IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1203

BRUCE EDWARD COMMITTE,

Petitioner/Appellant

vs.

THE FLORIDA BAR

Respondent/Appellee.

****

AN APPEAL FROM THE REFEREE'S FINDING OF FACT AND CONCLUSIONS OF LAW

T.F.B. FILE NO. 2002-01, 100(A)
HONORABLE MICHAEL C. OVERSTREET
Referee

****

PETITIONER'S FIRST AMENDED INITIAL BRIEF

****

BRUCE COMMITTE, ESQUIRE
17 South Palafox Place, Suite 306
Pensacola, FL 32502
(850) 439-1999
Florida Bar No. 797502
PRO SE

IN THE SUPREME COURT OF FLORIDA

BRUCE EDWARD COMMITTE,

Petitioner,

v. Case No. SC03-1203

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

THE FLORIDA BAR,

Respondent.
_____/

PETITONER'S FIRST AMENDED INITIAL BRIEF

I. Table of Contents

II. Table of Citations

Statutes:

Treatises:

Cases:

Florida Civil Rules:

III. Introduction

Now comes Petitioner, Bruce Committe, Florida Bar Member, Pro Se, and files this Initial Brief following his filing of a Petition for Review of The Referee's Finding of Fact and Conclusions of Law signed 2 April 2004. Exhibit A/1 to A/10. The Referee's Report is Unlawful and Erroneous for the reasons stated below, and should be reversed. Florida Bar Rule 3-7.7(5).

IV. Statement of Jurisdiction

This court has jurisdiction pursuant to Florida Bar Rule 3-7.7(a)(1) which states: "All reports of a referee and all judgments entered in proceedings under these rules shall be subject to review by the Supreme Court of Florida."

V Standard of Review

The standard of review for this court is denovo in determining whether the

Referee's Report on the Complaint[1] (Exhibit B/1 to B/33) is lawful.

The standard of review for this court in determining whether the Referee erred in reaching his findings of facts and conclusions of law is whether the record includes competent and substantial evidence to support the proposition that the Referee reached his conclusions with proof that was clear and convincing. The Florida Bar re Walter Benton Dunagan, 775 So.2d 959 (Fla 2000); The Florida Bar v. J.B. Hooper, 509 so.2d 289 (Fla 1987).

VI Statement of the Facts

The Bar's Complaint arises out of Petitioner's Pro Se conduct in two civil cases brought in Florida and federal trial courts respectively. In those two cases, the Petitioner invoked the protections and privileges afforded him by provisions of the federal Fair Debt Collection Practices Act (FDCPA), 15 UC 1692c(c)[2] and 15

[1] The Complaint has attached to it as exhibit's the following: 1. Order Adjudicating Defendant in Contempt of Court and Order of Commitment (Exhibit B/10), 2. Order [of federal court granting defendant Guttmann's motion for summary judgment] (Exhibit B/12), 3. Order [of federal court denying Petitioner's motion for new trial and show of cause why Rule 11 sanctions are not proper] (Exhibit B/24), and 4. Order [of federal court taxing costs and defendant's attorney's fees to Petitioner] (Exhibit B/29).

[2] If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except-- (1) to advise the consumer that the debt collector's further efforts are being terminated; (2) to notify the consumer that the

USC 1692c(b),[3] (Exhibit I) and the Florida Consumer Collection Practices Act (FCCPA), Fla. Stat. 559.72(7), clause 2 (Exhibit J).[4] The Bar Complaint alleges, generally, that Petitioner's actions in these two cases violated Florida Bar Rules. Exhibit B/1 to B/33.

The first case was a county court debt collection case, Escambia County, Florida (Judge G. J. Roark III), wherein Petitioner was defending himself--against an attorney consumer debt collector, Stephen Guttmann, who was attempting to collect a post-judgment consumer debt of the Petitioner--by invoking the protections and privileges afforded Petitioner by the plain language of the federal Fair Debt Collection Practices Act (FDCPA), in particular 15 USC 1692c(c) (Exhibit I). See text in footnote 2 supra. Petitioner invoked that section of the

---

debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.If such notice from the consumer is made by mail, notification shall be complete upon receipt."

[3] "Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction or as reasonably necessary to effectuate a post-judgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor or the attorney of the debt collector." Emphasis added.

[4] "No person shall…willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of his family."

FDCPA by motioning the county court for a series of protective orders to prevent the attorney debt collector from taking Petitioner's deposition in aid of execution of a money judgment. The invocation for this purpose was novel and a case of first impression in the U.S. Petitioner reasonably believed these motions stayed the depositions until the motions were heard and ruled upon. The Florida Bar and the Referee consider Petitioner's non-appearances at the scheduled depositions, notwithstanding Petitioner's filing of motions for protective orders prior to the time noticed for the depositions, to be violations of the Florida Bar Rules.

The second case was a complaint filed by the Petitioner in the U.S. District Court for the Northern District of Florida, Pensacola Division (Judge Roger Vinson) against attorney debt collector Stephen Guttmann in the county case for various alleged violations of the FDCPA while the debt collector was otherwise attempting to collect Petitioner's post-judgment consumer debt. Judge Vinson was unsympathetic with Petitioner's claims and stated that the complaint brought in his federal court was frivolous, nonmeritorious, and brought for the purpose of abuse and harassment of the consumer debt collector whom Petitioner had alleged, pursuant to the FDCPA, had abused and harassed him. Judge Vinson filed a Rule

11 sanctions order against the Petitioner for bringing the case in his court. Exhibit B/27. The sanction fee paid was $15,382.50. Exhibit B/31.

Stephen Guttmann reported Judge Vinson's order to the Florida Bar, and the latter used it as the basis for filing the Bar Complaint in this case. Judge Vinson's order had made reference to Petitioner's series of motions for protective orders filed in the county court case, and made negative comments as to Petitioner's Pro Se conduct in the county court case.[5]

After a one and one half day final hearing, the Referee found in favor of the Bar respecting most of its allegations, and he recommended the sanction of a private reprimand. The Bar filed a motion for rehearing, but later withdrew it. Since Petitioner filed his Petition for Review with this court, the Florida Bar has returned fire, which is its right, with its own Petition for Counterclaim seeking, among other matters, the much harsher sanction of a 91 day suspension.

VII. Statement of the Issues

All of the matters in this Petition center on Bar proceedings leading up to

[5] In Judge Vinson's order on Petitioner's motion for rehearing, Judge Vinson withdrew his negative comments about petitioner's conduct in county court apparently because he recognized that those matters were not properly before him in his court.

the filing of the Bar Complaint as well as happenings after the filing of the Bar Complaint including a one and one-half day final hearing before the Referee. The Complaint appears[6] to allege that Petitioner violated Bar Rules of Conduct when he (1) invoked in county civil court, in multiple motions for a protective order, 15 USC 1692c(c) (Fair Debt Collection Practices Act--FDCPA) (text in footnote 2 supra, also at Exhibit I) as a privilege allowing him not to have to submit to a deposition in aid of execution of a civil money judgment to collect a consumer debt and (2) filed complaints in U.S. District Court against debt collector attorney Stephen Guttmann based on 15 USC 1692c(b) and (c) of the FDCPA and on Fla. Stat. 559.72(7) of the Florida Consumer Collection Practices Act (FCCPA) (Exhibit J).[7]

The issues raised in this Petition are:

A. Whether as a matter of law the manner in which the Complaint was brought against the Petitioner in this case violated Florida Statute 286.011 (public

[6] The Complaint does not connect the allegations of conduct with the individual rules such conduct allegedly violated. This was raised in a motion to dismiss for insufficiency of the complaint (Exhibit E/1) which the Referee denied and which denial is raised before this court in issue #1.

[7] Stephen Guttmann is the attorney who complained of Petitioner's conduct which is the basis for the Bar's Complaint in this case.

meetings law) and otherwise denied Petitioner due process rights guaranteed him by the Florida and U.S. Constitutions.

B. Whether as a matter of law the failure of the Complaint to connect allegations of Petitioner's conduct with particular alleged Bar Rule prohibitions caused the Complaint to be insufficient and thereby deny Petitioner due process of law.

C. Whether there is competent and sufficient evidence in the record to prove by clear and convincing evidence that Petitioner violated any Bar Rule when he relied on his own Pro Se protective order motions and 15 USC 1692c(c) for authority not to have to appear at depositions in aid of execution of a civil money judgment against him.

D. Whether there is competent and sufficient evidence in the record to prove by clear and convincing evidence that Petitioner violated any Bar Rule when he filed claims of first impression in U.S. District Court relying on the plain language of 15 USC 1692c(c) and (d) and Fla Stat 559.72(7), clause 2 against an attorney consumer debt collector for debt collection abuse and harassment prohibited by these statutes.

VIII. Summary of Argument

With respect to issue A, a Florida Bar disciplinary committee met in private session to discuss the preliminary complaint in this case filed by a member of the Florida Bar against the Petitioner. Bar Counsel specifically informed the Petitioner that the meeting was closed to him. The meeting also was not noticed to others nor was it open to the public nor was the meeting reported so that a transcript could be made. This was a violation of Fla Stat 286.011 which requires that meetings under the authority of the State of Florida shall be open to the public, and it thereby denied Petitioner due process of Florida law.

With respect to issue B, the Bar's Complaint was insufficient in that it failed to connect the conduct it apparently intends to allege is wrong to the Bar Rule prohibitions stated at the end of the complaint. This lack of connection is a critical defect of the information which significantly prejudiced Petitioner's ability to defend himself.

With respect to issue C, the evidence shows that Petitioner's nonappearance at scheduled depositions was based on a lawful privilege arguably granted him by 15 USC 1692c(c) and further that such nonappearances were preceded by Petitioner filing motions for protective orders based on that privilege and

eventually on the privilege of an automatic stay granted him by the U.S. bankruptcy law.

With respect to issue D, the Referee failed to recognize, Judge Vinson's order notwithstanding, that the cases brought in Federal court against attorney debt collector Guttmann were (1) based on the plain language of 15 USC 1692c(c), (d), and Fla Stat 559.72(7), clause 2, (2) cases of first impression in the U.S. 11th Circuit, and (3) supported elsewhere by a dissenting judge on a three judge U.S. 6th Circuit court panel which panel was the only federal panel ever to have addressed the particular issue.

IX Argument

This argument centers on four issues (A, B, C, and D) and other miscellaneous matters (E):

Issue A. Whether as a matter of law the manner in which the Complaint was brought against the Petitioner in this case violated Florida Statute 286.011 (public meetings law) and otherwise denied the Petitioner his due process rights guaranteed him by the Florida and U.S. Constitutions. When a disciplinary

committee of the Florida Bar met to decide whether to proceed with a general complaint filed with the bar by another Florida attorney, the committee met in private and specifically and emphatically prohibited Petitioner from attending the meeting. See Amended Notice of Review by a Grievance Committee at Exhibit C. When Plaintiff motioned to obtain a copy of the transcript of that meeting, he learned that the meeting had not been reported. It also appears no public notice of the meeting was ever made. This closed and unreviewable meeting of an agency of the judicial branch of the State of Florida is a violation of Fla Stat 286.011 which requires such meetings to be open to the public.

In this case, Petitioner had a particular reason to be present at the meeting and to know the contents of the meeting. Two grievance committee members, Messrs. Rodney Rich and Frederick J. Gant, Esquire, who had been assigned the duty of investigating the case for presentation of facts to the grievance committee for consideration, had been commanded to discuss with the Petitioner "the investigation, and disposition of the [informal] complaint as well as [Petitioner's] rights in such proceedings." See Exhibit D. Petitioner was to telephone Rich, and he did that, but Rich was not yet familiar with the matter and stated he would call Petitioner later after he had time to become familiar with the matter. Rich

never re-contacted with the Petitioner, and he never discussed the matters of the complaint filed with the Bar with the Petitioner. The grievance committee met and order Bar Counsel to prepare the Bar Complaint for filing with the Supreme Court.

Petitioner raised this issue in his "Corrected Motion to dismiss the Complaint" which was heard by the Referee on 14 November 2003. Exhibit E. The motion, along with all other motions, was denied.

The above wrongdoing by the Florida Bar is unlawful and denied Petitioner the process of law (procedures) that had been established for Petitioner's protection and which was due him. The Complaint in this case should be dismissed, and the Bar Member grievance committee members participating in the wrongdoing and initiating the complaint should be sanctioned by the Florida Supreme Court by an order to pay Petitioner his costs and a pro se attorney fee for his time expended responding to a complaint brought forward in an unfair manner.

Issue B. Whether as a matter of law the failure of the Complaint to connect allegations of Petitioner's conduct with particular alleged Bar Rule prohibitions caused the Complaint to be insufficient and thereby deny Petitioner due process of law.

Before Petitioner filed an answer to the Bar's Complaint , he filed a corrected second motion to dismiss based, in part, on the insufficiency of the complaint. The Referee denied it.

Petitioner's motion noted that the complaint failed to relate, or connect, the Petitioner's alleged law practice behavior, set out in the first 38 paragraphs of the complaint, to The Florida Bar Rules of Conduct identified (only by number and title) in paragraph 39 of the complaint as having been violated. Thus, the complaint failed to inform the Petitioner as to which alleged conduct was a violation of which alleged Bar Rule. This prevented petitioner from being informed and therefore from preparing an effective defense and receiving a fair hearing. This insufficiency of the Complaint was a denial of due process.

Issue C. Whether there is competent and sufficient evidence in the record to prove by clear and convincing evidence that Petitioner violated a Bar Rule when he relied on his own Pro Se protective order motions and 15 USC 1692c(c) for authority not to have to appear at depositions in aid of execution of a civil money judgment against him.

Neither the Bar Complaint nor the Referee's Report states the language of the any of the Bar Rules Petitioner allegedly violated. That deficit may be the

reason for the error in the Bar's bringing the complaint in the first place and the Referee concluding in the second place that violations of the Bar Rules occurred. The rules which the Referee cited, but did not state, at the end of his report as being violated are reproduced here along with the official commentary:

Rule 4-3.1. Meritorious Claims and Contentions.

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every elopement of the case be established.

Comment.

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguous and potential for change.

> The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith

argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

Rule 4-3.4(c) & (d) Fairness to Opposing Counsel (part c).

A lawyer shall not:

….

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

(d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

Comment.

The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like.

Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed. Applicable law in many jurisdictions makes in an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense.

Rule 4-8.4(a) & (d). Misconduct.

A lawyer shall not:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

….

(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age socioeconomic status, employment, or physical characteristics.

When Petitioner filed motions for protective orders in order to prevent Defendant consumer debt collector Guttmann from taking his deposition, he stated therein proper legal reasons which granted him the privilege of not having to submit to such depositions. The Referee has concluded that, notwithstanding the filing of such motions, Petitioner should have appeared at the scheduled depositions anyway. This does not make any sense, unless it is found that the motions were not filed in good faith and were without proper legal foundation; and there is no evidence of that, much less evidence that is clear and convincing.

In filing his motions for protective orders, Petitioner reasonably invoked 15 USC 1692c(c) as a privilege entitling him not to have to submit to a deposition duces tecum. Section 1692c(c), in plain language (see text of section at footnote

2 supra), permit's a consumer debtor to stop a consumer debt collector from communicating with the debtor by the debtor merely stating in writing to the collector that the debtor "wishes the debt collector to cease further communications with the consumer." There are no exceptions for depositions in aid of execution of a money judgment. Persons other than "debt collectors," as narrowly defined in the statute, can engage in such communications because the statute only applies to professional "debt collectors") as defined by the statute at 1692a(6). An employee attorney of the creditor, for instance, could conduct the deposition, so could any attorney who does not meet the statute's definition of a "debt collector" (generally, a person whose principal business is not the collection of debts due another). In small claims court an employee of a corporation could conduct the deposition. Fla. Small Claim Rules 7.050(a)(2).

As the Referee notes in his report, Petitioner's non-appearance at each noticed deposition in aid of execution was preceded by Petitioner filing a motion for a protective order. The first such motion was based on the circumstance that the date Guttmann set for Petitioner's first scheduled deposition had not been coordinated with the Petitioner and that date was in conflict with Petitioner's schedule. In that motion Petitioner offered alternative dates, including dates prior

to the date originally scheduled, and a new date was selected that preceded the original date. Tr. p. 113. No motion to compel was ever filed; the deposition was simply voluntarily rescheduled on a date that turned out to be prior to the original date. Prior to the time of that new deposition time, Petitioner for the first time invoked 15 USC 1692c(c) in a second motion for another protective order and stated therein that 1692c(c) gave him a privilege of not having to submit to a deposition. That motion was called up for hearing, and the court denied that motion based on Guttmann's citation to the U.S. 6th Circuit Case Green v. Hocking, 9 F.3d 18 (6th Cir. 1993) (Exhibit F) which stated that the FDCPA did not apply to attorneys engaged in litigation activities. After the hearing, Petitioner discovered that the holding in that case had been overturned by a unanimous decision of the U.S. Supreme Court in Heintz. B. Jenkins, 514 U.S. 291, 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995) (Exhibit G) which had received the case from the 7th Circuit based on a direct conflict with the 6th Circuit Green decision. Tr. P. 114. In other words, Guttmann had mislead the court (either negligently or intentionally--possibly another FDCPA violation, 1692e) at the hearing by not mentioning to the court that the very case he asked the court to rely on unanimously had been overturned by the higher court.

It should be emphasized now, in an important aside, that in Heintz the Supreme Court overturned the 6th Circuit in a decision that centered on the FDCPA's 1692c(c). Should the 6th Circuit Lewis case holding (cited and block quoted extensively below at p. 30 for its strong dissent which supports the merits of Petitioner's case brought in federal court against Guttmann) ever reach the Supreme Court by way of conflict, it too could, if not likely will, be overturned in favor of the Petitioner's position regarding the protections afforded would be deponents by 1692c(c). This is indeed where Petitioner was headed with his case of first impression before Judge Vinson until Judge Vinson ruled in accordance with the 6th Circuit. Although Petitioner lost his appeal, of Judge Vinson's order, in the 11th Circuit Court of Appeals, that decision was not reported and therefore does not serve as precedent.

The county court, Judge Roark, notwithstanding the holding in Heintz that the FDCPA, and 1692c(c) in particular, applied to attorneys engaging n litigation activities, nevertheless denied Petitioner's motion for rehearing on the motion for a protective order. The county court noted Heintz' Court dicta which stated that "it would be odd if the Act empowered a debt-owning consumer to stop the "communications inherent in an ordinary lawsuit." The Heinz Court continued its

dicta at 296, 1491 to 297, 1492:

> But it is not necessary to read 1692c(c) in that way--if only because that provision has exceptions that permit communications "to notify the consumer that the debt collector or creditor may invoke" or "intends to invoke" a "specified remedy" (of a kind "ordinarily invoked by [the] debt collector or creditor"). 1692(c)(2), (3). Courts can read these exceptions, plausibly, to imply that they authorize the actual invocation of the remedy that the collector "intends to invoke." The language permits such a reading, for an ordinary court-related document does, in fact "notify" its recipient that the creditor may "invoke" a judicial remedy. Moreover, the interpretation is consistent with the statute's apparent objective of preserving creditors' judicial remedies. We need not authoritatively interpret the Act's conduct-regulating provisions how, however. Emphasis Added.

The statement emphasized above is the Court's (1) invitation for attorney's and the courts below further to develop the law and (2) is as clear a statement as possible that the Court's dicta is not to be relied upon as authoritative matter by anyone. In the matter at bar, the Referee wrongfully cited the U.S. Supreme Court's Heintz decision for authority supporting his conclusion that Petitioner's case was unethically nonmeritorious and brought for the purpose of harassment and was an abuse of the legal process. Petitioner's bringing of his 1692c(c) privilege (in county court) and claims (in federal court) was in the best tradition of zealous advocacy leading to development of the law and securing consumer rights granted by the Congress to consumers. And, considering the plain language of the

statute the risk of not succeeding was small. The Referee's conclusion that the bringing of these claims was clearly and convincingly unethically nonmeritorious is not supported by the record; in fact, the record clearly and convincingly supports the opposite conclusion.

Guttmann scheduled a new deposition in aid of execution, and this time Petitioner motioned the county court for a protective order to stay the order in anticipation of Petitioner appealing to the Florida Court of Appeals, First Circuit, the county court's decision, on the rehearing motion order, denying the previous motion for a protective order. Irreparable harm would have occurred if Petitioner would have had to submit to the deposition the avoidance of which was the benefit Petitioner was seeking. Guttmann, notwithstanding the new motion for a protective order and stay, nevertheless maintained the deposition date and obtained a certificate of non-appearance notwithstanding that Petitioner had previously motioned the court, and informed Guttmann by service of the notice, for a protective order, or stay, so that he could appeal the county court's latest decision. The purpose of that motion, and all of the other motions (save the first) for protective order, was to invoke Petitioner's federal right or privilege under 1692c(c) not to have to submit to a consumer deposition if he "wished" otherwise.

With the certificate of non-appearance in hand, Guttmann filed a motion for sanctions, and the county court followed with an order directing Petitioner to either submit to the deposition and pay attorney fees and costs or present himself to the county jail until he complied. The county court never ruled on Petitioner's then outstanding motion for a protective order and stay. Petitioner, rather than file a notice of appeal and in light of the court's sanction order currently outstanding and otherwise committing him to the county jail, filed a Petition for Bankruptcy with the federal court and, thereby, obtained an automatic federal stay which finally and forever prevented Guttmann taking his deposition and at the same time stayed the county court's order which included attorney fees and commitment to jail.[8]

---

[8] At pages 128, line 20 to 131, line 23 of the final hearing transcript, Guttmann admits that he knew that Petitioner believed that the motion for a protective order regarding the deposition served as an automatic stay of the deposition and that he intentionally chose not to inform the Petitioner of his, Guttmann's belief, to the contrary. In other words, it appears Guttmann's used his understanding of Petitioner's understanding of the effect of a motion for a protective order to set-up the Petitioner. This practice is the intentional use of deception to gain an advantage over opposing counsel, and in this case it was the basis for Guttmann obtaining a sanctions order committing Petitioner to jail and fees if he did not submit to depositions notwithstanding privileges against same granted the Petitioner by 15 USC 1692c(c), and it ultimately led to Petitioner filing bankruptcy in order to stop the collection proceedings. At page 131, line 23 of the final hearing

At no time did Petitioner not show up to a deposition without giving advance notice by way of a motion for a protective order that was based in the law. It is not clear that such advance notice is even necessary where the federal right under 1692c(c) has previously been invoked. But notwithstanding 1692c(c), according to Trawick's Florida Practice and Procedure, 2004 edition, at sec. 16-12, p. 267, the filing of the motion for protective order itself lawfully should have caused the suspension of the deposition, and the motion was in the court's file at the time it rendered the motion to compel:

> Service of a motion [for protective order] suspends discovery until the motion is determined. Due to court congestion and short notice for discovery, no other procedure can effectively protect the rights of all the parties. If it is possible to obtain a hearing on the motion before the discovery time, this should be done. If not, suspension of proceedings until the hearing is the only alternative. This does not apply to motions made during a deposition.

For all the reasons stated above, Petitioner committed no violation of any Bar Rules by failing to appear as a deponent at scheduled depositions.[9] More

---

transcript, Guttmann was asked if he had any animosity towards the Petitioner. Guttmann answered "I don't lie the way you practice law." At transcript page 128, line 3, Guttmann stated that it was his regular practice to set the other side's motions for hearings.

[9] In fact, it appears Petitioner was the victim of misconduct involving deception by attorney debt collector Stephen Guttmann.

importantly, there is not competent and sufficient evidence in the record to support a finding that the evidence clearly and convincingly proves that a Bar violation occurred with respect to Petitioner's non-appearance as a witness at scheduled depositions.

Issue D. Whether there is competent and sufficient evidence in the record to prove by clear and convincing evidence that Petitioner violated any Bar Rule when he filed claims of first impression in U.S. District Court relying on the plain language of 15 USC 1692c(c) and (d) and Fla Stat 559.72(7), clause 2 against an attorney consumer debt collector for debt collection abuse and harassment prohibited by these statutes.

The U.S. District Court's order sanctioning the Petitioner for bringing a meritless and frivolous case before it in order to abuse and harass the defendant attorney consumer debt collector Stephen Guttmann contains language which itself belies the court's conclusion that the case was meritless and frivolous. See original order and new trial (rehearing) motion order at Exhibits B/12 and B/24. Therefore, this section refers to the orders' own language to argue against the orders' conclusions and to argue against the Referee's apparent adoption of the District Court's conclusion as his own. The Referee's report was fully discussed

in the final hearing pretty much in the form it is discussed below. The contention is that the gross defects in Judge Vinson's reasoning prevent it from being competent and sufficient evidence in this Bar Complaint proceeding.

The complaint filed in federal court by Petitioner against two attorney debt collectors of Petitioner's consumer debt their alleged violations of the FDCPA and the FCCPA. Petitioner dismissed early on the out of state, Virginia attorney consumer debt collector, Mr. Gardner, from the action whom Petitioner believed had subcontracted the debt collection to local attorney Stephen Guttmann. The case continued with attorney consumer debt collector Stephen Guttmann as the sole remaining defendant. The U.S. District Court for the Northern District of Florida, Pensacola Division, Judge Roger Vinson, issued an initial opinion/order granting defendant's motion for summary judgment (Exhibit B/12) and a second opinion/order on Petitioner's combined motion for rehearing (called a motion for "new trial") and to show of cause why Rule 11 sanctions should not be ordered in granting summary judgment in favor of the defendant (Exhibit B/24). The opinion on the rehearing concluded on page 11:

> There is no indication in the record that defendant Guttmann took any actions that could reasonably be construed as a violation of either the FDCPA or the FCCPA. All of his actions clearly were

> legitimate steps taken to execute on a judgment through the legal process. Committee's filing of this civil action amounts to an abuse of the legal process. Moreover, in light of his conduct in the state court proceeding and the fact that he filed two actions before this court which raised the same frivolous claims, it appears that Committe's intent in filing this action was to harass the defendant.

The court's own language preceding the above conclusion, however, belies the above conclusion and ought to prevent this Supreme Court from concluding that competent and sufficient evidence was before the Referee that could support his decision with clear and convincing evidence . Because much of the case Refereed below centered around Judge Vinson's decision that Petitioner's claim there was frivolous and brought for purposes of harassment and was an abuse of the legal process, that decision was the focus of the Petitioner's case in chief at the Refereed final hearing and is the focus below in discussing whether the Referee had competent and sufficient evidence to conclude that evidence before clearly and convincingly showed a Bar Rule violation. The only witnesses at the Refereed proceeding was Stephen Guttmann and the Petitioner. The Bar relied extensively on court documents in the federal court and the county court. The paragraphs immediately below address paragraphs in Judge Vinson's order which themselves discuss Petitioner's complaint brought in federal court.

Petitioner's Count I of the complaint, discussed at pages 8 and 9 of the court's order, alleges that Guttmann communicated with the Petitioner after the Petitioner had invoked his right under 15 USC 1692c(c) to demand that such communications from Guttmann cease. The court, however, in a case of first impression, stated that the communication from Guttmann (settlement talks) was not a violation even though the court admitted that the communication did not meet the criteria of any of the three exceptions stated in the statute. The court created its own exception. Of importance to the present proceedings is the circumstance that the U.S. District court stated no authority--case law, statutory, or otherwise--for its decision to create the exception. It created its exception out of thin air with the following language:

> Although settlement offers are not included in the three exceptions expressly set forth in section 1692c(c), such offers are a necessary and important aspect of the legal process. Therefore, Guttmann's offers are always proper during litigation that is underway. Therefore, Guttmann's offer to settle the judgment against Committe was proper.

Count I claim was not frivolous and was well taken and should have been the basis for denying Guttmann's motion for summary judgment, not the basis for granting it. The court erred in concluding that the claim was frivolous and was an abuse of the legal process. The plain language of the statute makes the

communication unlawful, and the fact that the Congress stated three specific exceptions and that the communication in question is not one of them makes even stronger the argument that the U.S. District court acted unlawfully in creating a fourth exception. The court usurped the power of the legislature when it created a fourth exception.

The statute is a consumer protection statute and commonly accepted rules of statutory construction require that remedial legislation be construed by the courts in favor of parties whose protection the law was enacted to protect--in this case consumer debtors of which the Petitioner was one. The U.S. district court has construed the statute in the opposite direction, and that is unlawful.

Furthermore, this was a case of first impression in the Eleventh Circuit. Although a three judge panel in the Sixth Circuit had previously ruled the same way[10]as Judge Vinson ruled in Petitioner's case, the third judge on the 6th Circuit court panel stated a strong and worthy dissent employing the courts to follow the plain meaning language of the statute. In considering the language of that dissent

[10] That case, Lewis, was also a 15 USC 1692c(c) cease communications case. The communications there were a debt collection letter and a telephone call. In Petitioner's case, the communication was a conversation initiated by the collector in an attempt to negotiate collection of the debt--judgment on the debt had already been obtained.

quoted below by U.S. 6th Circuit Judge Ryan, Lewis v. ACB Business Services, Inc., 135 F.3d 389, 413 (6th Cir. 1998) (Exhibit H), it should be noted that in the matter at bar Judge Roger Vinson did not even rely on legislative history but simply declared his own private opinion to be the law of the case (which in the right circumstance is reasonable to do as in a case of first impression--but not here where the language of the statute is plain and unambiguous):

> In finding no violation of the FDCPA, the majority opinion relies heavily on legislative history and other decisional devices that are properly employed when a legislative enactment is vague, obscure, ambiguous, or inherently contradictory. If I thought for a moment that we were free to decide this case on the basis of "legislative history, "Senate Reports," "the purpose behind the [FDCPA]," "Federal Trade Commission advisory opinions," "The policy of the legislation as a whole," and whether ACB's collection practices are "less coercive" than litigation, as the majority does, I might be tempted to sign on to the majority opinion. But I do not, and, therefore, I cannot.
>
> There are very few propositions defining the proper scope of judicial review that are more firmly settled than the rule that when the language of a congressional enactment is clear and unambiguous, courts may not "interpret" or "construe" the meaning of the language of the law by resort to "legislative history,: apparent "legislative policy," or "legislative intent," but must simply apply what Congress has said, assigning to the words used in the statute their primary and generally accepted meaning. The FDCPA is such a statute. There is nothing ambiguous, unclear, vague, or inherently contradictory about any of the language of the FDCPA. As a matte of fact, the provisions of the statute are so painfully, some might thing annoyingly, even nitpickingly, clear, and impose such unambiguous burdens upon even

> ethical debt collectors, that it is somewhat understandable that the majority opinion would resort to interpretation and construction to soften some of the harsh effects of the statute.

The Referee's reliance on Judge Vinson's order to conclude that Petitioner's claim against debt collector Guttmann was not meritorious was unjustified and was error, especially considering that the standard for the Referee's decision making requires that he find that the evidence against the Petitioner be clear and convincing. There is not competent and sufficient evidence in the record to support the Referee's decision that Petitioner's count I was clearly and convincingly unethically nonmeritorious. The Referee's conclusion is error.

Petitioner's Count II claim, discussed at pages 9 and 10 of the court's order, alleged that Guttmann violated 15 USC 1692c(b) by making substitute service of a notice of contempt, directed at the Petitioner and in connection with the collection of Petitioner's consumer debt, on Petitioner's father. This section of the FDCPA prohibits a debt collector from communicating, in connection with the collection of a debt, with any person other than the consumer, in part and unless "reasonably necessary to effectuate a post judgment judicial remedy." Petitioner reasonably claimed in Count II that this communication to Petitioner's father was

not necessary because service could have been had directly on, or restricted to, the Petitioner. (Guttmann admitted this in the Refereed final hearing. Trans. p. 126, line 22 to p. 127, line 7). But the court, without reference to any case law authority, opined that because state law authorized substitute service that it was "reasonably necessary." The court so concluded even though it noted that Guttmann had the ability to instruct the process server to serve only, or restrict service to, the Petitioner; thereby admitting such substitute service was in fact not necessary. The court's finding that substitute service on Petitioner's father was reasonably necessary is not tenable in light of the court's own admissions. There is not competent and sufficient evidence in the record for the Referee to have concluded that there was clear and convincing evidence that Petitioner's Count II claim was not meritorious, especially considering that this count too was a case of first impression not only in the Eleventh U.S. Circuit but in all U.S. Circuits.

Petitioner's Count III claim, discussed at pages 10 and 11 of the court's order, alleged that Guttmann violated 15 USC 1692e and f which together prohibit a debt collector from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt" and using "unfair or unconscionable means to collect or attempt to collect any debt,"

respectively.

As the court noted in its order, the evidence before it was that Guttmann at one time during his collection efforts against the Petitioner continued after Guttmann's client no longer owned the debt because it had sold the debt to another. The court concluded that because at that time Guttmann did not know his client had sold the account out from under him (there was no evidence to support this fact, the court simply and disturbingly assumed Guttmann had no knowledge), that no violation of either of these two provisions had occurred. But FDCPA provisions do not have an "intent" or "willful" requirement. The statute is a strict liability statute. The statute only requires that the debt collector deceive or mislead. The statute does offer a "lack of intent" affirmative defense elsewhere in the statute at 15 USC 1692k(c), but Petitioner never pled that defense (and it is doubtful he could have proven the defense in light of its requirement that Guttmann have procedures in place to prevent the unintended deception and misleading communications). The court nevertheless reached its decision as if the defense had been pled, and the court appeared further to be unaware that the defense stated requires that Guttmann prove he had procedures in place to prevent the violation. That the affirmative defense is stated in a separate section of the

FDCPA is good reason to conclude that it does not inhere in any other sections of the statute. This too was a case of first impression in all of the U.S. Circuits. There is not competent and sufficient evidence in the record to support the Referee's finding with clear and convincing evidence that Petitioner's Count II claim unethically was not meritorious.

Petitioner's Count IV claim, discussed at page 11 of the court's order, stated a claim based on the Florida FCCPA, section 559.72(7), clause 2 which, in relevant part, prohibits a debt collector "willfully engag[ing] in conduct which can reasonably be expected to abuse or harass the debtor or any member of his family." In light of the above FDCPA violations, Petitioner very reasonably believed it was reasonable to conclude that any of the above FDCPA violations are abusive in Florida. The preamble to the FDCPA indicates at 15 USC 1692(a) that the purpose of its provisions is to prevent debt collection abuse, and section 559.72(7)(2000) of the Florida Statutes speaks of preventing abuse.[11] It is reasonable to conclude that the U.S. Congress enacted each of the FDCPA provision as anti-debt collection abuse measures. The 1 July 2001 amendments to

[11] No person shall…willfully engage in other conduct which can reasonably be expected to abuse or harass the debtor or any member of his family.

the FCCPA specifically state at 559.77(5)(2004) that "due consideration and great weight shall be given to the interpretations of the federal Trade Commission and the federal courts relating to the federal Fair Debt Collection Practices Act." It was not frivolous to conclude that such violations amount to violations of Florida's FCCPA, 559.72(7)(2000), and there was not competent and sufficient evidence before the Referee for him to conclude by clear and convincing evidence that this count was frivolous.

E. Other Miscellaneous Matters. The Referee's Report, like the Bar Complaint, mentions other miscellaneous matters but fails to connect them to any Bar Rule violation. The reader and Petitioner is left to make the connection himself or herself which Petitioner has been unable to do. Therefore, each of these other matters will be addressed individually and generally,

First, the Report mentions at par. 20 that Petitioner's federal complaint against Guttmann claimed damages of over $3 million dollars. No evidence whatsoever was presented in the Refereed proceedings indicating that Petitioner's did not suffer damages of this amount.

Second, the Report mentions at pars. 23 and 24 that Petitioner's claim against Guttmann in federal court had a speculative and estimated market value of

$1,000. No evidence whatsoever was presented in the Refereed proceedings indicating that the claim did not have a speculative estimated market value of $1,000 other than that the actual value turned out to be zero when the federal court granted defendant's motion for summary judgment and awarded the defendant costs and attorneys fees. Damages and market value are two different things.

Third, the Report mentions at par. 24 that Petitioner attempted to settle the federal case for $4,500. There is no evidence presented in the case to suggest that there was anything unethical about attempting to settle a case for $4,500 that eventually resulted in Petitioner receiving no damage award whatsoever because he lost on the issue of liability.

Fourth, the Report states at par. 42 that an offer to settle his complaint with the out of state Virginia debt collector Mr. Gardner was prejudicial to the administration of justice. But the report does not state how it was prejudicial. Mr. Gardner himself is a consumer debt collector attorney who obtained a consumer debt judgment against the Petitioner, and more likely than not Gardner sends out debt collection letters himself on a regular basis all of the time in an attempt to settle claims he has been hired to collect. The FDCPA anticipates such conduct (offering a settlement instead of, or in substitute for, a lawsuit) and condones it as

long as the debt collector intends to pursue a court claim at the time he threatens such. 15 USC 1692e(5), "[A debt collector may not] threat to take any action that cannot legally be taken or that is not intended to be taken." In this case such a suit was indeed initiated against Gardner. It is not prejudicial to attempt to settle a claim that is valid on its face in light of such unambiguous federal FDCPA language.

X Conclusion

The Referee's conclusion that Petitioner violated Florida Bar Rules 4-3.1, 4-3.4(c), 4-3.4(d), 4-8.4(a), and 4-8.4(d) should be reversed because: (1) The process of bringing the complaint violated Florida's open meetings law; (2) Petitioner was specifically, by name, excluded from observing the conduct of, witnessing, or attending, the grievance committee meeting leading to the bringing of the complaint, and this was a violation of Florida's open meetings law; (3) The grievance committee member charged with discussing the complaint with the Petitioner prior to the grievance committee decision making hearing failed to communicate with the Petitioner, and thus Petitioner was denied due process; (4) No court reporter was present to record the grievance committee meeting and thus no transcript is available so that the alleged bona fides and other proprieties of the

meeting can be reviewed which is of special concern in this case because of item (3) immediately above; (5) The Bar Complaint is insufficient because it fails to relate conduct described in the Complaint to particular Bar Rules which the Complaint alleges the Petitioner violated, and thus it fails to inform the Petitioner sufficiently and fairly so that he could prepare an informed defense; (6) Sufficient and competent evidence does not appear in the record to support the Referee's finding that any Bar Rule violations occurred, notwithstanding Judge Vinson's order in federal court which order appears to have been the basis for most of the Referee's findings of fact and conclusions of law, and (7) allowing the Referee's decision to stand will put an improper and unfair harsh chill over the Plaintiff Bar's zealous representation of consumer debtors' vis a vis the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act.

Respectfully submitted,

Bruce Committe, PhD, CPA, Fla Bar 797502
17 S. Palafox Place, #306
Pensacola, FL 32502
Ph 850 439-1999/Fax 850 439-1444

Certificate of Service

I hereby certify that I furnished a copy of the above this day _____ by first class USPS mail to:

Olivia Paiva Klein, Bar Counsel
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

John Anthony Boggs
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300

_____
Bruce Committe

Certificate of Font Size

I hereby certify, pursuant to Fla R. App. P. 9.210 (a), that the font is 14 Times New Roman.

_____
Bruce Committe