IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross Petitioner,

vs.

BRUCE EDWARD COMMITTE,

Respondent/Petitioner.

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Case No. SC03-1203

TFB File No. 2002-01,100(1A)

THE FLORIDA BAR'S REPLY BRIEF ON CROSS PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Complainant/Cross Petitioner, THE FLORIDA BAR, hereby incorporates and adopts its Preliminary Statement as set forth in its Answer Brief.

Reference to "Petitioner's Reply Brief" will be designated as "Committe's Reply Brief" with the appropriate page number.

LEGAL ARGUMENT

I. A 91-DAY SUSPENSION IS AN APPROPRIATE DISCIPLINE BECAUSE COMMITTE'S MISCONDUCT CONSISTED OF REPETITIVE INSTANCES OF ABUSE OF LEGAL PROCESS.

A disciplinary sanction must be fair to the public protecting it from unethical conduct, fair to the respondent yet be sufficient to punish the breach of the rules and encourage rehabilitation, and the discipline must be severe enough to deter others from similar misconduct. See The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994). The Florida Bar recommends a 91-day suspension based on the referee's findings of fact, the rule violations, the aggravating factors found by the referee, the relevant case law, and the Florida Standards Governing Lawyer Sanctions. The Court should impose a 91-day suspension because Respondent's misconduct in repetitively abusing the legal process in state and federal court is particularly egregious under the facts of this case, and the discipline must be severe enough to deter others from similar misconduct.

Committe's actions in state and federal court were not just a negligent aberration, or a sole instance of poor judgment in filing a frivolous motion or lawsuit. See The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991) ("The intentional nature of respondent's conduct, coupled with the selfish motivation

which prompted the filing of a frivolous proceeding, combined to make this misconduct far more egregious that a negligent act." Id. at p. 1017.) Committe's abuse of legal process continued over a period of almost five years from the time of the issuance of Mr. Guttmann's first notice of deposition and subpoena duces tecum in June 1998 until Mr. Guttmann executed on the final order to pay taxable costs and attorney fees imposed by the federal court in November 2003. See TFB Exhibit 2, T-119.

Respondent not only filed two frivolous lawsuits in federal court, but also threatened the opposing counsel, Mr. Gardner, with a lawsuit if he did not withdraw Mr. Guttmann's third notice of deposition and subpoena duces tecum. See TFB Exhibits 12 and 19. Committe sent Mr. Gardner a letter claiming violations of the federal Fair Debt Collection Practices Act ("FDCPA") [15 U.S.C. § 1692 et seq.] after the county court had ruled two times, that Mr. Guttmann had not violated the "cease communication" rule of the FDCPA by setting Committe's deposition in aide of execution. After Mr. Guttmann served his motion for contempt in October 1999, Respondent did, in fact, carry out his threat and filed two federal lawsuits against both attorneys. See TFB Exhibits 15, 20, and 22.

Respondent also continually thwarted the discovery process in state court when Mr. Guttmann attempted to take a deposition in aide of execution on three

occasions. From June 15, 1998, through July 30, 1999, Respondent filed repetitive motions for protective order in state court to delay the debt collection suit against himself, and obstinately refused to appear despite being served with three separate subpoenas to appear for a deposition in aide of execution.

Committe's argument that prosecuting him for filing frivolous lawsuits could have a "chilling effect" on other attorneys who bring claims under the FDCPA is without substance. The Court has addressed this issue in The Florida Bar v. Richardson, 591 So. 2d 908, 910-911 (Fla.1992) when it stated:

> Neither the Bar nor this Court wishes to stifle innovative claims by attorneys. Nevertheless, under the rules of professional conduct, the pursuit of imaginative claims is not without limit. The standard embodied in rule 4-3.1, requiring a good faith argument for the extension, modification, or reversal of existing law, is broad enough to encompass those cases where the claims are the result of innovative theories, rather than, as here, an obsessive attempt to relitigate an issue that has failed decisively numerous times. The federal court in this case specifically found this claim to be frivolous and malicious.

The referee found that there was no statutory basis under the FDCPA , the Florida Consumer Collection Practices Act ("FCCPA")(Fla. Stat. § 559.55 et seq.) or relevant case law to support Respondent's federal claims against Mr. Guttmann or to support Respondent's filing of frivolous motions for protective order in state court. See ROR at pp. 7, 9. The referee also considered the decision of the federal district court holding that Committe's federal lawsuit against Mr. Guttmann

based on the FDCPA and FCCPA was " an abuse of legal process," "brought in bad faith" and to "harass" Mr. Guttmann. See TFB Exhibit 22 at pp. 11-12. See ROR at p. 6. He concluded that Respondent's federal lawsuits were frivolous because there was no reasonable "good faith" basis in law or in fact for the reasons stated in the federal judge's order. See ROR at p. 7. Similarly, as in Richardson, Committe attempted to relitigate the same facts and issues in federal court even after the state court judge had issued two orders ruling that the FDCPA was inapplicable to Mr. Guttmann's litigation activity. See TFB Exhibits 8 and 11.

The referee did not state any basis in the case law or Florida Standards for Imposing Lawyer Sanctions to support his recommendation of a private reprimand which is no longer a permissible discipline under Rule 3-5.1. Committe's bare assertion that the recommendation of a private reprimand meant that the referee intended to recommend minor misconduct is without substance in the referee's report or the record. There is also nothing in the record to support his allegation that the discipline is too severe because it appears to be a punishment for requesting review of the referee's report, and for not accepting a minor misconduct. Bar counsel has no recollection of any specific offers of settlement in Committe's case. Committe's position that his conduct should be treated as a minor infraction is not supported by reference to any case law or evidence in the record.

II. THE REFEREE DID NOT "DECIDE" WHETHER TO GRANT OR DENY TAXABLE COSTS TO THE FLORIDA BAR.

Committe's statements that The Florida Bar requested fees and costs, brought a motion for fees and costs, and then dismissed it, are inaccurate. See Committe's Reply Brief at p. 14. The Florida Bar did not request or file a motion for attorney fees and costs. The Florida Bar was awaiting the referee's findings of fact and determination as to rule violations before making any recommendation as to discipline or taxable costs. See T-255. Rule 3-7.6 provides only for taxable costs, not attorney fees, if The Florida Bar prevails on the merits. See Rule 3-7.6(m). The record reflects that, after receiving the referee's report, The Florida Bar did file a Motion to Amend the Report of Referee in reference to the discipline and taxable costs and did not set it for hearing, but instead filed a cross petition for review on the same issues.

The referee's report makes no reference to taxable costs. The absence of any mention of taxable costs in the referee's report leads Committe to the erroneous assumption that the referee "chose" not to do so, and he speculates as to several reasons why he believes no taxable costs were awarded. None of these reasons, however, were ever stated in the referee's report. The referee did not "decide" the issue of taxable costs in his report. Absent a finding that the costs were

unnecessary, excessive, or unlawful, it is an abuse of discretion for the referee not to award taxable costs to The Florida Bar because the findings of fact in the report indicate that The Florida Bar prevailed on the merits. See Rule 3-7.6(m)(1)(E) and 3-7.6(q)(2), (3). On the other hand, Committe is not entitled to fees or costs, because he did not prevail on the merits at the referee level, and he cannot show that The Florida Bar raised no justiciable issues of fact of law in the disciplinary proceeding. See Rule 3-7.6(q)(4).

III. CONCLUSION

For the foregoing reasons, The Florida Bar would respectfully request that the Court approve the report of referee as to the findings of fact and determination of guilt in violation of the Rules Regulating The Florida Bar, but reject the disciplinary recommendation of the referee as to a private reprimand, impose a 91-day suspension on Committe, and grant taxable costs to The Florida Bar.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Reply Brief on Cross Petition for Review, regarding Supreme Court Case No. SC03-1203, TFB File No. 2002-01,100(1A) has been forwarded by U.S. Mail, to Respondent, Bruce Edward Committe, at 17 South Palafox Place, Suite 306, Pensacola, Florida, 32502, this_____ day of _____2004.

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OLIVIA PAIVA KLEIN
BAR COUNSEL

CERTIFICATE OF COMPLIANCE WITH FLA. R. APP. P. 9.210(a)(2)

The undersigned counsel hereby certifies that The Florida Bar's Reply Brief on Cross Petition For Review dated September 22, 2004, 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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OLIVIA PAIVA KLEIN
BAR COUNSEL