IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JORGE LOUIS CUETO,

Respondent.
_____/

Supreme Court Case
No. SC00-890

The Florida Bar Case
No. 2000-71,354(11H)

Complainant's Initial Brief

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STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar's case against Respondent emanates from his adjudication of guilt as to the crime of unlawful compensation.

Respondent has testified that Julio Garcia came to his office during 1993. (T. 12). He told the Respondent that for 10% of Respondent's fee, Garcia, a claims adjuster for the county, could arrange the settlement of cases filed against the county. (T. 13). Payments of 10% of Respondent's fee were to be made in cash. (T. 13). Respondent agreed to the arrangement.

Respondent entered into a similar arrangement with other adjusters. (T. 14, 15). He dealt with Carlos Cano regarding 6-10 cases. He delivered 10% kickbacks to Cano in cash. (T. 15). Respondent had the same agreement with adjuster Juan Batallo. (T. 18).

An adjuster told Respondent that he (Respondent) could either give the adjuster the 10% payment for a settlement or go to trial. (T. 27). The kickbacks were provided by Respondent from 1993 until 1999 when he was arrested. (T. 19). Respondent was originally charged with bribery (T. 93) as well as unlawful compensation. Respondent entered a plea of guilty to the crime of providing unlawful compensation pursuant to F.S. §838.016 in exchange for probation and restitution. (T. 30). In furtherance of the plea agreement the state nolle prossed the

bribery (F.S. 838.015) charges.

Respondent did not believe that his conduct wrongfully appropriated tax payer funds. (T. 34-35). He did not report the kickback scheme to anyone. (T. 36). Respondent stated that he did not believe his acts were criminal. (T. 36).

Several individuals testified as to Respondent's character. John Ruiz, an attorney and friend since junior high school, stated that he never heard anyone accuse the Respondent of illegality or improper conduct. (T. 44). Andrew Haggard, an attorney who worked closely with the Respondent, asserted that Respondent had not been associated with sham cases. (T. 56). He added that the Respondent was a very good lawyer. (T. 58). He believed that the Respondent was remorseful. (T. 61). Rafael Cruz Alvarez, another attorney who knew the Respondent professionally, had never heard of any other wrongdoing on the part of the Respondent. (T. 75).

The Respondent also testified as part of the defense. He claimed that the cases were settled for the "proper" amount (T. 83), that he handled approximately 35 county cases, (T. 86) and obtained a small amount of income from those cases. (T. 87).

He recognized the benefit attained by settlement, namely avoiding being tied up in a trial for two on three years (T. 101) and by getting his fees quickly by

settling the cases. (T. 101, 103). The kickbacks came out of his fees. (T. 88).

The Bar sought disbarment. However, the Referee agreed with the Respondent's argument that a three year suspension was the proper discipline and recommended that the suspension should be nunc pro tunc to April 27, 2000.

The Referee found Respondent was guilty of violating Rule 3-4.3 (Misconduct and minor misconduct) and Rule 4-8.4(b) (Committing a criminal act reflecting on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), but not Rule 4-8.4(c) (Conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules Regulating The Florida Bar.

The Bar filed a petition for review of the discipline on December 27, 2000.

SUMMARY OF ARGUMENT

The Respondent should be disbarred. The principles governing this case have been clearly stated by this Court. They include the axiom that the most important concern is protection of the public against unethical lawyers. Further, the Bar must demand conduct which furthers respect for our legal system. This Court has held that responsibility to the public exceeds the interests of the client. Conduct which leads to scorn of the justice system demands condemnation.

The Referee found Respondent guilty of violating Rules 3-4.3 (Misconduct and Minor Misconduct) and 4-8.4(b) (Criminal act reflecting on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects) of the Rules of Professional Responsibility.

The Referee improperly concluded that proof was required of excessive settlement amounts (or fraudulent claims) in regard to Rule 4-8.4(c) (Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), and that suspension was the appropriate discipline.

The standards for Imposing Lawyer Sanctions specify disbarment as the appropriate discipline for Respondent's conduct. Furthermore, if evidence of dishonesty was required, it is inherent in the act of providing unlawful compensation.

Several cases involving the similar statute of bribery (F.S. 836.015) establish that the act of bribery or providing unlawful compensation constitutes the wrong, even if the bribe is for doing that which the bribee is legally obligated to do. Furthermore, the statute of which Respondent was convicted includes the proof that the act was carried out corruptly.

Several Bar cases also hold that the corrupt act of unlawful payment is the gravamen of the offense without regard to the result sought. In other words, even if the result sought is within the norm or strictly legal, the payoff is corrupt by definition. This Court held that disbarment was appropriate in those cases. Furthermore, there were unlawful benefits for the participants in the scheme. The briber received prompt service, his fee, and the avoidance of going to trial. The recipients received extra compensation to which they were not entitled.

The Referee also found that the Respondent was one of fifteen defendants designated in a multiple count indictment and that Respondent pled to the unlawful compensation charge in exchange for a nolle posse of the other counts, including bribery.

Under the circumstances the "mitigating factors" should have been given little weight. Character evidence has been given no weight by this Court in appropriate circumstances. The Respondent's conduct impacted the legal system

as viewed by the public. He participated in the scheme for six years, until he was caught. He made deals with three adjusters and didn't discontinue the practice even though the county cases constituted a very small portion of a growing practice.

Respondent's conduct reduced public respect for our legal system. Respondent should be disbarred.

POINTS ON APPEAL

I

WHETHER THE REFEREE ERRED BY FAILING TO DISBAR THE RESPONDENT?

ARGUMENT
I

THE REFEREE ERRED BY FAILING TO DISBAR THE RESPONDENT

This Court's scope of review of recommendation of attorney discipline is broader than that of findings of fact because of ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Vining, 761 So.2d 1044 (Fla. 2000).

Some basic principles which apply to this case should be considered. When deciding upon the proper discipline, the single most important concern is the protection of the public from incompetent, unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412 (Fla. 1980). Neither the law nor the profession should lose sight of the obligation of every lawyer to conduct himself in a manner which will cause laymen, and the public generally, to have the highest respect for and confidence in the members of the legal profession. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). A lawyer's responsibility to the public rises above his responsibility to his client, and he must uphold democratic concepts regardless of how they affect the case at hand. Petition of Florida State Bar Association, 40 So.2d 902 (Fla. 1949). Any conduct of an attorney which brings the administration of justice into scorn and disrepute demands condemnation and the application of appropriate penalties. The Florida Bar v. Calhoon, 102 So.2d 604 (Fla. 1958).

The Florida Standards for Imposing Lawyer Sanctions recommend disbarment under these circumstances. The governing standards follow:

5.11 Disbarment is appropriate when:

(a) a lawyer is convicted of a felony under applicable law.
(b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.
(e) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sanctions (a)-(d).
(f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The Referee did not follow the standards.

The Bar recognizes that case law holds that disbarment is not automatic. The Florida Bar v. Bustamante, 662 So.2d 687 (Fla. 1995). However, there is a presumption that disbarment is appropriate in connection with a felony. Bustamante, supra.

The Referee based her recommendation as to guilt to a large degree upon the alleged absence of evidence of dishonest conduct; specifically, that the compensation provided to Respondent's clients was unjust (or claims were sham), citing "e.g." The Florida Bar v. Pettie, 424 so.2d 734 (Fla. 1983). She found that thee was no violation of Rule 4-8.4(c) on that basis. Pettie, however, did not apply to any statute similar to those which pertained to this Respondent. Pettie was

convicted of criminal conspiracy to import marijuana. This court held that his conviction proved illegal conduct, but not necessarily dishonest conduct.

The Pettie ruling advanced by the Respondent is totally misdirected. The Florida Statute governing bribery, F.S. §838.015 is extremely similar to F. S. §838.016 to which the Respondent pled guilty. In fact, Respondent was charged with the bribery violation as well. (T. 93). The same facts can support charges under both statutes. State v. Sune, 360 So.2d 1128 (Fla. 3rd DCA 1978).

Cases decided under §838.015 have explicitly held that one is guilty of bribery even if his payment is for doing an act that the "bribee" is legally bound to do. State v. Saad, 429 So.2d 757 (Fla. 3rd DCA 1983) is most illuminating in regard to that holding:

> [1] Saad attempted to deliver $1,000 each to two police officers to secure the return of $20,700 in cash which had been taken from him in the course of an arrest. The trial judge granted a Fla. R. Crim. P. 3.190(c)(4) motion to dismiss the resulting bribery charges, Sec. 838.015, Fla. Stat. (1981), on the ground that the initial seizure had been unlawful and that he was therefore entitled to the money in any case. We summarily reverse. Even if arguendo the premise of an illegal taking were correct, it is obvious, hornbook law, that one is guilty of bribery if he corruptly pays or accepts unlawful compensation even for doing an act that the bribee is legally bound to accomplish. 11 C.J.S. Bribery §2(e)(4) (1938); 12 Am.Jr.2d Bribery §12 (1964). Thus in People v. Furlong, 140 A.D. 179, 184, 125 N.Y.S. 164, 168 (1910), aff'd, 201 N.Y. 511, 94 N.E. 1096 (1911),

the court said:

> The corruption aimed at is not simply the doing of things which may be improper in themselves, but even the doing of proper things as the result of an improper agreement. The statute would be violated as much by an agreement for compensation from private parties to take special pains to decide, even properly a matter coming before the officer, as it would by an agreement to decide it improperly. In other words, the statute reaches out as much against the influencing of the officer's judgment or decision as it does against the improper result of such influence. The offense is so subtle in its fruits that the law endeavors to lay the ax at its very roots.
>
> [2] In our system at least, the end does not justify the means. The effectuation of Saad's intent to get his money by short-circuiting and subverting that system may, and must, be held accountable to the criminal law. See also, Trushin v. State, 384 So.2d 668 (Fla. 3d DCA 1980); aff'd, 425 So.2d 1126 (Fla. 1982); State v. Napoli, 373 So.2d 933 (Fla. 4th DCA 1979). Reversed.
>
> (Emphasis added)

State v. Lopez, 522 So.2d 997 (Fla. 3rd DCA 1988) is strikingly similar to this case. Payment to a putative building inspector for nothing more than "timely, prompt and cooperative" efforts was sufficient to satisfy the corrupt intent element of the bribery statute. Also, in State v. Gonzalez, 528 So.2d 1356 (Fla. 3rd DCA 1988), the Court held that payment intended to influence a performance of any act by a public servant is a criminal violation, even if payment is for doing an act the public servant is legally bound to do.

In addition to the case law cited above, the statute which was the basis of Respondent's conviction, F.S. §838.016, established the existence of dishonesty. That statute is titled "Unlawful Compensation on Reward for Official Behavior." The statute follows:

> 838.016. Unlawful compensation or reward for official behavior.
> (1) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal. (Emphasis added).
>
> (2) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law for the past, present, or future exertion of any influence upon or with any other public servant regarding any act or omission which the person believes to have been, or which is represented to him or her as having been, either within the official discretion of the other public servant, in violation of a public duty, or in performance of a public duty. (Emphasis added).
>
> (3) Prosecution under this section shall not require that the exercise of influence or official discretion, or

> violation of a public duty or performance of a public duty, for which a pecuniary or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.
>
> (4) Whoever violates the provisions of this section shall be guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775,083, or s. 775.084.

Note the emphasised word "corruptly." "Corruptly" is defined by both Unjust Compensation and Bribery in F.S. §838.014(6) as follows:

> 838.014(6) "Corruptly" means done with a <u>wrongful intent</u> and for the purpose of obtaining or compensating or receiving compensation for any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties. (Emphasis added).

One may also conclude that based upon facts which are uncontested, it is clear that the Respondent obtained distinct advantages by indulging in the payoff scheme. Respondent admitted that he obtained his fees promptly by settling, rather than becoming involved in trials which would require 2 - 3 years. (T. 101, 103).

Benefit also inured to the three public officials involved. By settling, the adjusters obtained a fee to which they were not entitled. If they did not settle the claim, they obviously would not receive compensation. The Referee was concerned about a lack of proof that the settlements were excessive. As the cases

discussed above indicate, no such requirement exists. Also the statute itself, §838.016, discussed above, reveals no requirement of excessive settlements.

Bar cases also support the same conclusion. The Florida Bar v. Cruz, 490 So.2d 48 (Fla. 1986) is instructive in this regard. Respondent was one of three men who bribed a warden to gain special privileges for an inmate. There was no requirement that the Bar prove that the privileges were outside the parameters of the law, or outside the authority of the warden, or beyond the privileges which the inmate could have earned by his own conduct.

What is readily evident is that the inmate would not have received the privileges, whether beyond the norm or not, without the payoff. Similarly, Respondent would not have obtained a settlement, whether fair or not, unless he kicked back the 10%.

The Respondent in Cruz, who was disbarred, had character witnesses who testified that he was a good person. One witness testified that the Respondent did not personally benefit from the bribe. Nevertheless, the essence of the basis for discipline was the bribe itself.

The same principle was set forth by this court in The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990). Kickliter forged a client's will. He did not do so to obtain an unfair result. Rather, his client told him that he wanted to

change his will, but died before he could sign the revision. Kickliter was disbarred for the forgery, false notarization of witnesses, and submitting the document to the probate court. It was the conduct of Kickliter, the forgery, etc. which was the gravamen of the disbarment. Likewise, the payoff scheme is the basis for disbarment in this case.

Also, in another jurisdiction, the Respondent who engaged in similar conduct in regard to a similar statute was disbarred. Nebraska State Bar v. Steier, 520 N.W.2d 779 (Nebraska, 1994).

The Referee also stated that she was influenced by the fact that the Respondent was approached by the county employee when he was a "fledgling" lawyer. That basis for lesser discipline is totally non-existent. Respondent was a "fledgling" in 1993. He continued to make payoffs for six years, until 1999. (T. 27). He didn't stop until he was caught. He didn't stop even after he had handled approximately 2,500 cases. (T. 86). He didn't stop or provide some official with an anonymous tip even though his practice had blossomed and the county cases provided only a small percentage of his income. (T. 87).

While Juan Garcia supposedly approached Respondent, the Respondent had a similar arrangement with two other adjusters. No auuthority supports the argument that Respondent is any less guilty of violating §838.016 because the

adjusters approached him.

Although there were mitigating factors in this case, the weight given to those factors must be viewed in the context of the Referee's own findings. Among other factual findings she concluded:

> B. The Respondent was one of fifteen defendants in a criminal case designated in a multiple count indictment, in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, Case No. 99-17765-D-Levenson.
>
> C. The Respondent pled guilty to one (1) count of Unlawful Compensation/Reward for Official Behavior as charged in Information filed in this cause. The state has, in furtherance of the plea agreement, filed a nolle posse on the following seven (7) remaining offenses: Two (2) counts for RICO-Conduct or Participation in an Enterprise through a Pattern of Racketeering Activity; three (3) counts for Bribery, one (1) count for Grand Theft, third degree, and one remaining count of Unlawful Compensation/Reward for Official Behavior. (RR p. 2).

In regard to the character testimony, in The Florida Bar v. Whitney, 237 So.2d 745 (Fla. 1970) in which the Respondent was disbarred rather than suspended as recommended by the Referee, this court stated:

> "In addition to Respondent's own testimony, thirty-two witnesses testified in his behalf. This list includes two circuit judges, ten practicing attorneys in Sarasota County, two ministers, one justice of the peace and seventeen persons who were business associates or close friends. Included in the list of business associates and close friends were the mayor of Sarasota; a city commissioner and former mayor of Sarasota; the sheriff of Sarasota County; the Assistant Superintendent of

> Schools of Sarasota County; a woman who has worked for Respondent's family and been in his home on many occasions; the District Director of Vocational habilitation; the Chairman of the City Planing Board; the Chief Counselor o the Sarasota Juvenile Court; the District Supervisor of the Florida Parole Commission; and others holding similar positions of trust and confidence in the community From the testimony of these witnesses it is established without any doubt that Respondent enjoyed a fine reputation as a capable attorney and an excellent reputation as a capable and qualified county judge; ....
>
> [1,2] The evidence of these witnesses as to the good character of the respondent are impressive, but have little relevancy in arriving at a conclusion concerning his guilt or innocence. The charges made in the Complaint and admitted here go to the very heart of a lawyer's qualification to be entrusted with the great responsibilities of his profession and when -as here- <u>there is shown a total disregard, over an extended period of time, of basic concepts of honesty and reliability</u> and a flagrant violation of trust reposed in him, a judgment of disbarment is fully warranted. (T. 47-48, emphasis added).

In <u>The Florida Bar v. Calhoon</u>, <u>supra</u>., there were also a number of mitigating factors. Nevertheless, Calhoon was disbarred. This Court held:

> " ... we are impelled to the inescapable notion that any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties." (At 608).

The absence of a disciplinary history must be reviewed in the context of the

admissions in this case. Respondent had engaged in the payoff scheme for six years. (T. 19). He gave kickbacks to three adjusters. (T. 15). He gave 20 to 25 kickbacks to Garcia alone. (T.14).

The referee's comments in the mitigation discussion about the lack of proof of fraudulent claims, or negative impact upon the clients, i.e., proof of dishonesty, has been amply negated above. Kickbacks or bribes inherently undermine the legal system, and constitutes intolerable conduct on the part of an attorney. Calhoon, supra.

CONCLUSION

The criminal statute which was the basis of Respondent's conviction declares that Respondent did corruptly provide unlawful compensation. Corruption of the system of justice must be viewed as the most serious offense that a lawyer can commit. The applicable standards and cases require disbarment instead of a suspension. Therefore, the Referee's ruling as to discipline should be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Initial Brief was forwarded Via Airborne Express to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to John A. Weiss, Attorney for Respondent, at 2937 Kerry Forrest Parkway, Suite B-2, Tallahassee, Florida 32308, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this ____ day of _____, 20____.

_____
RANDOLPH MAX BROMBACHER
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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the Brief of The Florida Bar 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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