IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

Case No. SC03-375
TFB File No. 1999-00,478(02)

DAVID A. BARRETT,

Respondent.
_____/

RESPONDENT'S CROSS-REPLY BRIEF

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

Undersigned counsel does hereby certify that the Respondent's Cross-Reply Brief in The Florida Bar, Complainant, v. David A. Barrett, Respondent, Case No. SC03-375, TFB File No. 1999-00,478(02), 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 Anti-Virus for Windows.

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John A. Weiss
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AMENDED JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Florida Constitution.

ARGUMENT

POINT I

Appendix C to the Bar's answer brief, the transcript of the September 25, 2003 hearing before the Referee, took place *after* proposed findings of fact had been submitted. It shows not only that the Referee announced no meaningful findings prior to the proposed reports being submitted, but that even as late as the day before the dispositional hearing on the case he could not articulate any factual basis to support any of his findings. The following dialogue was relevant to this case:

> MR. WEISS: Yes, sir. It's pretty succinctly stated, Your Honor, in order to prepare for basically is [sic] a sentencing hearing, *we need some specificity on the conduct involved*. To give you an example, was the Molly Glass (phonetic) incident a basis for misconduct, and if so, were the checks in 1997 a basis for misconduct. And if so what *– a little bit of specificity of the exact conduct involved would help us greatly*.
>
> And Your Honor, I think the best way to do it, short of your actually writing down your findings of fact, which I don't think is necessary for our purposes, is to have a bench conference just counsel with you. *And I think we could probably resolve it within a half an hour or so.*
>
> *But the normal situation, Your Honor, is we have specific findings of fact before we go into the dispositional*

hearing. Here just finding the rules, or just citing the rules it kind of handicaps us, Your Honor.

THE COURT: Okay. Anything else?

MR. WEISS: That's our pitch, Your Honor.

THE COURT: Okay. And Mr. Davey?

MR. DAVEY: *I'll let it be resolved right now. All he needs to know is: did you find guilt as to Molly Glass, and did you find guilt as to the 21 clients that I had submitted in my proposed report of referee.*

THE COURT: *Well, the answer to that is yes.*

MR. WEISS: Both of them?

THE COURT: Yes, sir.

MR. WEISS: Are you – Your Honor, and I ask these questions with all due respect. Are you finding that my client knew and participated in a solicitation, for want of a better word, scheme, or that it was vicarious and failed to properly supervise his partner, Eric Hoffman?

THE COURT: *I'll write it more clearly, but I can tell you for now, some of all, some of all of the above, sufficient to meet all of the allegations of the complaint.*

MR. WEISS: May I assume for the purpose of our hearing tomorrow that basically every allegation the Bar pled, you are going to find for the Bar on?

THE COURT: Yes, sir. (Emphasis supplied.)

TR. 09/25/03, pp. 3-5.

Respondent's counsel was pleading with the Referee to make specific findings of fact so that he could prepare for the dispositional hearing. He refused to do so. In fact, Bar Counsel answered Respondent's counsel's questions for the Referee by stating:

> I'll let it be resolved right now. All he needs to know is: did you find guilt as to Molly Glass, and did you find guilt as to the 21 clients that I had submitted in my proposed report of referee.

The Referee then said: "Well, the answer to that is yes."

Later, the Referee answered Respondent's request for specificity thusly:

> I'll write it more clearly, but I can tell you for now, some of all, some of all of the above, sufficient to meet all the allegations of the complaint.

The Referee never wrote it "more clearly, . . ."

The Referee's actions in the instant case are similar to the trial judge's actions in this Court's recent opinion in *Perlow v. Berg-Perlow*, Case No. SC02-1317, 29 FLW S130 (March 25, 2004), currently pending on rehearing. The philosophy behind the Court's opinion in that case applies to the instant proceedings. In *Perlow*, within two hours after the end of an extremely acrimonious dissolution of marriage trial, the presiding judge signed without change a 25-page order written by the wife's lawyer. While an additional issue in *Perlow* not present here was the fact that the husband had

not been provided a copy of the proposed order prior to its being given to the judge, it is the signing of a proposed order without change that is the issue present in both cases.

This Court in *Perlow* rejected the trial court's order and remanded the case for new trial. In so doing, the Court found that the trial judge's adopting the wife's proposed order

> verbatim without any additions, changes, or deletions so quickly thereafter (i.e., within two hours of its submission) without the trial judge having indicated on the record any findings of fact or conclusions of law, there was an appearance that the trial judge did not independently make factual findings and legal conclusions, i.e., an appearance of impropriety.

Perlow, p. S132. That appearance of impropriety is present in the case at bar. The argumentative proposed report of the Bar was signed by the Referee verbatim. Such a report cannot be "meaningfully reviewed by an appellate court." *Rykiel v. Rykiel*, 795 So.2d 90 (Fla. 5th DCA 2000).

This Court in *Perlow* observed that proposed judgments/reports

> can serve as a starting point and reminder of the facts and issues that should be considered and weighed by the judge in his or her own evaluation. However, such submissions *cannot substitute for a thoughtful and independent analysis of the facts, issues and law by the trial judge*.

Perlow, p. S133 (emphasis supplied).

In Justice Pariente's concurring opinion, she pointed out the *Perlow* final judgment was replete with inflammatory and one-sided findings and conclusions. Examples of similar language in the Referee's report below are:

> This case is among the most egregious conduct imaginable. . . . The damage done to the legal system is great and incalculable. ROR p. 12.
>
> This testimony is not logical, reasonable or credible. . . . I find that Respondent lied to the Referee about the reason for this bonus. ROR p. 12.

(This finding, i.e., that the Respondent lied to the Referee, was not in any way announced in advance by the Referee and was not charged by the Bar in its complaint.)

Justice Pariente noted on page S133 that the

> submission of proposed final judgments by the parties can be assistance to trial judgment *only* if the proposed judgment set forth the facts in an objective and neutral manner. (Emphasis in original).

The Bar's proposed report was not neutral. It was advocacy in its most zealous form. By adopting the Bar's language *in toto* the Referee abdicated his role as fact finder and delegated it to the advocate for the Bar. Nothing in his report gives this Court the benefit of his thought processes.

Justice Lewis in his concurring opinion stated on page S135 that:

> I concur with the majority's determination that the trial court

> improperly delegated its decision-making authority here to the respondent by adopting her proposed final judgment without modification, or even, apparently, an opportunity for thoughtful reflection. In both substance and form, the final judgment facially is doubtlessly the work of an experienced, zealous, partisan advocate, as opposed to an informed, but neutral, officer of the judicial system. The trial court's action in merely adopting the petitioner's (sic) final judgment as it exists in this case contravenes established principles of law requiring the judge – not the parties – to decide the issues in the case.

Justice Lewis goes on to state on the next page that:

> In my view, it is impossible to draw any conclusion or inference other than this "final judgment does 'not reflect the trial judge's independent decision on the issues of [the] case.'" *Cole Taylor Bank v. Shannon*, 772 So.2d 546, 551 (Fla. 1st DCA 2000) (quoting *Flint v. Fortson*, 744 So.2d 1217, 1220 (Fla. 4th DCA 1999).

The Referee also abdicated his responsibility on the issue of prosecutorial delay. There he merely adopted the Bar's language that its four-year delay "was reasonable." He also adopted the Bar's language that the delay was not mitigation because the Bar "was engaged in constant investigation of this case for the entire four years." ROR p. 14. He then "found" that Respondent's deceased partner "might have been a witness for The Florida Bar, or might have been a witness for Respondent." ROR p. 14. These are not the Referee's findings; these are Bar Counsel's arguments.

This Court's concerns about the propriety of a jurist signing without change

counsel's proposed reports are also shared by the federal judiciary. Though it recognized that such a verbatim adoption does not always mandate reversal nor change the standard of review, the 11th Circuit in *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353,1373 (11th Cir. 1997), wrote that the appearance of impropriety arises by the uncritical adoption of counsel's drafts of sensitive dispositive orders adopted nearly verbatim. The court in *Chudasama* also pointed out on page 1373 that the adoption of party-prepared orders "impedes our ability to review" lower court decisions. They then quoted Judge J. Skelly Wright:

> In their zeal and advocacy and their enthusiasm [lawyers who draft opinions] are going to state the case for their side … as strongly as they possibly can. When these [opinions] get to the court of appeals they won't be worth the paper they are written on as far as assisting the court of appeal in determining why the judge decided the case. 123 F. 3d 1353, 1373.

As argued in Respondent's initial brief on cross-appeal, this Court relies heavily on its referees' independent findings and conclusions in reviewing these important disciplinary cases. When, as here, there is no thoughtful, independent review by the referee, this Court's ability to adequately review is hamstrung. The only remedy is remand.

POINT II

Respondent's argument regarding this point were set forth on pages 9-13 of his cross-appeal brief.

POINT III

The two exceptions to this Court's statute of limitations rule, Rule 3-7.16, are not applicable to the Molly Glass complaint. If they were, Bar Counsel Spangler would not have dismissed the case on December 21, 2000. Mr. Spangler's letter is quoted on page 14 of Respondent's initial brief.

In essence, the Bar in its answer brief is arguing with its own decision, i.e, the dismissal of the Glass grievance by Bar Counsel Spangler on December 21, 2000. If Mr. Spangler's decision was wrong, the Bar should have formally reopened Molly Glass's complaint under the case number originally given to it. They should have then presented the Glass grievance to the grievance committee. They did not do so.

The Bar, as an afterthought, now argues that the two exceptions to Rule 3-7.16 are applicable and that Mr. Spangler's December 2000 decision was wrong. First, they argue that the six-year period did not begin to run until Molly Glass read a newspaper article on May 27, 1999, rather than when the alleged solicitation took place in 1994. (She still did not file her grievance, however, until December 4, 2000.) Mr. Spangler rejected that argument. Ms. Glass knew in 1994 that Mr. Cooper contacted her in the hospital and that he worked for the firm.

There is no basis to argue that the second exception, concealment, applies. Respondent did nothing to conceal Mr. Cooper's actions. Respondent did not work on the Glass case at all. He never even met Ms. Glass.

Bar Counsel Spangler properly closed the Molly Glass complaint in December 2000 because it did not fall within this Court's six-year statute of limitations rule. His decision was imminently correct.

POINT IV

The Bar urges this Court to forgive the Bar's failure to responsibly prosecute these disciplinary proceedings with dispatch by asking rhetorically if it is fair for alleged misconduct to go unsanctioned because of the Bar's delay. The answer is absolutely. *See, e.g., Florida Bar v. Rubin*, 362 So.2d 12 (Fla. 1978); *Florida Bar v. Walter*, 784 So.2d 1084 (Fla. 2001). For 40 years this Court has been ordering The Florida Bar to prosecute disciplinary cases with dispatch. Those directives are, simply stated, ignored by the Bar. Until this Court starts dismissing cases as a sanction, The Florida Bar will continue to believe it has carte blanche to handle cases at a glacial pace.

The Bar argues that the delay in this case was reasonable and necessary. It argues that it was investigating 19 lawyers, presumably for the entire four years. Apparently, no charges were brought against 16 of those lawyers because the only

lawyers prosecuted by the Bar were Messrs. Flowers and Vanture, both of whom received 20-day suspensions, and Respondent. The Bar repeatedly points out that the Referee denied Respondent's motion to dismiss. However, he neither articulated any findings on the issue nor gave a detailed basis for his ruling. Accordingly, the "facts" stated by the Bar in its brief are its own arguments, not findings by the Court.

The Bar correctly points out that on May 31, 2001, the criminal staff investigation into the various lawyers being investigated by the Department of Insurance was ended. Notwithstanding that fact, The Florida Bar did not take Respondent's case to probable cause hearing until December 2002, 19 months later. There is no record evidence indicating any significant new evidenced gleaned by the Bar during that 19-month period.

The facts are uncontroverted; (1) with the exception of Randy Pelham, an insignificant witness, every one of the Bar's witnesses had been interviewed by the middle of 1999. By the first quarter of 2001, those interviews were over; (2) The Frances Brown grievance was filed in November 1998. It went to probable cause hearing in December 2002. It was dismissed by Bar Counsel during final hearing in August 2003; (3) The Molly Glass complaint, involving 1994 conduct, was dismissed by the Bar in December 2000. Even so, she was interviewed in June 1999 and March 2001; (4) Chad Cooper had been interviewed by the State and by the Bar May 5, 1999

and December 20, 2000; and (5) The only documentary exhibit of any significance, Bar Exhibit 4, was provided to the Bar by Respondent, completely voluntarily, in May 1999.

The Florida Bar had all the information that it needed to try this case by March 2001. It should have taken the case to probable cause hearing at that time.

Respondent was severely prejudiced by the Bar's failure to act reasonably by the death of Eric Hoffman in July 2000. At that point in time, the investigation had been ongoing for 18 months. If the case had been taken to probable cause hearing promptly, Mr. Hoffman would have been available to testify.

As argued below, Respondent submits he is not guilty of any misconduct. Even if he is, the dismissal of the charges against him can be laid solely at the Bar's feet because it abdicated its responsibility, as ordered by this Court, to prosecute cases diligently.

POINT V

The Bar's argument that the Referee's findings should be upheld because of the uniqueness of his position in assessing the credibility of witnesses is emasculated by the fact that he made no independent findings. The Referee's words are those penned by Bar Counsel in his proposed report. Bar Counsel is an able advocate; he is not charged with making neutral findings of fact. His job is to advocate zealously for his

positions and he clearly and properly did so here. His language in his proposed findings of fact should in no way be construed as being the Referee's dispassionate, neutral observations.

A. Chad Cooper's duties. Respondent's arguments on this point were thoroughly discussed on pages 22-24 of his initial brief.

B. The evidence is unrebutted that Mr. Cooper never received any referral fees for work brought into the firm while a full-time employee. The Glass case is the *only* case shown to have come into the office as a result of Mr. Cooper's chaplain duties. Respondent stands by the arguments made on page 24 and 25 of his initial brief that the Referee's adoption of the Bar's language that Respondent "devised a plan" was not proven by clear and convincing evidence. The Bar quotes on page 28 of its brief Respondent's alleged remark "I paid for you to go to class. You need to be up there." TR. 109. That remark in no way proves improper motive. As Mr. Cooper himself testified, the bulk of the time he spent at the hospital was in the cancer ward.

The last sentence on page 28 of the Bar's brief is not supported by the record. No evidence shows that Mr. Cooper's resignation was "orchestrated" or that Dr. Antolic was "Respondent's captive chiropractor . . . ." In fact, the only evidence in

the record is that Respondent met Dr. Antolic on one occasion. Mr. Hoffman secured Mr. Cooper's employment with Dr. Antolic.

The statement that "Cooper continued to be paid $200 per head for personal injury clients . . ." brought into the firm after Respondent fired Mr. Cooper is without basis. Mr. Cooper was paid no referral fees for any clients brought into the firm prior to his dismissal in September 1997.

C. Molly Glass case. The Bar misses Respondent's arguments about Molly Glass as set forth in pages 25-28 of his initial brief. Mr. Hoffman, not Respondent, was Mr. Cooper's immediate supervisor. The fact that Mr. Hoffman secured employment for Mr. Cooper with Dr. Antolic after Respondent fired Mr. Cooper buttresses that argument.

The most telling point in Respondent's argument, however, on Glass is that when Ms. Glass finally met with Mr. Hoffman, she was not even tendered a contract of employment. No lawyer improperly soliciting a client would let her walk out of the office once she made contact without at least tendering a contract to her

D. The primary thrust of this argument is set forth on pages 28-30 of Respondent's initial brief. The Referee never announced prior to signing the Bar's report that he found Respondent lied.

E. All of the events listed by the Bar in its answer brief involve conduct by Eric Hoffman.

F. Assuming for the purpose of this brief that Respondent is, indeed, a "micro-manager", his unrebutted testimony was that he refused to allow the ten checks to be issued until invoices were presented. The evidence is overwhelming that the remaining checks were hidden from Respondent's attention by Mr. Hoffman.

G. There is no evidence for the Referee's finding that Mr. Cooper's actions were at Respondent's direction and under his supervision.

H. Simply put, Mr. Cooper did not testify that Respondent sent him to either Miami or Chicago. He said he was sent, but not by whom. The logical assumption is that he was sent by his direct supervisor, Mr. Hoffman. Merely saying that he was "sent" without specifically naming Respondent as the individual that sent him, or without indicating that Respondent knew about the trips, cannot constitute clear and convincing evidence of misconduct in this regard.

POINT VI

Respondent submits that the arguments he made under Point VI in his initial brief as set forth on pages 38-49 conclusively demonstrate that the Referee's recommendation of a one-year suspension is not justified in light of the two 20-day suspensions given to Messrs. Vanture and Flowers. The only portion of the Bar's

argument that is not rebutted by Respondent's arguments in his initial brief on cross-appeal is the discussion regarding the "Prime Time Live" muck-raking TV show. In fact, the only Florida case mentioned was the Molly Glass case. Respondent objected to such hearsay being admitted into evidence .

Molly Glass stated in her television interview that Chad Cooper was paid $200.00 to solicit her case. That was clearly wrong. Even the Referee so acknowledged when he stated:

> THE COURT: I do need to state for the record that the $200 that was flashed on the screen two or three times was not proven, so that everybody knows that I know that.

TR. 09/26/03, pp. 37, 38.

CONCLUSION

The Referee's report is not a true, independent decision by the Court. Rather, it is an acceptance without criticism of the Bar's arguments. As such, its accuracy is tainted and should not be relied upon by this Court. This case should either be dismissed or remanded to a new referee for a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's cross-reply brief has been furnished by U. S. Mail to James A. G. Davey, Jr., Bar Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, and by U.S. Mail to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 12th day of May, 2004.

John A. Weiss