IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC03-375

v.

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

DAVID A. BARRETT,

Respondent.
_____/

AMENDED INITIAL BRIEF

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PRELIMINARY STATEMENT

The complainant, The Florida Bar, is seeking review of a Report of Referee recommending suspension for one year. Complainant will be referred to as The Florida Bar, or as the Bar. David A. Barrett, respondent, will be referred to as Respondent, or as Mr. Barrett throughout this brief. Mr. Barrett is seeking cross review of the Report of Referee.

References to the Report of Referee shall be by the symbol **RR** followed by the appropriate page number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE

On March 3, 2003, The Florida Bar filed its Complaint against Respondent. The parties began the process of discovery, which continued until shortly before the final hearing.

On April 7, 2003, Respondent filed a Motion to Dismiss for Prosecutorial Delay seeking to dismiss the complaint because it had taken four years for The Florida Bar to investigate the case. At the same time, Respondent filed a Motion to Strike and for Protective Order seeking to strike all reference to Molly Glass, a client of the Barrett law firm, and to prohibit The Florida Bar from making any reference to Molly Glass. The Florida Bar filed responses to both motions on April 25, 2003.

On May 19, 2003, Respondent requested the Referee to issue a subpoena duces tecum for deposition to John Barr, Staff Investigator for The Florida Bar. On May 27, 2003, The Florida Bar filed a Motion to Quash the subpoena duces tecum and for Protective Order on the grounds that the documents demanded were privileged. On June 3, 2003, a telephonic hearing was held regarding that motion and the referee ordered that an in camera review of the documents would be necessary. The deposition was canceled.

On June 10, 2003, a telephonic case management conference was held and the referee set August 12 - 15, 2003, as the date for the final hearing.

On July 10, 2003, the in camera review of the disputed documents was held at Lake City, Florida. The Referee ordered that the disputed documents were not discoverable, as they are privileged. The referee, however, also ordered that four of the twenty-five documents might be reconsidered if appropriate at a later time.

On August 1, 2003, Respondent filed a Supplemental Answer to The Florida Bar's First Interrogatories seeking to call eight new witnesses previously undisclosed. The Florida Bar filed a Motion In Limne seeking to exclude the witnesses.

An evidentiary motion hearing was held at Lake City, Florida, on August 4, 2003. The Florida Bar's exhibits 2 and 3 were received, as well as Respondent's exhibits 1 and 2 and the testimony of four witnesses was heard. Respondent's Motion to Dismiss for Prosecutorial Delay was denied, but the referee ordered that it might be reconsidered at a later time. Respondent's Motion to Strike and for Protective Order was denied. The Florida Bar's Motion In Limne was considered and a ruling obtained as to each new witness.

A final hearing was held in this matter commencing on August 12, 2003, and ending on August 14, 2003, at Tallahassee, Florida, with all evidence concerning guilt completed. A hearing was held on September 19, 2003, at Lake City, Florida, at which argument of counsel regarding guilt was heard.

On September 23, 2003, Respondent filed a motion for a continuance of the dispositional hearing and a telephonic hearing was held on September 25, 2003, at which the motion was discussed, but not granted.

On September 26, 2003, the final discipline phase hearing was held. The Florida Bar submitted a videotape into evidence. Respondent called 9 witnesses to show the good character of Respondent and submitted into evidence 12 letters, with leave to file an additional letter from Gloria Fletcher later. The Florida Bar called one witness in rebuttal to show bad character.

On October 9, 2003, the Referee held a hearing on costs and those findings are included in Paragraph VI of his report.

At the conclusion of the proceedings, Respondent renewed again his Motion to Dismiss for Prosecutorial Delay, which was again denied.

The Referee found that Respondent was guilty of violating the following rules: 4-5.1(c)(1) (Responsibilities of a Partner), 4-5.3(b)(3)(A) (Responsibilities Regarding Nonlawyer Assistants) (numbered as Rule 4-5.3(c)(1) at the time in question), 4-5.4(a)(4) (Sharing Fees with Nonlawyers), 4-7.4(a) (Solicitation), 4-8.4(a) (Violate or attempt to violate the Rules of Professional Conduct), 4-8.4(c) (Engage in conduct involving deceit), and 4-8.4(d) (Engage in conduct in connection with the practice of

law that is prejudicial to the administration of justice) of the Rules Regulating The Florida Bar.

STATEMENT OF THE FACTS

The Florida Bar adopts the finding of the referee as set out in his Report of Referee. Those findings are reprinted below for the reader's convenience:

I find the following facts: In 1993, Respondent was the senior partner and managing partner of his law firm, Barrett, Hoffman and Hall, P.A., with office in Tallahassee, Florida.

In or around January, 1993, Respondent hired Chad Everett Cooper, an ordained minister, as a "paralegal." However, Mr. Cooper's job did not involve paralegal work, but his duty was to bring in clients to the law firm. Chad Everett Cooper was thereafter paid an annual salary averaging over $20,000, plus bonuses.

Thereafter, Respondent devised a plan to bring in more clients. He paid for Chad Everett Cooper's attendance at a chaplain's course, given at Tallahassee Memorial Hospital, so that Mr. Cooper could gain access to hospital patients in order to improperly solicit their business. Mr. Cooper completed the course. Respondent offered Chad Everett Cooper $100,000 if he would bring in a big case.

In or around March, 1994, Molly Glass, whose son had been critically injured in a car/bicycle accident, was in a room of the Tallahassee Memorial Hospital. Chad Everett Cooper appeared dressed in clothing that resembled a pastor, identified himself as a chaplain and offered to pray with the family. Thereafter, Chad Everett Cooper

gave the business card of Eric Hoffman, Respondent's partner, to a family member of Molly Glass and suggested that they call Mr. Hoffman.

Molly Glass was not a friend or relative of Chad Everett Cooper or Respondent, and was unknown to both previously.

Molly Glass did thereafter call for an appointment with Eric Hoffman and, after her son died, retained Respondent's law firm. A settlement was negotiated and Molly Glass was very happy with the result until in or around May, 1999, when she realized by reading a newspaper article that Chad Everett Cooper's actions were improper solicitation.

Chad Everett Cooper was an agent of Respondent when he solicited Molly Glass. Respondent had direct supervisory authority over Chad Everett Cooper, ordered the conduct, and also ratified Chad Everett Cooper's conduct by paying him a salary and "bonuses."

On or about April 17, 1994, Chad Everett Cooper brought a friend, Terry Charleston, to Respondent. Terry Charleston was an automobile accident victim whose injuries left him a quadriplegic. The case was settled in 1996 for over three million dollars and Chad Everett Cooper was paid a "bonus" that year of $47,500. Respondent testified that the "bonus" was given for three reasons: 1) personal services rendered by Chad Everette Cooper to Terry Charleston, 2) companionship

provided by Chad Everette Cooper to Terry Charleston, and 3) pastoring services provided by Chad Everett Cooper to Terry Charleston. This testimony is not logical, reasonable or credible. I find that the reason for the bonus was compensation for bringing in the case and the bonus was therefore a splitting of Respondent's legal fee with Chad Everett Cooper. I find that Respondent lied to the Referee about the reason for this bonus.

On September 19, 1997, Respondent fired Chad Everett Cooper. The Respondent had the ultimate authority over hiring and firing in his law firm. The real reason for the firing was, in the words of Respondent's partner Eric Hoffman (now deceased) "it was getting pretty hot and he was afraid that everyone would get caught."

After Chad Everett Cooper was fired, he continued, as an independent contractor or vendor, to solicit clients for Respondent. The scheme involved one Dr. Antolic. Chad Everett Cooper solicited patients for Dr. Antolic in return for a salary of $10,000 per month. This scheme involved the obtaining of accident reports. After the patients were seen by Dr. Antolic, the accident reports were then forwarded in an alley behind Dr. Antolic's office to Eric Hoffman, and Chad Everett Cooper was then paid an additional $200 per client for bringing them to Respondent's law firm as clients. I find that Respondent knew all about what Chad Everett Cooper and Eric Hoffman were doing and that Mr. Cooper's actions were at the direction of and under

the supervision of Respondent. Respondent ratified the conduct of both Eric Hoffman and Chad Everett Cooper. Respondent was a micro-manager of his office, especially as to finances. On at least one occasion, the accident reports were taken from the alley directly to Respondent's office.

I find that while Chad Everett Cooper was acting as an independent contractor, he brought many friends and relatives to Respondent, which is permissible. However, the following clients were improperly solicited by Respondent in violation of the Rules of Professional Conduct: Cindy Baker, Christina Cannon, Cora Cannon, Harry Cannon, Meltonia Chandler, Dorothea Crawford, Melvin Crawford, Myra Enzor, Bobby George, Dorothy George, Gilbert Harrell, Antonio Jackson, Chenet Labossiere, Lataina Lenton, Marsha Louis, Cecelia Myrthil, Michaelson Myrthil, Ken Robinson, Rosa Thomas, Clarence Wilson, and Marie Wilson. Respondent personally signed checks to Chad Everett Cooper for $200 for soliciting eight of those same clients as shown by a comparison of tabs B and I of The Florida Bar's exhibit #4. Respondent was a micro-manager of finances and had absolute control over the money. He knew at the time that the solicitations were improper. Respondent intended that it be done. He demanded to know whether there was insurance coverage before authorizing the checks to Chad Everett Cooper for soliciting clients signed by his partner, Eric Hoffman.

The above named 21 clients were not friends or relatives of Chad Everett Cooper or Respondent, or known to either of them before they were contacted by Mr. Cooper. Chad Everett Cooper was paid for bringing in each of these clients by Respondent.

In May, 1996, Respondent sent Chad Everett Cooper to Miami and Chicago in order to solicit business as a result of the Value Jet crash in the Everglades. Respondent denies that he sent Chad Everett Cooper to Miami and Chicago, but his own records prove that $974.24 of travel expense was incurred (Tab H, The Florida Bar Exhibit #4). This testimony is not credible.

In his testimony, Respondent has denied that solicitation occurred and denied that he knew anything about it. His testimony is not logical, reasonable, or credible. The testimonial, documentary and circumstantial evidence directly corroborates the testimony of Chad Everett Cooper and Sandy Scott. I find that Respondent is guilty by clear and convincing evidence of a violation of all of the Rules as alleged. Respondent is responsible for the conduct of Chad Everett Cooper and his partner, Eric Hoffman. I find that a significant motive for Respondent's conduct was his own pecuniary gain and that his conduct was deceitful and prejudicial to the administration of justice.

SUMMARY OF ARGUMENT

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

ARGUMENT

While the referee's fact findings are presumptively correct and should not be overturned unless clearly erroneous or lacking evidentiary support, The Florida Bar v. Vining, 707 So.2d 670, 672 (Fla. 1998), the referee's recommended discipline is afforded a broader scope of review. This Court has stated, however, that a recommended discipline will not be second-guessed "so long as that discipline has a reasonable basis in existing case law." Vining at 673 (quoting The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997). The Florida Bar intends to show that the recommended discipline in this case is not supported by existing case law, nor by The Florida Standards for Imposing Lawyer Sanctions.

ISSUE I

SHOULD THIS COURT IMPOSE A ONE YEAR SUSPENSION ON AN ATTORNEY FOR HOSPITAL ROOM SOLICITATION OF A CLIENT, THE SUBSEQUENT USE OF ACCIDENT REPORTS TO SOLICIT 21 OTHER CLIENTS, SPLITTING A FEE WITH HIS RUNNER, AND THEN LYING TO THE REFEREE WHEN THIS COURT HAS IMPOSED DISBARMENT FOR SIMILAR MISCONDUCT IN THE PAST.

A. Solicitation Cases

The Supreme Court of Florida imposed disbarment in a previous case involving hospital room solicitation of a client. In The Florida Bar v. Weinstein, 624 So.2d 261 (Fla. 1993), respondent personally solicited business from a stranger who

was hospitalized after a motorcycle accident, with resulting serious head injuries. Respondent also lied to a nurse and the victim's brother, telling them that he was the victim's lawyer. He also engaged in four improper or false written solicitations of other families and lied under oath about that. Weinstein had a prior discipline in 1987 in which a private reprimand was imposed for failure to notify a client of receipt of funds, failure promptly to pay or deliver the funds to the client, and failure to keep adequate trust account records. Disbarment was imposed in spite of very significant evidence in mitigation including a long-standing history of kidney disease, surgery and financial difficulties.

This Court stated that "Weinstein lied under oath regarding the truth of the claims he made in his written solicitations to Dowe and Fluke. We moreover view Weinstein's in-person solicitation of a brain-injured patient in a hospital room, accompanied by lying to health-care personnel, as one of the more odious infractions that a lawyer can commit; his conduct brings the profession into disrepute and reduces it to a caricature." Weinstein, supra at 262. The Court went on to cite The Florida Bar v. Rightmyer, 616 So.2d 953, 954-955 (Fla. 1993) for the principle that false testimony in the judicial process deserves the harshest penalty. Rightmyer was disbarred.

In this case, Mr. Barrett did not personally appear in the hospital room. Instead, he devised a plan even more odious. Mr. Barrett paid his "runner," Chad Everette

Cooper, to attend a chaplain's course, given at Tallahassee Memorial Hospital, so that Mr. Cooper could gain access to hospital patients in order to improperly solicit their business. Mr. Barrett offered Chad Everette Cooper $100,000.00 if he would bring in a big case. The "runner," Chad Everette Cooper appeared in a hospital room dressed to resemble a pastor, identified himself as a chaplain and offered to pray with the family of the victim. Then Chad Everette Cooper gave the victim's family the business card of Mr. Barrett's partner and suggested that they call. After the victim died, Barrett's firm was retained. (RR, p. 7). Mr. Barrett ordered the conduct of Chad Everette Cooper (RR, p. 7, 8).

Mr. Barrett has not been found guilty of lying, as was Weinstein. However, the Report of Referee finds that Mr. Barrett lied to the referee in the course of his disciplinary hearing and sets that forth as a matter in aggravation (RR, p. 8, 13). In both Weinstein and this case, hospital room solicitation and lying are present.

But, Mr. Barrett's misconduct didn't stop there. Respondent, subsequent to the hospital room solicitation, changed to another scheme. Mr. Barrett then hired Chad Everette Cooper as an independent contractor and improperly solicited an additional 21 clients by the use of accident reports (RR, p. 8, 9, 10). This scheme is similar to the method employed in the case of The Florida Bar v. Stafford, 542 So.2d 1321 (Fla. 1989). In that case, respondent engaged in an arrangement with a police

officer who referred ten to eleven cases, then split the fee with the police officer by paying 15% of respondent's fees (ten to eleven thousand dollars in total). This Court imposed a six month suspension for that misconduct. Mr. Barrett also split a fee with Chad Everette Cooper by paying him $47,500 as a "bonus."

This case combines the worst behavior of Weinstein with the worst behavior of Stafford, and is thus more egregious than Weinstein. This case involves misconduct extending for a three year period and a total of 22 clients, far more than Weinstein.

In other cases, this Court has imposed discipline ranging from eighteen-month suspension to public reprimand. In State ex rel The Florida Bar v. Dawson, 111 So.2d 427,431 (Fla. 1959), this Court noted that in solicitation cases, "[t]he exact nature of the disciplinary action to be taken is a problem which must be resolved on the basis of the factual situation presented by each particular case. In Dawson, respondent solicited professional employment through a runner who was a photographer with a police radio in his car in several instances and made agreements that he would advance funds for medical and automobile repairs as inducements for employment. An eighteen month suspension was imposed.

In The Florida Bar v. Wolfe, 759 So.2d 639 (Fla. 2000), respondent personally solicited four clients over a one week period of time at their homes which had been

damaged by tornados and offering the clients contingency fee contracts which did not comply with the Rules. A one year suspension was imposed. Wolfe had a prior discipline for a trust account violation.

Although the solicitation took place in the homes of the clients, some of the fee contracts were signed in hospitals.

Wolfe does not amount to hospital room solicitation in the same sense as Weinstein or this case. It did not involve a lengthy sojourn into solicitation of 22 clients, nor the use of a runner dressed as a pastor, nor fee splitting, nor lying to the Referee.

In The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967), respondent went to a hospital in response to a legitimate telephonic inquiry and, while there, improperly solicited three clients. A public reprimand was imposed due to respondent's youth and inexperience.

In State ex rel, Florida Bar v. Murrell, 74 So.2d 221 (Fla. 1954), respondent personally or by his runner solicited seven cases during a four year period. A one year suspension was imposed.

In The Florida Bar v. Sawyer, 420 So.2d 302 (Fla. 1982), respondent mailed 30,000 letters which resulted in the improper solicitation of 2,100 clients. This was not

a runner case but a direct mail solicitation case and thus not directly applicated to this case. An eighteen-month suspension was imposed.

In The Florida Bar v. Curry, 211 So.2d 169 (Fla. 1968), respondent was both an attorney and an accountant. As an accountant, he had made numerous income tax returns for clients. He then mailed a letter to 800 of those clients to improperly solicit their legal business. This is another direct mail solicitation case and, as such, is not directly applicable to this case. A six month suspension was imposed.

In The Florida Bar v. Gaer, 380 So.2d 429 (Fla. 1980), respondent used a bail bondsman as a runner and, over a one month period, improperly solicited a total of three clients. Respondent split the fees with the bail bondsman. Respondent had been found guilty of a violation of misdemeanor criminal charges. This Court imposed a public reprimand as discipline.

In The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967), respondent solicited five clients on the same day by using a runner. The runner was a bail bondsman and preacher. A six month suspension was imposed, after considering other cases in which a public or private reprimand was approved.

In The Florida Bar v. Bieley, 120 So.2d 587 (Fla. 1960), respondent used a runner to solicit clients (how many and over what period of time is unclear) and agreed

to use the runner as an investigator in the cases as payment. A six month suspension was imposed.

In The Florida Bar v. Britton, 181 So.2d 161(Fla. 1965), respondent was charged with acts of professional misconduct in connection with one client and improperly soliciting the business of another couple. A three month suspension was imposed.

Other than a combination of Weinstein and Stafford, none of the above Florida cases approach the egregious nature of this case. None of them have the extensive involvement of Mr. Barrett. None involve lying to the Referee. Other than Weinstein, and Wolfe, none are hospital room solicitation cases. And none involve the despicable desecration of hospital chaplains.

Other jurisdictions have imposed disbarment for hospital room solicitation and lying. In Kitsis v State Bar, 23 Cal.3d 857, 592 P.2d 323, 153 Cal. Rptr. 836 (Ca, 1979), respondent used three runners to solicit victims in care repair shops at sites of accidents, and in hospital rooms over a three year period. As many as 150 clients were improperly solicited. He also mislead his runner into believing that her solicitation activities were only unethical and not unlawful. The Court stated that suspension has been the usual discipline for using runners, but they have disbarred attorneys for solicitation when the attorneys also committed other acts involving moral turpitude and

dishonesty. The court imposed disbarment in spite of 19 letters of favorable character references from fellow attorneys, friends and clients.

The Supreme Court of South Carolina also imposed disbarment in the case of In the Matter of Reaves, 272 S.C. 213, 250 S.E. 2d 329 (S.C. 1978), wherein respondent improperly solicited four clients in concert with a medical doctor, and loaned money to clients. He also submitted a false affidavit to his attorney and failed to appear at final hearing.

New York has also disbarred attorneys for solicitation, lying and fee splitting in the case of In re Ariola In re Swartz, 252 A.D. 61, 297 N.Y.S. 100 (1937). Respondents used a medical doctor who was an intern at a hospital to solicit ten accident victims as clients over a period of twenty months. The respondents also split the fees with the doctor, spoiled evidence, and gave false testimony before the district attorney and the referee.

ISSUE II

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

There are four general factors that should be considered prior to imposing discipline, (a) the duty violated, (b) the lawyer's mental state, (c) the potential or actual

injury caused by the lawyer's misconduct, and (d) the existence of aggravating or mitigating factors. Standard 3.0.

Concerning the solicitations, the potentially applicable standards are 7.1 and 7.2, which are set forth below:

> 7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.
>
> 7.2 Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The key distinctions between disbarment and suspension are, 1) whether the conduct was intentionally engaged in with the intent to obtain a benefit and 2) whether the injury or potential injury to the client, the public or the legal system was "serious."

The Referee found that, with regard to the hospital room solicitation, Respondent devised the plan (RR, p. 6) and ordered the conduct (RR, p. 8). With regard to the later solicitation by means of accident reports of 21 clients, the Referee

found that the runner's actions were at the direction of Respondent (RR, p. 9) and that Respondent intended that it be done (RR, p. 10). The Referee further found that a significant motive for Respondent's conduct was his own pecuniary gain (RR, p. 11).

The Referee further found that the injury to the client, Molly Glass, is severe and that the damage done to the legal system is great and incalculable (RR, p. 12).

Clearly the findings of the Referee fall within the standard 7.1 and indicate that disbarment is the appropriate discipline, and not the suspension recommended by standard 7.2.

The standards should then be calibrated by a consideration of aggravating and mitigating factors as set out in standards 9.2 and 9.3.

Mr. Barrett had a dishonest or selfish motive - his own pecuniary gain. The scienter is shown by his offering to pay the runner $100,000 to bring in a big case (RR, p. 7).

Mr. Barrett engaged in a pattern of misconduct which encompassed a period of three years, the improper solicitation of 22 clients, the use of two different methods of accomplishing his end, and the splitting of a fee with his runner. This pattern warrants a finding of extreme aggravation.

Mr. Barrett is guilty of seven different Rule violations involving the solicitation of 22 clients and fee splitting. There are certainly multiple offenses in aggravation.

The client, Molly Glass, was solicited in a hospital room while her son lay dying. This type of solicitation is the ultimate and most egregious form of ambulance chasing. The referee found that the injury to Molly Glass is severe, that the damage done to the legal system is great and incalculable and that this case is among the most egregious conduct imaginable (RR, p. 12).

Respondent was admitted to practice almost 30 years ago and, as such, has substantial experience in the practice of law.

The most serious of the aggravating factors, however, is that Respondent lied to the referee. This Court has stated that:

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

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

For the sole act of testifying falsely to a grievance committee, this Court has disbarred attorneys. In The Florida Bar v. Budnitz, 690 So.2d 1239 (Fla. 1997), Mr. Budnitz was disbarred in Florida based upon his disbarment in New Hampshire for the sole violation of knowingly making a false statement of fact in connection with a disciplinary matter. The New Hampshire rule is virtually identical to the Florida rule 4-8.1. Mr. Budnitz' falsehood was a statement, made in response to a bar inquiry, that he believed his grand jury testimony (regarding the date certain employment termination documents were notarized) was true. This grand jury testimony was shown to be false.

In The Florida Bar v. Ryder, 540 So. 2d 121 (Fla. 1989), respondent had been convicted of three counts of perjury in connection with his sworn testimony before a grand jury. Disbarment was imposed.

Other acts of lying have resulted in suspension or public reprimand. See, e.g. The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983), The Florida Bar v. Corbin, 701 So.2d 334, 336 (Fla. 1997), and the cases cited therein at FN1.

In terms of mitigation, Mr. Barrett has no prior discipline. He demonstrated a cooperative attitude toward the proceedings and made full disclosure of his records. Respondent called 9 witnesses who testified as to his good character and introduced 13 letters from others to the same effect. Mr. Barrett demonstrated remorse in his

testimony at the discipline phase hearing, but only as to the effect this has had upon his family, friends and clients.

While Respondent has established some mitigating factors, these factors must not only be weighed against the aggravating factors, but the misconduct itself. The Florida Bar v. Shuminer, 567 So.2d 430, 432 (Fla. 1990). As with many areas of the law, the court must weigh all the factors on the scales of justice.

Here, the misconduct is extremely serious and the Referee found that the damage done to the legal system is great (RR, p. 12). Hospital room solicitation is an extreme form of ambulance chasing which reduces our profession to a caricature. Respondent preyed upon his client who was emotionally distraught at a time when she was tending to her dying son and did so by the reprehensible use of a hospital chaplain.

This Court has imposed the following guidelines in imposing discipline:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla. 1998).

The only judgment severe enough to deter others in this case is disbarment. In recent years, this Court has moved towards stronger sanctions for attorney misconduct. The Florida Bar v. Rotstein, 835 So.2d 241, 245 (Fla. 2003). The Florida Bar urges that this Court do the same regarding hospital room solicitation and lying. Both denote moral bankruptcy and unfitness to practice law. Lying can not be tolerated. This egregious conduct, coupled with the aggravating factors in this case, warrant disbarment. Leniency will not protect the public. The Referee found that Mr. Barrett presents a danger to the public (RR, p. 12). His conduct is shocking to the conscience and he should be disbarred.

CONCLUSION

For the many reasons set forth above, The Florida Bar respectfully requests that this Court adopt the findings of fact and recommendations of guilt as found by the Report of Referee, but impose disbarment as the appropriate sanction rather than a one year suspension.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Initial Brief regarding Supreme Court Case No. SC03-375, TFB File No. 1999-00,478(02) has been mailed by certified mail #7001 1140 0001 7559 2081, return receipt requested, to John A. Weiss, Respondent's counsel, at his record Bar address of 2937 Kerry Forest Parkway, Suite B2, Tallahassee, FL 32308-6825, on this _____ day of _____, 2004.

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

Undersigned counsel does hereby certify that the Initial Brief of 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 AntiVirus for Windows.

_____

James A.G. Davey, Jr., Bar Counsel