**ORIGINAL**



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.
_____/

# INITIAL BRIEF

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

Undersigned counsel does hereby certify that the Answer Brief of Complainant/Appellant/Cross Appellee 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 page number.

References to the transcript of the hearing before the Referee shall be by the symbol **TR** followed by the appropriate volume and page number.

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 CASE

The Florida Bar adopts the Summary of Proceedings and Findings of Facts as presented by the Report of Referee.

## SUMMARY OF ARGUMENT

The Referee's recommended discipline falls short of the discipline warranted by Respondent's misconduct in light of 1) prior decisions of the Florida Supreme Court and other state courts; and 2) the Florida Standards for Imposing Lawyer Sanctions.

## ARGUMENT

While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997)). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law.

## ISSUE I

THE RECOMMENDED DISCIPLINE DOES NOT COMPORT WITH PRIOR DECISIONS OF THIS COURT OR OTHER STATE COURTS.

### A. SEXUAL MISCONDUCT CASES

The Florida Supreme Court has wrestled with the task of imposing the appropriate level of discipline for an attorney's sexual misconduct with a client on only three occasions. All three would support The Bar's contention that additional discipline is warranted under the facts of this case.

The first reported case is The Florida Bar v. Samaha, 557 So.2d 1349 (Fla.

1990). Samaha received a one year suspension followed by one year probation for touching an adult teenage client on the back and thighs and taking seminude photographs of his client. Neither the touching nor the photographs were necessary for the case. Samaha was later charged with and pled no contest to a misdemeanor battery. While the discipline imposed by the Court in Samaha is less than that recommended by the referee for Mr. Scott, the actions of Samaha were also far less egregious. The acts of Samaha, while reprehensible, almost seem juvenile when compared to the acts of misconduct attributed to the Respondent in this case. Where Samaha received his perverse gratification by viewing his client's semi-clad body and touching her with his hands on personal, but not sexual areas of her body, Respondent in this case touched his client with his penis and left a semen stain on her blouse. (RR p 5 para.5) Respondent exposed himself to her again on October 31, 1997. (RR p 6-7 para.8) He enticed his client for sex on three occasions. The referee found that The Bar had proven by clear and convincing evidence that Mr. Scott had committed two misdemeanor crimes: exposure of sexual organs and battery. (RR p 12).

The per curiam opinion in Samaha states that "[e]ven the slightest hint of sexual coercion or intimidation directed at a client must be avoided at all costs." Samaha at 1350. If Samaha went "far beyond the limits of propriety" and received

a one year suspension, how much further beyond the actions taken by the Respondent in this case must an attorney go before disbarment is the appropriate remedy? As shown by the Court's opinion in The Florida Bar v. McHenry, 605 So.2d 459 (Fla. 1992), Respondent has gone too far.

McHenry, much like Samaha, touched a female personal injury client on her neck, arms, rib cage, and back. He then went behind his desk and appeared to be masturbating. Another of McHenry's clients testified that McHenry was indeed masturbating during an office consultation. McHenry was found to have committed the crimes of battery and exposure of sexual organs. McHenry at 460. The referee recommended a two year suspension. This Court ultimately imposed permanent disbarment. Mr. Scott's misconduct goes far beyond the facts of McHenry. Not only did he touch his client in an inappropriate manner and masturbated in her presence, but he encouraged his client to engage in a sex act with him and deposited the outcome of his masturbation on his client. Such misconduct "reflects adversely on his fitness as a lawyer and on the reputation and dignity of the profession." McHenry at 460. Respondent should be disbarred.

The third case is somewhat different in that the attorney was convicted of a felony. Nevertheless, the facts involve sexual misconduct and a lack of candor that are analogous and instructive for determining the proper discipline in this

case. In The Florida Bar v. Barket, 633 So.2d 19 (Fla. 1994), Barket was disbarred after being convicted of lewd and lascivious assault on a minor. While initially confessing to having sexual intercourse with the minor, he later recanted and insisted that the confession was coerced. Barket continued to deny any wrongdoing in the disciplinary proceedings by arguing that he believed the victim was over eighteen years old. Barket also argued that his misconduct did not involve the practice of law. The Court found that argument lacked in candor in that he had given the minor legal advice and met the girl through another client. Admittedly, Barket had a prior three year suspension stemming from another felony conviction as an aggravating factor while Mr. Scott does not.

Other states have also imposed discipline on attorneys for sexual misconduct with clients. Understandably, the discipline imposed varied from public reprimands, to suspensions to disbarment. See, Oklahoma Bar Association v. Sopher, 852 P.2d 707, 709 (Okla. 1993) (Footnote 3 reviews disciplinary cases based on sexual misconduct from multiple states. The Oklahoma Court found that disbarment was imposed in cases that involved additional misconduct). The referee explicitly considered cases from other jurisdictions. (RR p 17). A review of those cases cited by the referee is appropriate at this time.

The Georgia Supreme Court imposed a three year suspension for an attorney

engaged in an extra-marital affair with a client before, during, and after his representation in dissolution proceedings. In re Lewis, 415 SE 2d 173 (Ga. 1992). The case was decided on summary judgment which deprived the court of a factual record to review. The Georgia Court specifically noted that had their been a factual determination that the representation was in any way premised upon the sexual relationship, then disbarment may have been the appropriate result. In fact, three of the Justices dissented and stated that they would have imposed a disbarment based on the facts as presented. Lewis at 175. The Lewis case is distinguishable from this case. Here the court possesses a full record from a hearing conducted before a referee which found that Respondent abused a vulnerable client in a stressful situation for either his "perverse sexual gratification or the sadistic exercise of power and control." (RR pp 16-17). Despite Respondent's testimony to the contrary, the referee did not find that the sexual relationship predated representation as was the case in Lewis. Additionally, there is no finding in Lewis that the attorney lacked candor during the disciplinary proceedings, or committed any other unrelated misconduct. Yet, in spite of these distinguishing facts, Lewis received more severe discipline than the discipline recommended for Mr. Scott.

The Missouri Supreme Court imposed a six month suspension on an

attorney for making sexual advances to a client and failing to return $1000.00 given to him to secure his client's release after the bond was reduced to $50.00. In re Littleton, 719 SW 2d 772 (Mo. 1986). The sexual advances described in Littleton, while not condoned, fall into the category colloquially termed "making a pass." Littleton kept trying to get physically close to his client and brushed his hands across her breasts while driving her to a friends house. These facts are a far cry from the graphic sexual comments and the overt, forceful, sexual misconduct of Mr. Scott. Furthermore, the additional charges of neglect leveled against Littleton were found lacking merit, whereas Mr. Scott was found to have violated every Rule charged by the Complaint. Even the Littleton Court was divided. Judge Welliver, dissenting, believed that Littleton should have been disbarred for misconduct which falls quite short of that committed by Mr. Scott.

The last case cited by the referee is Carter v. Kritz, 560 A.2d 360 (R.I. 1989). In Kritz, the attorney was suspended for one year and thereafter until rehabilitation is established for soliciting three female clients to pose nude or semi-nude in exchange for his legal services. Two of the women declined and went to the authorities. A third acquiesced and apparently engaged in some sexual act with the attorney, although the circumstances are not described. Distinguishing the facts without knowing the details of the attorney's encounter

with the third client is impossible. However, one distinguishing fact is Kritz' admission of wrongdoing as compared to Mr. Scott's repeated denials and explanations which have been found lacking in candor.

Two cases from other jurisdictions not mentioned in the Report of Referee deserve the Court's consideration. The first case is People v. Gibbons, 685 P.2d 168 (Co. 1984). The attorney in Gibbons was disbarred by the Supreme Court of Colorado for engaging in exploitive sexual misconduct with a client, multiple conflicts of interest in representing that client along with her six other criminal co-defendants, and providing false and misleading information to the grievance committee. Gibbons had also been previously suspended for unrelated misconduct. While Respondent in this case has not been previously suspended, he did receive an admonishment for minor misconduct in 1992. Additionally, while Mr. Scott was not found to have violated any rule regarding conflicts of interest, he has been found in violation of much more serious misconduct including committing crimes which reflect adversely on his honesty trustworthiness or fitness as a lawyer, engaging in conduct prejudicial to justice, and knowingly disobeying an obligation under the rules of a tribunal, in addition to the violations found for his perverse sexual misconduct and deceitfulness. Mr .Scott should be disbarred by this Court as Gibbons was by the Supreme Court of Colorado.

The second case is factually strikingly similar to this one. In Nebraska State Bar Association v. Denton, 258 Neb. 600, 604 N.W.2d 832 (Neb. 2000), that state's high court disbarred Denton for enticing an emotionally vulnerable client into a sexual relationship, failing to call beneficial witnesses at her trial that could reveal the relationship, and denying any involvement in misconduct despite overwhelming evidence to the contrary. Denton represented K.J. in dissolution proceedings. At that time, K.J. was removed from the marital home and was seeking counseling. Denton made sexual advances to his client which were not rebuffed because of her emotional state. When K.J. confided her situation with another attorney, he encouraged her to obtain corroborative evidence. K.J. surreptitiously tape recorded conversations between Denton and herself that revealed the sexual nature of their relationship. Denton denied any such relationship and stated that he had no idea what K.J. was talking about when he was confronted with the tapes. Throughout the proceedings, Denton continued to raise explanations that were neither convincing nor believable. These findings closely mirror those made by the referee in this case. Judge Lewis described the vulnerability of Mr. Scott's client:

> the client[] was particularly vulnerable. As the Respondent took great pains to point out, she has a history of mental and emotional instability. She was uneducated and unsophisticated when she came

> to Mr. Scott to seek help in a case that, by its very nature, is extremely stressful to a client - a petition for termination of parental rights. Even without a history of mental illness, this would be a trying and stressful situation. Mr. Scotts' graphic sexual comments and actions show a callous disregard for his client's best interests and the vilest exploitation of her vulnerability. His conduct cannot be deemed a mistake, but rather was intentional. The only logical motivation for his action was either a desire for perverse sexual gratification, or the sadistic exercise of control over his client/victim. (RR pp 16-17)

The Report of Referee states, on pages 8-9, that Respondent presented false and misleading testimony to both the grievance committee and the referee. The referee also found Respondent's contentions inconsistent and unbelievable, including Respondent's contention that his emotionally imbalanced client concocted and carried out an "elaborate extortion plan" which required her to manipulate the listening device planted on her by law enforcement to only record his salacious comments and not record appropriate lawyer-client conversation. While the holdings of cases from other state high courts are not binding on this Court, they can be persuasive. Mr. Scott, like Nebraska's Mr. Denton, "has exploited his client's emotional vulnerability and placed his own self-interest and protection above that of his client. His abuse of the professional relationship, his continual refusal to accept responsibility for his conduct, and his disingenuous behavior throughout the disciplinary proceedings render [him] unfit to practice law." I pray

this Court finds the holdings of McHenry, Barket, Gibbons, and Denton persuasive and orders Mr. Scott disbarred from the practice of law.

B. CASES INVOLVING LACK OF CANDOR AND FALSE STATEMENTS

There can be no dispute that Respondent's sexual misconduct charge is by far the most egregious of the allegations leveled against him. However, that should in no way minimize the serious ethical failing of Respondent in committing perjury in an attempt to cover up his sexual misconduct. This Court has stated that:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done it deserves the harshest penalty. (citation omitted). We can conceive of no ethical violation more damaging to the legal profession and process than lying under oath, for perjury strikes at the very heart of our entire system of justice - the search for truth. An officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically be expected to be excluded from that process. The Florida Bar v. Kleinfeld, 648 So.2d 698, 701 (Fla. 1994) (quoting The Florida Bar v. Rightmyer, 616 So.2d 953, 954-55 (Fla. 1993).

Accordingly, this Court has frequently suspended attorneys for false testimony. See e.g. The Florida Bar v. Kleinfeld, 648 So.2d 698 (Fla. 1994) (three year suspension for neglectfully failing to appear at scheduled hearings and submitting

a false affidavit). For the sole act of testifying falsely to a grievance committee, this Court has disbarred attorneys. In The Florida Bar v. Budnitz, 690 So.2d 1239 (Fla. 1997), Mr. Budnitz was disbarred in Florida based upon his disbarment in New Hampshire for the sole violation of knowingly making a false statement of fact in connection with a disciplinary matter. The New Hampshire rule is virtually identical to the Florida rule 4-8.1. Mr. Budnitz' falsehood was a statement, made in response to a bar inquiry, that he believed his grand jury testimony (regarding the date certain employment termination documents were notarized) was true. This grand jury testimony was shown to be false. Interestingly, neither New Hampshire nor Florida imposed any discipline or entered any findings regarding his false testimony to the grand jury. How much more egregious is Mr. Scott's misconduct in not on one occasion, but twice lying to the grievance committee that he had never solicited his client for sex, agreed to engage in sex with his client, or even indicate a willingness to engage in a sex act when his own words were on tape and shown to him transcribed.

In another case, an attorney was suspended for eighteen months solely for falsely testifying before the grievance committee and attempting to have another attorney corroborate the lie. The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961). Unlike Mr. Scott, Langford subsequently confessed his misconduct. The

Court stated in closing that "[t]he harsher penalty of disbarment might be deserved because of the nature of the misconduct; however the age, short period of practice, and quick action of respondent . . . merit the lesser penalty." Id.

If either sexual misconduct or false testimony to a grievance committee warrant disbarment under certain circumstances, then the combination of these serious ethical failings should certainly warrant no less than disbarment under the facts of this case.

## ISSUE II

## THE RECOMMENDED DISCIPLINE DOES NOT COMPORT WITH THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

There are four general factors that should be considered prior to imposing discipline, (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. Several duties were violated by Respondent's misconduct which correspond to several specific standards including: 5.1 Failure to Maintain Personal Integrity, 6.1 False Statements, Fraud, and Misrepresentation, 6.2 Abuse of the Legal Process, and Violations of Other Duties Owed as a Professional. Whether these standards recommend disbarment,

suspension, public reprimand, or admonishment depends whether the conduct was intentional or negligent and whether serious injury (either actual or potential), any injury, or little to no injury stemmed from the misconduct. Respondents acts of misconduct with regard to Ms. L were not negligent but knowing and intentional. (RR p 17). The injury, as defined in the standards, can be to the client, the public, the legal system, or the profession. Ms. L was demeaned in a vile way that is magnified by her fragile emotional state which was caused, in part, by similar sexual misconduct by her father. Such misconduct must fall into the "serious" category. Additionally, Mr. Scott's inappropriate advances cast aspersions on the entire profession. Similarly, Mr. Scott's lies to cover up not only his misconduct but his alcoholism were intentional and seriously injure the legal system and the profession.

His failure to appear at trial is not so easily defined. He failed to properly seek a continuance, and he ultimately failed to appear as required. Respondent was in some pain and discomfort, however, which cannot be discounted as a major factor in his failure to appear. His words and demeanor during his testimony on this matter suggest that it was intentional. Mr. Scott had made up his mind that he was well enough to attend the conference and too ill to prepare a motion for continuance or appear at trial. (RR p 16). While the scheduling of a trial is no

trivial matter it is certainly less serious than the sexual misconduct and deception engaged in by respondent in the other case. Accordingly, the standards cited above in conjunction with the factual findings would suggest disbarment under the G L case and suspension under the Contempt case.

The standards should then be calibrated by a consideration of aggravating and mitigating factors as set out in standards 9 -12.

Mr. Scott has been disciplined in the past: Mr. Scott accepted an admonishment for minor misconduct on April 8, 1992. However, this should not be considered as an aggravating factor under the standards as seven or more years have past in which no disciplinary sanction was imposed. Standard 9.22(a), Florida Standards for Imposing Lawyer Sanctions.

Respondent had a dishonest or selfish motive. Mr. Scott's many misrepresentations to the Bar and the judicial system regarding these allegations in an attempt to cover up his wrongdoing, in addition to his purely selfish desire for sexual gratification, merits a finding of aggravation.

Mr. Scott engaged in a pattern of misconduct. This was on ongoing series of acts on multiple days, any single one of which, would merit discipline. The pattern warrants a finding of aggravation.

There are three general offenses charged and proven, the inappropriate

sexual conduct with Ms. L which occurred over a period of time, the ongoing misrepresentations made by Respondent regarding the sexual misconduct, and the finding of contempt. This equates to multiple offenses.

Respondent engaged in submission of false evidence, false statements, or other deceptive practices during the disciplinary process. Not only did Respondent render false statements to the grievance committee, he compounded his lies and made additional misrepresentations in responses to The Florida Bar in correspondence and under oath in depositions and at trial.

Respondent refuses to acknowledge the wrongful nature of conduct. Respondent continues to believe that he did nothing wrong and that any discipline imposed will not hurt him but his clients and potential clients from his small, rural community. Even assuming that the only evidence against him were the audiotapes of his conversations with Ms. L he fails to acknowledge that those conversations were professionally inappropriate. When finally caused to admit that he stated the words reflected on the transcript, he still maintained that he had not lied to the grievance committee and to the referee by stating that he never even indicated a willingness to engage in sex with Ms. L .

The victim has a long history of psychiatric problems. There is some indication that these problems were caused, in part, by prior sexual abuse from her

father when she was a young girl. While Mr. Scott was not apparently aware of the extent of her problems when he engaged in his misconduct, he knew that a prior husband had committed suicide, that one of her children had attempted suicide, and that her father had sexually abused her. He also knew that the State was attempting to deprive her of her parental rights. Mr. Scott attempted to impeach his client's testimony with her psychological history. Mr. Scott apparently failed to realize that her testimony was corroborated by other testimony, physical evidence, documents (including many from his own office), and finally, his own words on tape. The victimized client was especially vulnerable.

Mr. Scott has substantial experience in the practice of law. As stated repeatedly by Respondent during his testimony, he has been practicing for 25 years.

In terms of mitigation, Mr. Scott did demonstrate personal or emotional problems. Mr. Scott is a widower who has raised a teenage daughter on his own. He has had some medical problems which, combined with the pressures of law practice and parenting, as well as solitude and loneliness, led Mr. Scott to drink to excess.

Respondent had several witnesses representing his community testify favorably

with regard to his reputation for truthfulness and charitable work in the community (serving on several local boards, coaching little league, etc.). Considering the findings regarding Mr. Scott's truthfulness contained in the Report of Referee, little weight should be given to the testimony regarding his reputation for truthfulness. His service to the community is, however, a mitigating factor.

Mr. Scott has admitted that he is an alcoholic and has sought treatment with Florida Lawyer's Assistance, Inc. He believes that his hospitalization in February 10, 1999, (leading to the contempt finding) was a result of his many years of excessive drinking. He testified that for approximately 5 years, including the time periods in question here, he drank to excess, eventually consuming a pint to a quart of rye whiskey daily. He voluntarily hospitalized himself in December 1999, and has not had any alcohol since. His sponsor in Alcoholics Anonymous testified that Mr. Scott has been attending the regular meetings and progressed in the twelve step program. Mr. Scott is on step eight. Such a finding of mitigation has been found sufficient to offset disbarment to a less severe sanction. However, the Court should not do so here for several reasons. First, the findings of sexual misconduct with a client, perjury and other criminal misconduct are extremely serious. Second, Mr. Scott has failed to show remorse or acknowledge his wrongdoing in any way, even though he has now been sober for several months.

Third, while his attempts at rehabilitation are to be commended, Mr. Scott has only completed these few months with the specter of discipline looming over his shoulder. Mr. Scott should be required to demonstrate over the long-term that he is remorseful and rehabilitated before he is again allowed to practice law. While a long term suspension of several years may accomplish that goal, Mr. Scott himself stated that any long term suspension would be tantamount to disbarment as he did not believe he would continue to practice for many more years. A long-term suspension, he felt, would be grounds for early retirement. Finally, but very importantly, what sort of precedent would leniency establish in this case? While it might further the goal of encouraging some attorneys to seek help for their addiction, it might also encourage the more cynical members of our profession to deny misconduct to the end, indeed, lie if necessary to protect themselves.

Accordingly, while Respondent did establish some mitigating factors, these factors must not only be weighed against the aggravating factors, but the misconduct itself. The Florida Bar v. Shuminer, 567 So.2d 430, 432 (Fla. 1990). As with many areas of the law, the court must weigh all the factors on the scales of justice. Here, the misconduct is extremely serious - exploitive sexual abuse of an especially vulnerable client and repeated lies in an attempt to cover up the misconduct. Misconduct of this magnitude, combined with the aggravating factors

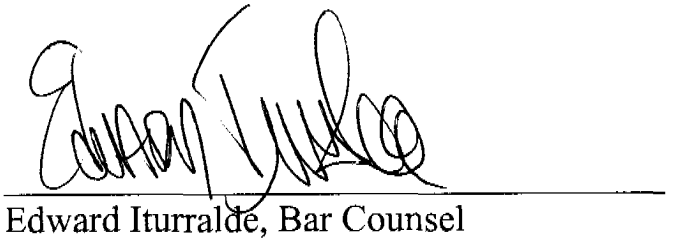
have tipped the scales so far, that the mitigation shown, while valid, is simply insufficient. Only disbarment can balance the scales of justice.

## CONCLUSION

For the many reasons set forth above, The Florida Bar respectfully requests that this Court adopt the findings of fact and recommendations of guilt as found by the Report of Referee, but impose disbarment as the appropriate sanction, rather than an eighteen month suspension followed by probation for two years with conditions to include continued sobriety monitored by Florida Lawyers Assistance, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case Nos. SC96087 and SC97020 has been mailed by certified mail #7099 3400 0010 9076 5771, return receipt requested, to John L. Scott, Respondent, at his record Bar address, on this 28th day of February, 2001.



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