IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SCO3-375

v.

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

DAVID A. BARRETT,

Respondent.
_____/

COMPLAINANT'S REPLY BRIEF AND ANSWER BRIEF ON CROSS APPEAL

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PRELIMINARY STATEMENT

Appellant/cross appellee, **The Florida Bar**, will be referred to as such, or as the Bar throughout this brief. The appellee/ cross appellant, **David A. Barrett**, will be referred to as Mr. Barrett, or as the respondent.

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

References to the transcript of the hearing before the Referee on August 12, 2003, shall be by the symbol **TR** followed by the appropriate page number.

References to respondent's answer/initial brief on cross appeal shall be by symbol **AIB** followed by the appropriate page number.

References to Bar exhibits introduced at trial shall be by the symbol **TFB Ex,** followed by the appropriate exhibit number.

References to specific pleadings will be made by title.

STATEMENT OF THE CASE AND FACTS

The Florida Bar relies upon its Statement of the Case and Statement of Facts as set out in its Amended Initial Brief.

SUMMARY OF ARGUMENT

In his answer brief and initial brief on cross appeal, respondent raises six points, only one of which (Point VI, AIB 37) is responsive to the Bar's initial brief. That single point argues that respondent should be suspended for twenty days, contrary to disbarment as sought by the Bar, and contrary to the referee's recommended one year suspension. The findings of the referee as to guilt should be adopted by the Court and respondent disbarred. The pre-hearing rulings entered by the referee on motions to dismiss, as well as similar rulings on motions to dismiss brought during the final hearing, all of which are attacked in respondent's brief, should be affirmed by the Court. The Bar has met its burden of proving the guilt of respondent on all rules found by the referee, by clear and convincing evidence, as found by the referee. Respondent should be disbarred.

REPLY BRIEF

ARGUMENT

Respondent should be disbarred for having engaged in a pattern of solicitation of personal injury cases through the use of a "runner" over a period of years, for encouraging said runner to engage in solicitation in a hospital under the guise of a hospital chaplain and for lying to the referee in the course of these proceedings.

ISSUE I

SHOULD THE COURT DEPART FROM THE RECOMMENDED ONE YEAR SUSPENSION SUGGESTED BY THE REFEREE AND IMPOSE ONLY A TWENTY DAY SUSPENSION, OR IS DISBARMENT THE APPROPRIATE SANCTION?

Respondent urges, in Point VI of his Answer/Initial Brief on Cross Appeal (AIB 4), that the appropriate sanction to be applied here is not the one year suspension recommended by the referee, nor the disbarment urged by the Bar, but a twenty day suspension instead. He employs, as his rationale for this drastic departure, the fact that two other respondents who had engaged in solicitation of personal injury cases were suspended for only twenty days and it would be inequitable for him to suffer a one year suspension, much less disbarment as the Bar is urging. Those two cases were resolved by conditional guilty pleas and

consent judgments, adopted by the Court in The Florida Bar v. Fred Herbert Flowers, SCO2-694 (Fla. August 29, 2003) (Appendix A) and The Florida Bar v. Charles Edward Vanture, SCO2-695 (Fla. November 21, 2003) (Appendix B). This argument was unsuccessfully advanced below, as well.

A comparison of the degree of egregiousness involved in Flowers and Vanture, as compared with that of respondent readily demonstrates that, as the referee observed in his report,

> "Vanture and Flowers were, by comparison, very minor cases, whereas this case is among the most egregious conduct imaginable. The injury done by this respondent to the client, Molly Glass, is severe. The damage done to the legal system is great and incalculable." (RR 12)

Both Flowers and Vanture acknowledged their misconduct, consisting of the use and compensation of runners for the purpose of solicitation of personal injury cases, in the form of consent judgments. Flowers admitted to having accepted three such cases through a runner named Johnny Nelomes during a two year period, 1996 to 1998 (Appendix A). Vanture likewise admitted to having accepted three such cases from Chad Everett Cooper, the same runner employed by respondent, during a one month period in 1997. Vanture asserted that when he learned that the cases Cooper referred were not friends or relatives, but in fact cold call solicitations, he discontinued the practice, although admittedly retaining the

three referred cases (Appendix B). Flowers agreed to disgorge $7833.33 in improper fees to the clients he acquired by this method (Appendix A) and Vanture likewise agreed to disgorge $5833.33 to his solicited clients (Appendix B). Like respondent, neither Flowers nor Vanture had any history of previous discipline.

Respondent, on the other hand, has been shown by clear and convincing evidence to have engaged in a protracted, orchestrated scheme of solicitation over a period of four years and twenty-two solicited cases. The evidence below demonstrates a level of sophistication far beyond the relatively feeble efforts of Flowers and the somewhat naive venture by Vanture. Neither Flowers nor Vanture conceived of the scheme conceived by respondent to gain entree to the mother lode of personal injury cases by encouraging and compensating his runner to become qualified as a hospital chaplain (TR 107-108); nor did either conceive of the surreptitious arrangement of having the runner refer the accident victims to his captive chiropractor, who in return, through a back alley liaison, referred those patients to respondent, in order to avoid the appearance of ambulance chasing (TR 219-220). Further, neither Flowers nor Vanture compensated their runners by year end bonuses totaling as much as $47,500 (TR 102), in addition to a base salary and/or a "finder's fee". Neither Flowers nor Vanture brought the measure of nationally public ridicule and disgust down upon the heads of thousands of ethical

conscientious Florida lawyers that respondent triggered as a result of the Molly Glass appearance on national television's "Prime Time Live" show (TFB Ex 13,Transcript of September 26, 2003 disciplinary hearing, 22-35). Finally, neither Flowers nor Vanture were found to have lied during the disciplinary process, as was respondent in the report of referee (RR 8, 10, 11). Judge Douglas was right in his comparison of the level of egregiousness involved.

As discussed in the Bar's initial brief, the holdings in The Florida Bar v. Weinstein, 624 So 2d 261 (Fla. 1993), The Florida Bar v. Rightmyer, 616 So 2d 953 (Fla. 1993), Kitsis v. State Bar, 23 Cal 3rd 857, 595 P2d 323, 153 Cal Rptr 836 (CA 1979) and In the Matter of Reaves, 272 S.C. 213, 250 SE 2d 329 (S.C. 1978) all support the Bar's contention that disbarment is the appropriate penalty for misconduct of the nature and severity we are dealing with here.

Further, as set out in the Bar's initial brief, The Florida Standards for Imposing Lawyer Sanctions are persuasive that disbarment is appropriate where, as here, 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 cause serious or potentially serious injury to a client, the public or the legal system. (Fla. Stds. Imposing Law. Sancs. 7.1).

ANSWER BRIEF ON CROSS APPEAL

ARGUMENT

The Court should adopt the referee's findings of fact regarding respondent's having violated the Rules Regulating The Florida Bar, as well as the referee's rulings on pre-trial motions to dismiss.

ISSUE I

SHOULD THE REFEREE'S REPORT BE STRICKEN AND A TRIAL DE NOVO CONDUCTED ON THE BASIS THAT THE REFEREE ACCEPTED THE BAR'S PROPOSED REPORT WITHOUT AN INDEPENDENT STATEMENT AS TO HIS FINDINGS OF FACT?

Respondent urges the Court to reject the report of referee in its entirety and conduct a de novo review of the record below, or alternatively, appoint a different referee and grant respondent a new trial. In effect, respondent is asking the Court to find that the referee should be recused, without any showing of any grounds for recusal.

Respondent's assertion that the referee made no findings of fact on the record is not accurate, as the transcript of a September 25, 2003 hearing appended hereto as Appendix C will demonstrate. The trial was tri-furcated, with evidence touching upon the respondent's guilt taken during a three day period, August 12th, 13th and 14th, 2003, closing argument as to guilt heard on September 19, 2003 and

evidence taken and argument heard as to the appropriate sanction on September 26, 2003. At the close of the proceedings on August 14, 2003 the referee asked that each side submit proposed findings of fact and be prepared to provide closing argument as to guilt on September 19, 2003. The proposed findings were submitted by mail on August 28, 2003 and September 2, 2003. The referee thus had both proposed reports and findings before him at the time of the closing argument hearing on September 19, 2003.

Following closing argument as to guilt, a telephone hearing was held on September 25, 2003. During that proceeding counsel for respondent advised the referee that, in his opinion, it would not be necessary for the referee to make any written findings of fact (Appendix C, 3). The referee then went on to state that he had made findings of guilt as to the Molly Glass issues, that he had found guilt as to the 21 clients referenced in Bar Counsel's proposed report of referee, that he found that respondent knew and participated in a solicitation scheme, that he found that respondent had ratified the misconduct of his then partner, Eric Hoffman, and that he had otherwise found respondent guilty of all the allegations raised by the Bar in its pleadings (Appendix C, 4, 5).

Further, in addition to rejecting the Bar's suggestion that disbarment was the appropriate sanction, the referee subsequently heard and partially granted respondent's objection to certain costs that the Bar sought to recover.

Respondent relies upon dicta appearing in a footnote in Waldman v Waldman, 520 So. 2d 87, 89 (Fla. 3rd DCA 1988) to support the argument that the report of referee should be rejected in its entirety. Interestingly, the Waldman court did not decide the case on that issue, and its comments in dicta demonstrate that this case is distinguishable from Waldman by virtue of the fact that the trial court in Waldman appears to have had only the ex-spouse's proposed final judgment for consideration, whereas the referee here had proposed reports from respondent as well as the Bar. The Walden opinion quotes with approval from Colony Square Co. v. Prudential Ins. Co. of America, 819 F. 2d 272 (11th Cir. 1987), "When an interested party is permitted to draft a judicial order *without response by or notice to the opposing side*, the temptation to overreach and exaggerate is overwhelming." (Emphasis added). Not only was this respondent provided with notice and an opportunity to respond, respondent submitted his own proposed report which the referee rejected.

Respondent further relies upon dicta found in Keystone Plastics, Inc. v. C & P Plastics, Inc., 506 F. 2d 960 (5th Cir. 1975), also cited in the Waldman dicta,

which, while it criticized the trial court's having unconditionally adopted one party's proposed findings, nonetheless affirmed the lower court.

While the court in Rykiel v. Rykiel, 795 So 2d 90 (Fla. 5th DCA 2001) did criticize the trial court's verbatim adoption of one party's proposed judgment, the case was remanded for a new trial due to error apart from that fact, as was the case in Corporate Management Advisers, Inc. v. Boghos, 756 So 2d 246 (Fla. 5th DCA, 2000), the other case relied upon by respondent. It is thus apparent that in none of the authority relied upon by respondent for the proposition that this case should be reviewed de novo or retried, did the courts cited provide the remedy respondent seeks.

As this Court has frequently observed in Bar discipline cases,

> "The referee, as a finder of fact, is in a unique position to assess the credibility of witnesses and appraise the circumstances surrounding alleged violations. Oftentimes the referee has an opportunity to evaluate first-hand the forthrightness and character of the respondent. As long as the referee's findings are supported by competent substantial evidence in the record, 'this court is precluded from reweighing the evidence and substituting its judgment for that of the referee." (Citation omitted) The Florida Bar v. Lecznar, 690 So 2d 1284 (Fla. 1997).

Respondent's urging that the report of referee should be rejected has no basis in law and should be disregarded.

ISSUE II

SHOULD THE COURT REVERSE THE REFEREE'S RULINGS ON RESPONDENT'S MOTIONS TO DISMISS SIMPLY BECAUSE THE PLEADINGS REFLECT A FLORIDA BAR CASE NUMBER THAT APPLIED TO ONLY ONE OF SEVERAL MATTERS?

Respondent would have the Court abandon fifty years of notice pleading and revert to the "form over substance" concept of common law pleading. The argument is that since Bar counsel withdrew the Frances Brown allegations of the Formal Complaint during trial, and since the Formal Complaint and all other pleadings referenced only the case number assigned to the Brown complaint, this matter should have been dismissed in its entirety.

A copy of the Formal Complaint is appended hereto, for ease of reference, as Appendix D. It is readily apparent that when respondent and counsel were served with the Formal Complaint, they were placed on notice that not only was the Bar pursuing disciplinary action with regard to the Brown complaint (Appendix D, **&&** 12-14), the Bar was also seeking disciplinary action with respect to the Molly Glass complaint, (Appendix D, **&&** 4-11), a matter involving respondent's client Terry Charleston (Appendix D, **&&** 15-18), the payments to a runner of finder's fees for solicitation of multiple clients (Appendix D, **&** 20) and respondent's ratification of his runner's and his partner's misconduct (Appendix D, **&&** 25-26) as well as his pecuniary gain therefrom.

Further, respondent and counsel were placed on notice that the Bar's concerns were not limited to the complaint of Frances Brown by virtue of the Notice of Hearing Before a Grievance Committee served on respondent's counsel on November 19, 2002, a copy of which is appended hereto as Appendix E. The Notice clearly states that the subject of the hearing would be "Complaint of Frances Brown; Solicitation of Molly Glass and other clients." (Appendix E, 1). Additionally, attached to the Notice was a list of materials to be considered by the grievance committee, enumerating 29 items including not only Frances Brown materials, but Molly Glass materials and others (Appendix E, 3).

It is of interest to note that respondent offers no legal precedent or authority for the suggestion that the withdrawal of the allegations of Frances Brown during trial should act as a dismissal of all allegations of the Formal Complaint. Withdrawal of a portion of the allegations at trial does not amount to a dismissal of the entire complaint! The only legal authority offered relates to violations of Bar rules in connection with the Molly Glass matter, which is treated separately as Point III in respondent's brief (AIB 13).

The Court should affirm the referee's denial of respondent's motion to dismiss.

ISSUE III

SHOULD THE COURT REVERSE THE REFEREE'S RULING ON RESPONDENT'S MOTION TO STRIKE THE MOLLY GLASS ISSUE PURSUANT TO RULE 3-7.16, WHERE THE FACTS ESTABLISH THAT THE ISSUE FALLS WITHIN AN EXCEPTION TO RULE 3-7.16?

Respondent argues that the referee erred in denying respondent's motion to strike the Molly Glass allegations on the basis that Bar counsel's predecessor had closed the Glass Inquiry/Complaint in December 2000 because the allegations did not fall within the 6 year period of limitations provided by Rule 3-7.16, Rules Regulating The Florida Bar. Respondent then erroneously concludes that Bar Counsel made a statement on the record during trial to the effect that the rules were irrelevant, and based on that mistaken conclusion, launches an attack alleging Bar misconduct that should be punished by dismissal of this matter, citing The Florida Bar v. Rubin, 362 So 2d 12 (Fla. 1978). Respondent's argument is flawed for two reasons.

First, a careful reading of the quotation attributed to Bar Counsel found in respondent's brief (AIB 12) demonstrates that Bar Counsel was referring to his predecessor's decision to close the Glass file as irrelevant, not that the rule itself is irrelevant. Respondent has misconstrued that statement in order to bootstrap into a fallacious argument that the Bar has violated the rule and feels it can do so with

impunity, and should therefore be punished. Nothing can be further from the truth, as will be seen from the discussion of the second reason why respondent's reasoning is flawed.

Respondent ignores the fact that Rule 3-7.16 contains two exceptions to the strict application of the 6 year period of limitations, both of which apply to the facts surrounding the timing of the Molly Glass complaint to the Bar. They are:

> **"RULE 3-7.16 LIMITATION ON TIME TO BRING COMPLAINT**
>
> **(a) Time for Inquiries and Complaints**. Inquiries raised or complaints presented by or to The Florida Bar under these rules shall be commenced within *6 years from the time the matter giving rise to the inquiry or complaint is discovered* or, with due diligence, should have been discovered.
>
> **. . .**
>
> **(c) Tolling Based on Fraud, Concealment or Misrepresentation**. In matters covered by this rule *where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter giving rise to the inquiry or complaint,* the limitation of time in which to bring an inquiry or complaint within this rule shall be tolled." (Emphasis added.)

Molly Glass testified at trial that she first learned of the duplicity of Chad Cooper, not at the time he solicited the wrongful death claim of her child under the guise of a hospital chaplain in 1994, but only when she read of the widespread runner/solicitation investigation involving Cooper, among others, in the Tallahassee Democrat on May 27, 1999 (TR p 34, 36). Clearly those facts bring

her discovery of respondent's misconduct within the discovery provisions of subparagraph (a) of Rule 3-7.16, i.e., 6 years from the time the matter giving rise to the inquiry or complaint is discovered. She brought her complaint to the attention of the Bar by submitting an Inquiry/Complaint form dated December 4, 2000 (Appendix F, 1), well within 6 years of her May, 1999 discovery. The Inquiry/Complaint form initially submitted by Molly Glass did not establish on its face that she had not discovered the misconduct until May 27, 1999 (Appendix F, 1), hence the mistaken belief by Bar counsel's predecessor that the 6 year period of limitations had expired. The documents appended hereto as Appendix F were submitted to the referee as attachments to the Bar's Response to Respondent's Motion to Strike, and were considered by the referee in his decision to deny respondent's motion.

Additionally, the evidence shows that Molly Glass and her family were contacted by the runner, Chad Everett Cooper, in the hospital pediatric intensive care unit waiting room while they were maintaining a deathbed vigil for her infant son. Cooper was wearing a clerical collar (TR 39-40) and represented himself to be a hospital chaplain. He offered to pray with the family, then provided them with the business card of respondent's partner, Eric Hoffman (TR 28-30). The record reflects that Cooper had been encouraged to attend a chaplain's training program,

and had been reimbursed for the cost of said training by respondent (TR 107-108). Under these circumstances it is clear that the provisions of sub-paragraph (c) of the rule applies, since it has been shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter giving rise to the inquiry or complaint, and the limitation of time in which to bring the inquiry or complaint within the rule was tolled. Rather than flaunt the rule, as is maintained by respondent, the Bar has instead enforced the exceptions to the rule, and there is no basis for the use of any penal approach to the Bar's handling of the Molly Glass matter.

Respondent takes comfort from the fact that Bar counsel's predecessor had closed the Molly Glass Inquiry/Complaint file on December 21, 2000, and advances the proposition that, once closed, the complaint cannot be re-opened. (Transcript of August 4, 2003 hearing, 137-138, 141-143) and even goes so far as to infer that the Molly Glass complaint was dismissed "with prejudice" (Transcript of August 4, 2003 hearing, 142). Not only is there is no reference in the Rules Regulating The Florida Bar for a dismissal "with prejudice" at the Inquiry/Complaint stage, the rules specifically provide that "Dismissal by Bar counsel shall not preclude further action or review under the Rules Regulating The Florida Bar." 3-7.3(d) R. Reg. The Fla. Bar. Further, the Bar routinely re-opens and re-considers closed Bar complaints upon the submission of additional evidence not previously considered in the decision to close the file, such as Molly Glass's later revelation that she did not discover the duplicity of Chad Cooper until she read the newspaper account on May 27, 1999.

The referee properly denied respondent's motion to strike the Molly Glass issues and his ruling should be affirmed.

ISSUE IV

SHOULD RESPONDENT'S MISCONDUCT GO UN-SANCTIONED BECAUSE OF DELAY IN PROSECUTION OF THIS MATTER BY

THE BAR WHEN THE REFEREE HAS FOUND THAT THE DELAY WAS REASONABLE?

The Bar complaint against respondent originated with the Inquiry/Complaint submitted by Frances Brown on November 10, 1998, in which the complicity of a runner was alleged, among other complaints. Respondent argues that this matter should be dismissed; with the effect that respondent would escape discipline for proven misconduct, because probable cause was not found until December, 2002. The cases cited in respondent's brief, however, do not support such a result based on the length of the delay time involved here, nor based upon the facts which established to the referee's satisfaction that the delay involved here was reasonable and necessary.

The Delay Was Reasonable and Necessary

The record below establishes that a timely investigation of the Frances Brown complaint was initiated, and that as the investigative facts involving the runner Brown complained of were developed, it became increasingly evident that the solicitation scheme involved went considerably deeper and considerably wider than was first suspected based on the Brown complaint. The investigation took on massive proportions, ultimately involving disciplinary files being opened against nineteen Tallahassee lawyers and allegations of solicitations by four or more

runners of the same ilk as Chad Everett Cooper. The investigation broadened into a cooperative venture between The Florida Bar and the Department of Insurance (DOI) insurance fraud division. Search warrants were issued under the auspices of DOI, and arrests resulted in criminal charges being brought against several runners [although no convictions resulted due to the finding by this Court that the application of '817.234(8), Fla. Stat., (1997) to solicitation of patients by chiropractors was unconstitutional. See State v. Bradford 787 So. 2d 811 (Fla. 2001)].

Following receipt of the Frances Brown complaint in November, 1998, Bar Staff Investigator, John F. Barr, III was assigned to initiate an investigation relating to Chad Everett Cooper, in January, 1999. As part of his investigation, he learned, in February, 1999, that the Department of Insurance, Criminal Fraud Division, was investigating possible criminal charges against doctors, chiropractors, lawyers and the "runners" for solicitation in violation of ' 817.234(8), Fla. Stat., (1997). Clay Mason was the lead investigator for the Department of Insurance. In March, 1999, The Florida Bar agreed to cooperate with the Department of Insurance to conduct a joint investigation and assigned Bar Investigator, John F. Barr, III to work with Clay Mason. The joint investigation was extremely complex and involved all facets of solicitation in Gadsden, Leon, Madison, Wakulla and Jefferson Counties.

Although this Respondent was one of the suspects, the scope of the investigation was immense and very time-consuming. Respondent remained a primary suspect throughout. The Florida Bar opened eighteen (18) additional related files concerning lawyers as a result of evidence obtained.

Throughout the later stages of the joint investigation, the constitutionality of '817.234(8), Fla. Stat., (1997) became a concern, as a trial court had found in 1999 that it was unconstitutional [Barr v. State, 731 So.2d 126, (Fla. 4th DCA,1999]. The "runner" in this case, Chad Everett Cooper, initially gave a sworn statement, but later hired a lawyer and refused to talk further because of the criminal charge against him. More than one runner had already been charged. The Florida Bar could no longer receive information from runners who had been charged. They had been the primary source of information. The Florida Bar faced a similar situation with regard to the Fifth Amendment rights of the Respondents in these nineteen (19) cases. Nevertheless, the investigation continued by The Florida Bar

A trial court ruling finding ' 817.234(8), Fla. Stat., (1997) to be constitutional was entered in yet another circuit [Bradford v. State, 740 So 2d 569(Fla. 4th DCA, 1999)]. Both rulings were appealed to the District Courts of Appeal who then entered conflicting rulings. On October 29, 1999, the State Attorney for the Second Judicial Circuit placed the filing of criminal charges

against Mr. Barrett and other lawyers on hold until the Florida Supreme Court could rule on the conflict and, although the Department of Insurance closed down the investigative efforts, The Florida Bar continued to investigate.

On May 31, 2001, this Court issued its opinion in State v. Bradford 787 So. 2d 811 (Fla. 2001), which declared ' 817.234(8), Fla. Stat., (1997) to be unconstitutional, in pertinent part. The Department of Insurance dismissed all criminal charges and closed its case. At that point, disciplinary action could appropriately proceed. The Florida Bar could then subpoena the runners and require the respondents to answer the solicitation charges. Chad Everett Cooper gave his second statement only after the State Attorney dismissed the charges against him.

The Florida Bar then proceeded with its own independent investigation into solicitation by the lawyers in the related nineteen (19) cases. At that point the investigation was limited to possible violations of the Rules Regulating The Florida Bar, any considerations of criminality having been resolved by the Bradford decision. The continuing investigation, since Fifth Amendment considerations no longer applied, included interviews of six runners, many clients, and obtaining the statements and evidence provided by the Respondents in the other eighteen (18) cases. The Florida Bar certainly did not "sit on" these cases. (RR, 14).

Respondent's case was not a separate investigation, but a part of a related web of runner misconduct. Respondent, by virtue of the Bar's assessment that he was by far the most heavily involved, remained the prime suspect the entire time. The activity in this investigation was continuous and matters concerning this Respondent were under investigation until the week before the Grievance Committee met on December 5, 2002. During the course of this investigation, additional information was uncovered about this Respondent that was not known in 1999, sixteen of the nineteen cases were closed and three were referred to the grievance committee.

Respondent asserts that no information was brought before the grievance committee in December 2002 that was not known to the Bar by June 1999, if not sooner. This assertion is not correct. The Committee considered information provided by Sandy Scott, a former secretary of Mr. Barrett's office, which she gave in her sworn statement of February 26, 2001, and the results of the Investigating Member's interview with William J. Hall, a former attorney with Mr. Barrett's firm. Both of those statements provided many new details of Respondent's involvement to the Committee that were not known in 1999. It is apparent from the foregoing description of the investigation that the delay involved was not only reasonable, it was necessitated by the breadth and scope of the investigation as well as by the then

existing uncertainty regarding criminality of the solicitation scheme in which respondent had been a participant.

It is important to note that the referee, sitting as the finder of fact, with the opportunity to observe and weigh the credibility, demeanor and candor of the witnesses who testified, heard the testimony of the Bar Staff Investigator, John F. Barr, III (TR 328-360, Transcript of August 4, 2003 hearing, 40-109), that of the DOI investigator, Edwin Clay Mason (Transcript of August 4, 2003 hearing, 24-39), as well as that of respondent's investigator, Eric T. Fisher (Transcript of August 4, 2003 hearing, 12-16), and in light of his ruling denying respondent's motion to dismiss for prosecutorial delay, made a determination that, under the unique circumstances of this case, any delay involved was reasonable and necessary.

The Legal Precedent Cited Does not Support Dismissal for a Four Year Delay

The cases respondent relies upon do not provide authority for the Court to dismiss this matter based upon a four year delay, even if the delay were not to be found to have been reasonable and necessary. Respondent's most recent case, The Florida Bar v. Walter, 784 So. 2d 1085 (Fla. 2001), resulted in this Court finding that even so much as a seven year delay was still "a close call" (*Id* at 1087) in

applying that remedy, and making a specific finding that under the "unique circumstances" (*Id*_at 1087) of the Walter case the delay was unreasonable, thus inferring that each case involving allegations of prosecutorial delay should be decided on its own unique circumstances. The unique circumstances of this case, as discussed above, do not warrant dismissal for prosecutorial delay, and the referee has made that specific finding in denying respondent's motion to dismiss on that basis.

This court rejected the remedy respondent seeks in The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986), another case cited in respondent's brief, apparently in reliance upon the dicta contained therein. The facts of the Lipman case, however, demonstrate that such reliance is misplaced. Mr. Lipman was suspended in October 1981 based upon a felony conviction, which was subsequently overturned on appeal in March, 1983. The Court terminated the felony suspension in December 1984, without prejudice to the Bar to proceed with disciplinary activity, and the Bar filed a Formal complaint in June, 1985. The Court found that the Bar proceeded within a reasonable time (*Id* at 1167), rejected Mr. Lipman's plea for dismissal and disbarred him.

Likewise, in The Florida Bar v. McCain, 361 So 2d 700 (Fla. 1978), cited in respondent's brief, the Court rejected the argument that the Bar was time-barred

from proceeding against a former judicial officer, holding that The Florida Bar shall have a reasonable time after it obtains jurisdiction to proceed against a lawyer who was a judge at the time of the alleged acts of misconduct, and specifically finding that the Bar had immediately begun proceedings upon Justice McCain's resignation from the bench (*Id* , at 705).

Respondent relies upon Murrell v. The Florida Bar, 122 So.2d 169 (Fla. 1960), but fails to recognize that the factual circumstances of Murrell bear absolutely no resemblance to those at bar. The disciplinary proceedings extant in the 1950's are vastly different than as now. The complaint in Murrell was brought by two previous clients of Mr. Murrell, in the latter part of 1954 or early 1955 (*Id* at 169), evidence was taken by the grievance committee on February 5, 1955 and Mr. Murrell was found not guilty on February 8, 1955(*Id* 170). No appeal was taken nor was there a provision for one to be taken, nor was any report of the committee proceedings filed with the Board of Governors or required to be so filed (*Id* at 171). On January 14, 1956, almost a year later the same complainant brought a new complaint based on the same facts and on February 12, 1959 the new grievance committee found probable cause and a Formal Complaint was filed by The Florida Bar on August 26, 1959 (*Id* at 172). Mr. Murrell filed a Petition praying that the Bar be ordered to cease and desist from taking further action against him, which this

Court granted. To compare the factual circumstances regarding delay in Murrell to the facts giving rise to delay in this case is equivalent to comparing apples and oranges.

The other cases cited by Respondent did not result in dismissal. In State ex rel The Florida Bar v. Oxford, 127 So 2d 107 (Fla. 1961) this Court observed that the disciplinary proceeding had been begun more than four years earlier, and that such proceedings should be handled with dispatch (*Id* at 112), but there is no discussion in the facts that provides any guidance as regards the cause of the four year delay, as the Court has before it here, nor is there any suggestion that the sanction imposed was lessened to any degree as a result of the delay, much less dismissed as respondent asks. The case of The Florida Bar v. Wagner, 197 So. 2d 823 (Fla. 1967) was not decided, and provides no precedential value here. The Court's ruling was dispositive only of the respondent's motion to dismiss proceedings then pending before the Board of Governors of The Florida Bar. In its ruling the Court deferred deciding the issue of prosecutorial delay, despite a finding of procrastination on the part of the Bar, pending the filing of a Formal Complaint, which was never filed.

The case of The Florida Bar v. Randolph, 238 So 2d 635 (Fla. 1970) represents a situation in which there was a determination that the prosecution of the

matter had resulted in "*unexplained* unreasonable delays" (*Id*, at 637)(emphasis added), "slipshod" handling (*Id*, at 637) and "flagrant delays" (*Id*, at 638) over a six or seven year period, in contrast to the comparatively limited delay of this matter (four years) for reasons set forth above that constitute justifiable delay. Nonetheless, despite the degree of egregious mis-handling described in Randolph, this Court did not provide the remedy respondent seeks, i.e., dismissal, but instead reduced the two year suspension sought by the Bar to a ninety day suspension. The facts giving rise to the delay here do not warrant a departure from the indicated sanction of disbarment.

The Florida Bar v. James, 478 So. 2d 27 (Fla. 1985) contains no facts or findings as to the length of any prosecutorial delay, nor does it provide any insight as to the cause of any delay. The Court simply observes that the referee took into consideration, apparently as a mitigating factor, some unspecified degree of delay, but nonetheless imposed the sanction the Bar recommended (*Id*, at 30). The complaint was not dismissed, as respondent urges here. In The Florida Bar v. Micks, 682 So. 2d 1104 (Fla. 1993), the delay was found to be unreasonable. Nevertheless, the Referee recommended that Respondent be suspended for eighteen months and required to pay restitution, as opposed to the dismissal sought here by the respondent.

In this case the referee found that "the delay was reasonable and that The Florida Bar was engaged in constant investigation of this case for the entire four years." He also found that respondent had not demonstrated specific prejudice resulting from the delay. (RR, 14). No reduction in discipline is warranted as a result of the delay.

The prosecutorial delay alleged by respondent should be found to have been reasonable and necessary and should not result in departure from the disbarment that is otherwise warranted, and certainly not in dismissal of this matter which would allow respondent to escape sanctions in spite of proven misconduct.

ISSUE V

WHERE THERE IS COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT, SHOULD THE COURT REJECT THOSE FINDINGS AND SUBSTITUTE ITS OWN?

As has previously been observed, the referee, as a finder of fact, is in a unique position to assess the credibility of witnesses and appraise the circumstances surrounding alleged violations. Oftentimes the referee has an opportunity to evaluate first-hand the forthrightness and character of the respondent. As long as the referee's findings are supported by competent substantial evidence in the record, this court is precluded from reweighing the evidence and substituting its judgment

for that of the referee. (Citation omitted) The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997).

Respondent's brief delineates eight contested issues of fact, identified as paragraphs A (AIB 22) through H (AIB 37) in Point V of the brief, and asserts that there is insufficient evidence to support the referee's findings concerning those issues, e.g., the evidence does not meet the criteria established in Lecznar. These issues will be discussed herein in the same order and by the same designation employed by respondent.

A. Respondent misquotes the report of referee, to the extent that he asserts that the referee's report states that Chad Cooper's sole duty was to bring in clients. (AIB 22). The report of referee, in fact, states that "Cooper's job did not involve paralegal work, but his duty was to bring in clients to the firm." (RR 6). It is acknowledged that Cooper may have also performed some minimal investigative functions for the firm during the period that he was a salaried employee, such as photographing vehicles and accident scenes, but it was clear from Cooper's testimony at trial that respondent hired Cooper because he was well connected, very popular and would attract business to the firm. (TR 96).

During the five years Cooper was so employed he brought "approximately 100"

clients in (TR 99) and that "had a great deal to do with" how he earned his salary (TR 99). In fact, respondent chided Cooper for wasting his time and money. Respondent told Cooper "You need to go out and you need to get some clients," and "you need to go out and do whatever you need to do to bring in some business." (TR 99). Further, the testimony of Sandy Scott, a secretary employed at respondent's firm, establishes that though Cooper was represented as being a paralegal, she never saw a paralegal certificate nor did she ever observe Cooper engage in paralegal activities. (TR 212-213). While the record may contain evidence that contradicts, to a degree, that upon which the referee relied, the decision to afford greater weight to one aspect of the evidence, while affording less to others, falls within the province of the trier of fact, who is in the unique position of having heard and observed the witnesses as they testified, and whose responsibility it is to assess their demeanor, credibility and candor. The findings of the referee should not be disturbed.

B. Respondent claims there is no competent substantial evidence to support the referee's determination that respondent devised a plan to bring in more clients. As has been noted above, Chad Cooper was not employed for his paralegal or investigative skills, and was taken to task by respondent for not performing to

respondent's expectations. Cooper also testified that respondent read of a course being offered to train hospital chaplains and thought it would be a good idea for Cooper to enroll as it would be a good opportunity to meet people and, if Cooper ran across any serious injuries, to get some business (TR 107). Respondent's law firm paid for the course (TR 108), and the record establishes that respondent was a micro-manager when it came to the fiscal affairs of the firm (TR 292, 319). Cooper testified that if he didn't go to the hospital, respondent would tell him he needed to be at that hospital, "I paid for you to go to class. You need to be up there." (TR 109) While the complexion of the solicitation practice changed following Cooper's orchestrated termination as a salaried employee, Cooper continued to be paid $200 per head for personal injury clients he brought to the firm under the guise of a marketing consultant employed by respondent's captive chiropractor, Dr. Antolic.

C. Respondent appears to take comfort in the fact that the Molly Glass solicitation was not at first successful, although not for want of effort on Cooper's behalf. It is true that the Glass family initially rejected Cooper's advances, but does a failed effort absolve respondent from responsibility? Ultimately, the effort did pay off, as Molly Glass did retain respondent's law firm under the impetus of the insurance carrier's inappropriate settlement advances. Further, the record reflects

that when Cooper's initial advance went unrequited, he returned in a second attempt to solicit the Glass case, going so far as to offer to phone the Barrett and Hoffman law office from the intensive care waiting room to make an appointment for Mrs. Glass (TR 30).

D. Respondent's position that the $47,500 bonus paid to Chad Cooper pertaining to the Terry Charleston case arose out of respondent's recognition of an obligation to compensate Cooper for personal services rendered to the client, rather than have the client pay for such services, strains credulity to the breaking point. We are led to believe that the services provided were for personal care, companionship and spiritual guidance, and then are asked to accept that those are obligations expected to be fulfilled by the law firm, hence the rationale that respondent should pay the bonus, not the client. If in fact respondent's firm paid Cooper for the provisions of such services, would that not be violative of Rule 4-1.8(e) R. Regulating The Fla. Bar, which prohibits furnishing financial assistance to the client apart from costs of litigation? In fact, Cooper volunteered a statement during his testimony that was telling, when he said "I was paid that money because I brought in that case. I also gave Terry a lot of care and attention. I was assigned to him." (TR102). He then goes on to testify that he expected to be paid $100,000

for having brought the Charleston case in because respondent and his partner, Hoffman, had told him he could expect to be paid $100,000 if he brought in a big case. (TR 106) The record reflects that Cooper was paid bonuses amounting to $80,000 from 1994 to 1996, of which amount over half, $47,500, was paid in the one year the Terry Charleston case was settled, 1996 (TR 554). The referee, as trier of fact, having heard and observed the various witnesses who testified in this regard, was entitled to draw the conclusion that respondent had lied in his testimony pertaining to the reason Cooper was paid such a disproportionately large bonus for the year the Charleston case settled.

E. Respondent takes issue with the referee's finding that Chad Cooper's employment was terminated out of fear that his solicitation activities were about to be exposed. Sandy Scott, an ex-secretary at respondent's law firm, who had no motivation to dissemble, testified on this point. She testified that she had been the secretary for Eric Hoffman, and that she typed Cooper's termination memo which Hoffman dictated. She stated that Hoffman called her in and told her he was going to dictate Cooper's resignation because he was concerned that Chad's practices were going to become a problem (TR 219). She stated that Hoffman's comments were that "it was getting pretty hot with Chad and that he was afraid that everyone

would get caught." (TR 219). On the Monday following Cooper's artificial resignation from respondent's law firm the previous Friday, respondent's partner, Eric Hoffman, told Cooper that he had been working with Dr. Antolic, a local chiropractor (TR 111), who was willing to employ Cooper for $10,000 per month to "do some marketing" (TR 112), consisting of securing motor vehicle accident reports from local police agencies, contacting accident victims and soliciting them as patients for Dr. Antolic. (TR112). Eric Hoffman then arranged a number of back alley trysts with Dr. Antolic, during which Dr. Antolic would provide Hoffman with copies of accident reports by the boxful, according to the testimony of Sandy Scott, who accompanied Hoffman on several of these back alley visits (TR 219-220). Scott informed respondent about what happened in the back alley (TR 220-221), and saw Hoffman take the box directly into respondent's office upon return from Dr. Antolic's office on one occasion (RR, 9) so respondent's protestations of ignorance are unworthy of belief.

F. Respondent attempts to distance himself from Chad Cooper's continuing solicitation activities during the Antolic period described above, following his "resignation" from respondent's law firm. (AIB 31-33) by asserting that respondent only signed ten of thirty-three identifiable checks in the amount of

$200 each, payable to Chad Cooper, on November 26, 1997 (TR 543). While these checks were ostensibly written to pay for investigative services, respondent acknowledged that he was unable to find any investigative materials or reports provided by Chad Cooper (TR 543). Nevertheless, respondent, who has a reputation as a fiscal micro-manager, authorized payment of Cooper's invoices for investigative services that were never performed. Cooper had previously been employed by respondent for a period of approximately four years, yet respondent disingenuously testified that he did not know at the time that these ten identical payments of $200 each were for anything other than investigative services. (TR544).

G. Page four of The Florida Bar's Exhibit 9, placed in evidence during trial (TR 224) lists the names of twenty-one clients for each of which Chad Cooper was paid the sum of $200 for "investigative services." Sandy Scott testified that Cooper presented invoices for these twenty-one referrals, which respondent found to be insufficient, and for which he demanded additional detail. As a result a list of the twenty-one names was typed, Sandy Scott was instructed to verify insurance coverage for each (TR 222), presented her findings to respondent and he authorized checks to be issued in payment of all twenty-one fees billed by Cooper (TR 223).

While respondent may not have personally solicited those twenty-one clients, there can be no doubt that he was aware that they had been solicited by Cooper, and that in paying Cooper the standard $200 fee for fictitious investigative services, he ratified and accepted the fruits of the solicitation. The referee found that Mr. Cooper's actions were "at the direction of and under the supervision of Respondent." (RR, 9).

H. Respondent claims that there is no proof that Chad Cooper was sent to Miami and Chicago to solicit cases following the tragic ValuJet air crash, apart from a travel expense voucher in the amount of $974.24. The entry appears in the Bar's Exhibit 4, a three ring binder, at page 2 under tab H, a computer generated report of "Paid Invoices by Vendor", under the vendor name "COOPER/CHAD", "EXPPENSE REIMB-CHICAGO & MIAMI", invoice date "052596", invoice amount "974.24", date paid "061096", amount paid "974.24". Cooper testified that he knew a family from Miami that had been involved in the crash and was asked to go there to see if he could contact them and bring their business into the firm (TR 119). He also testified that he knew a FAMU student whose mother was on the plane, and "they flew me to Chicago." He attended the funeral, but was unable to summon the courage to solicit the case (TR130). As has been noted, respondent

was known to closely control the fiscal affairs of the firm, and since he approved payment of the expenses, he ratified the attempted solicitation even if he did not direct it.

CONCLUSION

The Court should affirm the referee's denial of respondent's motion to dismiss for prosecutorial delay, should adopt the referee's findings of fact as set out in the report of referee, should adopt the referee's assessment of costs against respondent and in favor of the Bar, and should disbar the respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing regarding Supreme Court Case No. SC03-375, TFB File No. 1999-00,478(02) has been mailed by certified mail #7001 1140 0001 7559 8182, return receipt requested, to John A. Weiss, Counsel for Respondent, at his record Bar address of 2937 Kerry Forest Parkway, Suite B2, Tallahassee, Florida 32308-6825 on this _____ day of April, 2004.

_____

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Copy provided to:
John Anthony Boggs, Staff Counsel

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

Undersigned counsel does hereby certify that the Reply and Answer on Cross Appeal Brief of The Florida Bar, Complainant, vs. David A. Barrett, Respondent, 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

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SCO3-375

v.

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

DAVID A. BARRETT,

Respondent.
_____/

APPENDIX TO
COMPLAINANT'S REPLY BRIEF AND
ANSWER BRIEF ON CROSS APPEAL

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APPENDIX

Appendix A	Supreme Court Approval and Report of Referee in The Florida Bar v. Fred Herbert Flowers; Case No. SC02-694; TFB File No. 2000-01,154(02)
Appendix B	Supreme Court Approval and Report of Referee in The Florida Bar v. Charles Edward Vanture; Case No. SC02-695; TFB File No. 2000-01,160(02)
Appendix C	Transcript of Hearing before The Honorable C. Vernon Douglas, Circuit Judge, dated Thursday, September 25, 2003
Appendix D	Complaint Filed with the Supreme Court dated February 28, 2004
Appendix E	Notice of Hearing Before A Grievance Committee dated November 14, 2002
Appendix F	Complaint by Molly Glass dated December 4, 2000, and closing letter of Donald M. Spangler dated December 21, 2000