reasons previously wherein his attendance at that settlement conference was absolutely necessary, the alternative being that a widow who lost her husband because of medical negligence would have a considerable probability of receiving a directed verdict.

6 - In the Referee's Aggravating Factors contained in IV. - C. of the RR the Referee further erred by ridiculing the apology the Respondent offered to Judge Kennon. The Referee seems to think that from the evidence he was able to discern that the Respondent's apology was "half -hearted" and that even though there was no evidence to the point the Referee was able to translate the actual meaning of the Respondent's apology. The Respondent certainly does not claim any nobility because of the apology. The Respondent apologized to Judge Kennon as part of the ninth step of the twelve step program of Alcoholics Anonymous. The Respondent feels that the sincerity of this apology speaks for itself and should not have been subjected to ridicule by the Referee.

CONCLUSION

For the many reasons set forth above, the Respondent respectfully requests that this Court reject the Findings of Fact and the Recommendation of Guilt as found in the RR and impose a considerably less severe punishment if wrong doing is found to have been committed on the part of the Respondent. As reasons therefore the Respondent would address the following:

1 - The only credible evidence in the entire case consists of silly, vulgar comments made by the Respondent while under the active influence of the disease of alcoholism.

2 - No question has ever arisen in the Respondent's twenty-five year career as to his competence. (The Respondent's prior minor misconduct, was only the result of a settled dispute over whether the Respondent had appropriately communicated with a client)

3 - The Respondent practices in a very rural and economically disadvantaged area. As a result, the Respondent's practice is comprised of approximately fifty percent pro bono cases in one form or another. The people of the area the Respondent serves desperately need competent legal counsel, which for all practical purposes they can get nowhere else nearby.

4 - The Respondent himself has a family to support and an eighteen month

suspension would in effect end the Respondent's ability to make a living for his family since the Respondent is nearly fifty-five years old and has no other skills or means by which to make a living.

5 - The Respondent voluntarily ended the drinking of alcohol on December 13, 1999. By the following Sunday he had acquired a sponsor in Alcoholics Anonymous and attended his first meeting of Alcoholics Anonymous on the following Tuesday, and has subsequently attended meetings of Alcoholics Anonymous on a regular basis from that time forward. The Respondent now attends a gym on an average of five times per week. The Respondent voluntarily entered the Florida Lawyers Assistance program in February of 1999 and has successfully completed all of their requirements since. In short the Respondent has taken great strides in rehabilitating himself at his own initiative.

6 - The Respondent respectfully suggests to the Court that if this Court determines that the Respondent needs to be sanctioned in some way that the Court seeks a creative solution that does not waste twenty-five years of legal experience and eliminate a source of legal counsel so badly needed in the Respondent's geographical area of practice. The Respondent would further respectfully suggest the following creative solution. In the rural area in which the Respondent practices the Public Defender's office and the local Legal Aid Office, known as Three

Rivers Legal Services, Inc. , are obviously understaffed and overworked. Instead of eliminating the opportunity for the Respondent to offer his unrefuted competent legal services to the public perhaps the Court would order the Respondent to accept a case or two per month from the Public Defender's Office and Three Rivers Legal Services, Inc., to be of course handled on a no fee basis. It strikes the Respondent that a creative sanction would best serve both the interest of the public and the interest of the Respondent.

The Respondent has reviewed that section of the Florida Standards For Imposing Lawyer Sanctions contained under, *A. Purpose And Nature of Sanctions section 1.1 Purpose of Lawyer Discipline Procedures*; (Fla. Stds. Imposing Law. Sancs. 1.1) which states,

> "The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly."

and with regard to the stated purpose of protecting the public the Respondent feels that the Respondent's own self imposed rehabilitation and Dr. Krop's psychiatric evaluation of the Respondent indicated that the public is in no danger from the Respondent's practice of law. The Respondent believes that same argument holds

true in terms of protecting the administration of justice and that the Respondent's self imposed rehabilitation process started on December 13, 1999 makes it entirely likely that the Respondent will discharge his professional duties to clients, the public, the legal system, and the legal profession.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Cross Initial Brief/Answer regarding Supreme Court Case Nos. SC96087 and SC97020 has been mailed by certified mail # 7000 0600 0023 0260 7584, return receipt requested to Edward Iturralde, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 23rd day of April, 2001.

_____

John L. Scott, Respondent
P.O. Box 475
Branford Fl., 32008
Florida Bar No. 206911