IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Case No.: SC04-49

v.

TFB File No. 2001-00,356(8B)

ROLAND RAYMOND ST. LOUIS, JR.,
Respondent.
_________________________________/

RESPONDENT'S AMENDED REPLY BRIEF

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[1] For ease of reference, Respondent is using the same Roman numerals as correspond to subject headings in his Initial Brief and the Bar's Answer Brief.

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STATEMENT OF THE CASE AND THE FACTS

The Bar begins its Answer Brief (at p. 2) with the claim that it relies upon the statement of facts set forth in its Initial Brief, but proceeds to add new, inaccurate and/or non-record facts throughout. For example, at p. 8, the Bar observes that it "is not clairvoyant and did not know that the secret side agreement existed" at the time of the Inverness meeting in June 1997, when it drafted the Referee's finding that Bar investigator Joan Fowler was under the misapprehension at that time that a $245,000 payment was being made to the law firm as part of a prohibited practice restriction (RR, ¶ 44).

Having been caught in a contradiction surrounding that "finding" – the only instance of an alleged misapprehension of fact by the Bar cited in the Referee's entire 49-page Report,[2] the Bar tried to convert the "misapprehension" into a different one, namely, that Ms. Fowler was under the "misapprehension that she had seen all the documents in the box" (Bar's Answer Brief at pp. 10-11, 23). The Referee found no such misapprehension, and Ms. Fowler herself explicitly admitted that she knew

[2] The contradiction is that on the one hand, the Bar maintains that Ms. Fowler knew of or suspected a paid practice restriction as early as the Inverness meeting (her purported "misapprehension"), and on the other, the Bar contends that it had no knowledge of a compensated practice restriction when it settled the initial Bar disciplinary proceedings with Mr. Rodriguez and Respondent a year later.

she had not seen all of the documents, abandoning the false testimony she had given in the Rodriguez case to that effect. (TR, Vol. III, pp. 385-86; see also, Rodriguez trial transcript, at pp. 399-400).

Bar counsel also falsely states that Respondent had entered into a settlement agreement with Sheehe & Vendittelli that "contains a restriction on the right to practice" (Bar's Answer Brief at p. 12), whereas in fact, Respondent as counsel of record for the Davis Estate and on its behalf as a disclosed principal, signed a standard settlement agreement letter containing release and covenant not to sue language, for specific defined claims of that client, which Judge Wilson erroneously considered tantamount to a general practice restriction.[3]

The Bar urges this Court to discount the Referee's finding that DuPont and its lawyers were the real architects of the deal and the real culprits who unfortunately were not before him, by suggesting that Messrs. Shomper and Lee "are presently being investigated by their state bars"

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[3] As a matter of law, such an agreement is binding on the client/principal, not the attorney/agent. See, e.g., *Boros v. Carter*, 537 So. 2d 1134 (Fla. 3d DCA 1989); *Beasley v. Girten*, 61 So. 2d 179 (Fla. 1952); *Restatement Second of Agency*, 11(1)(A) §320. Ironically, the Bar cites Respondent's truthful statement to Judge Wilson in 2000, that a direct practice restriction made as part of a settlement would be prohibited by Bar rules, as "proof" of Respondent's duplicity. Had Respondent said the opposite, the Bar would undoubtedly argue that Respondent refused to recognize Rule 4-5.6(b) even long after DuPont's midnight ultimatum.

(Bar's Answer Brief at p. 18). Not only is that "fact" not of record, it is especially dubious since the Pennsylvania and District of Columbia Bars maintain absolute confidentiality over disciplinary matters, even as to the complainant.

Perhaps most disturbing is the Bar's statements concerning the *Mandelkorn* case (*Florida Bar v. Mandelkorn*, 874 So. 2d 1193 (Fla. 2004)), urging this Court to consider its consent judgment approved by this Court as a "mistake" that should be disregarded (Bar's Answer Brief at pp. 18-20).

Nowhere in its briefs does the Bar indicate a basis for refuting the Referee's overall conclusion that Respondent is the kind of person who has well served and should continue to be permitted to serve others as an attorney… "…a good lawyer, and a caring and good person." (RR, p. 47).

> I considered disbarment and rejected it easily. [Respondent] is a good man. He is a good lawyer, and but for this he would be a credit to the profession and his family and the community.
>
> This was a terrible – this is a tragedy. This case is a real tragedy, to do such good work and to have it turn into eight years of misery, and God only knows what this had to cost. I'm sure somebody knows besides God. It had to cost a lot.[4]

[4] TR, Vol. XV, p. 2058.

ARGUMENT

VI. THE DOCTRINE OF RES JUDICATA AND RELATED PRINCIPLES APPLY IN DISCIPLINARY CASES SUCH AS THIS

The Bar's treatment of res judicata principles, including collateral estoppel, impermissible collateral attack and the rule against splitting causes of action (Bar's Answer Brief at pp. 22-30) is perplexing and confused. In one of its many contradictions, trying to distinguish the earlier disciplinary cases as not invoking res judicata, the Bar states that in 1997 it was only investigating complaints about an alleged undisclosed aggregate settlement, lack of communication to clients regarding their own "share" of the settlement proceeds, threats to withdraw from representing clients who elected not to settle, and keeping interest on DuPont's prepayment of the settlement funds (Bar's Answer Brief at p. 22).

Yet throughout this case, the Bar has contended that the scope of the Bar's 1997 inquiries was so broad that Mr. Rodriguez and Respondent should have understood that all information pertaining to the 1996 Benlate settlements was required to be disclosed. Which is it? After years of litigation, multiple trials and briefing to this Court in two cases, the Bar still cannot commit to a clear position.

Respondent readily concedes that misrepresentations made by an attorney in a disciplinary proceeding may properly be the subject of a subsequent disciplinary action; however, he maintains that there were no such misrepresentations by either him or Mr. Rodriguez, and that the Bar's defiance of res judicata principles led the Referee into error.[5]

The Bar's entire legal analysis in this regard is flawed, as it acknowledges that it "is not seeking to set the 1997 consent judgment aside, but desires that it remain in full force and effect" (Bar's Answer Brief at p. 27). If there was the kind of extrinsic fraud that would justify re-opening examination of the 1996 Benlate settlements (that is, not invoking the principles of res judicata), then the 1997 consent judgments would necessarily be void. If there was not that kind of extrinsic fraud, the 1997 consent judgments would be dispositive. The Bar misreads and relies upon a misreading of its own authorities, *DeClaire v. Yohanan*, 453 So. 2d 375 (Fla. 1984), and *United States v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878).

[5] Whether for inflammatory effect or to further confuse the issue, the Bar cites as an example a serial rapist who is tried for several distinct crimes, then later identified as a suspect in other rapes, and claims that he should have been tried only once for all of his crimes (Bar's Answer Brief at p. 25). The Bar's example is bewildering. An analogous circumstance is the suspect who is tried for rape, then later sought to be tried for assault and battery upon the same victim associated with the same altercation.

VII. IMPUTED "UNJUST ENRICHMENT" DOES NOT JUSTIFY THE RECOMMENDED FEE FORFEITURE FINE IN THIS CASE

The Bar cites as a "fact" that Respondent does not have a negative net worth, because it hired an appraiser after the close of discovery and after the announced conclusion of the trial in this cause, to perform an "appraisal" without being subjected to cross-examination, and that such appraisal purportedly showed dramatic appreciation in Respondent and his wife's homestead property (owned at all times by the entireties), based upon dubious comparable sales information and without regard to deferred maintenance and other normal adjustments (Bar's Answer Brief at p. 31).

The Bar also states that "the referee found that [Respondent] could pay [the $2 Million fee forfeiture] under a payment schedule" (Bar's Answer Brief at p. 31). The Referee made no such explicit finding of ability, nor was there any evidence adduced at trial to support such an improbable inference. First, there was no evidence of any funds or assets of Respondent that were either attributable to the income he received from his law firm in 1996, whether or not connected with the Benlate settlements. There was also no evidence of any funds or assets with which Respondent could pay any material obligation. Finally, whatever the Referee's opinions are of Respondent's future ability to satisfy his debts and obligations to support his

family, given the admitted "tragedy" of Respondent's circumstances, there was no evidence from which anyone could conclude that Respondent will be able to earn an additional $125,000 to $300,000 per year for the next 10 years with which to make installment payments to the Bar.

Alternatively, the Bar argues that financial ability is irrelevant to a fee forfeiture, citing *Florida Bar v. Lechtner*, 666 So. 2d 892 (Fla. 1996), which held only that the referee abused his discretion in not assessing the Bar's costs of suit against the non-prevailing attorney in a disciplinary action, and had nothing to do with a fee forfeiture.

The Bar convinced the Referee that a "fee forfeiture" of fees earned 9 years ago is warranted as a form of "deterrence" under several fictions. First, that Respondent should not be permitted to "keep ill-gotten gain." But there was no evidence at trial that Respondent has been able to keep any gain – in fact, he has far less now than before the Benlate settlements. Second, the Bar pushed the Referee to accept the untenable premise that by rejecting DuPont's settlement terms (whereby, in the Referee's own words, the clients were "overcompensated"), the clients would have been so relieved that their lawyers told them everything and got them nothing that they would not have sued the firm. There was no evidence in support of that premise either, and there was substantial competent evidence that at least

one client would have "felt betrayed" and would have sued the firm for that. With the attendant loss of many millions of dollars, it is difficult to believe that most of the clients would not have joined in, when they sued the firm after receiving world record recoveries.

The Bar cites to and attaches consent judgments for Diane Deighton Ferraro and Paul D. Friedman, as "proof" that their cases involved "disgorgement." In fact, both entered into settlements of the civil claims pending against them, and with the Bar's agreement, recharacterized their payments to those former clients who were suing them as "restitution" in their consent judgments. But neither involved an involuntary forfeiture paid to the Clients Security Fund, and there was no competent evidence adduced to that effect. In the case of Mr. Friedman, the consent judgment was entered into more than 7 months after he agreed to the settlements.[6]

The Bar wants Respondent to be disbarred or to effectively be an indentured servant, with his readmission contingent upon paying an enormous sum of money (Bar's Answer Brief at p. 35) he is not likely to obtain as a member of the Bar and he will almost certainly not make outside his chosen profession. It is grossly excessive and disproportionate.

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[6] Mr. Friedman settled with the Gainesville Plaintiffs in December 2002; he entered into the consent judgment with the Bar on July 15, 2003.

VIII. THE RULE OF LENITY IS IMPLICIT IN THE PREAMBLE TO THE RULES

Contrary to the Bar's suggestion, Professor Winick testified concerning the common law rule of lenity, not a specific statutory provision (Bar's Answer Brief at p. 36). The issue is whether, on the night of August 7, 1996, it was sufficiently clear that indirect preclusion from taking future cases against an adverse party by agreeing to a prospective engagement agreement with that party constituted a prohibited practice restriction under Rule 4-5.6(b). The caselaw was virtually non-existent. There was academic support to the contrary. One of the Bar's experts (Mr. Chinaris) – who was then the Director of its Ethics Department – later gave the sworn opinion that it was not a violation. Years later, the Bar has prepared an interpretative commentary which was still in draft at the time of trial.

Only subsequently decided cases, frequently cited by the Bar, suggest that "indirect preclusion" is a violation of the rule. The *Preamble to the Florida Rules of Professional Conduct* states that:

> The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation.

In other words, the Preamble supports the premise of the common law rule of lenity, that lack of clarity or ambiguity of a rule should be construed in favor of the accused party who stands to be punished or sanctioned for violating it. Ironically, the Bar argues that this Court should look for guidance to case law interpreting Rule 4-5.6(b) decided after August 7, 1996 in construing how Respondent must have knowingly violated the rule on that date (Bar's Answer Brief at p.38).

IX. DURESS, NECESSITY AND COERCION SHOULD BE CONSIDERED AS ALLOWABLE DEFENSES AND MITIGATING FACTORS

The Respondent has never said "the devil made me do it," nor even suggested that he did not participate in making the decision to acquiesce in DuPont's ultimatum on the night of August 7, 1996. One of the key problems of this case is that the Bar refuses to consider the actual predicament Respondent and his partners were in, and has goaded the Referee into assumptions about the circumstances that are untrue.

Respondent and his partners had a choice, and only one choice: they could acquiesce in DuPont's demand that they secretly enter into a prospective engagement agreement and thereby effectively sell their right to take future Benlate cases, or they could refuse to do so and DuPont would repudiate its overwhelmingly favorable, previously negotiated settlement

offers.[7] There was not another option, such as, accept the engagement with the clients' knowledge and consent, refuse the engagement but keep the settlement offers intact, etc. (See Respondent's expert witness hypothetical, Resp. App. C). The clients were mostly in desperate financial condition, and were unable to endure the risks, delays, expenses and other hardships of protracted litigation. Although Respondent believed that they had meritorious claims and at least some provable damages, there was no reason to believe that any of them could possibly benefit from rejecting the offers.

From another perspective, if Respondent had refused to enter into the engagement agreement, or violated its terms by disclosing it to the clients, by all accounts the settlement would have imploded. Upon learning that Respondent rejected readily available settlements far higher than the existing 20 clients could reasonably hope to obtain in any other conceivable circumstance, and that most of them would face irremediable financial ruin, while Respondent and his firm would be free to take future larger and more lucrative Benlate cases, would the clients have cause to feel that their lawyers were "loyal" to them and were serving the clients' best interests, or would they feel (in the words of Brenda Webb) "betrayed."

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[7] There is no question that DuPont insisted on the engagement agreement that night; see the deposition testimony of lead DuPont negotiator Patrick W. Lee, Esq., TR, Vol. X, pp. 1337-1339.

Although numerous witnesses testified that Respondent is extremely kind, compassionate and devoted to others, it does not take an abundance of those traits, coupled with uncertainty about the rule, to recognize the coercive nature of the circumstances. The Bar's argument to the effect that because Respondent had some leverage he had used for his clients' benefit in the settlement negotiations, he was negotiating from a "position of strength" and could dictate all of the terms (Bar's Answer Brief at p. 39) is absurd, contrary to the evidence and does not rebut the necessity defense.

X. RULE 4-5.6(b) IS A QUESTIONABLE RULE OF UNCERTAIN MEANING IN 1996

As noted above and in Respondent's Initial Brief, there was not a clear meaning or consensus on August 7, 1996, to the effect that Rule 4-5.6(b) would be violated by an "indirect preclusion" through a prospective engagement or consulting agreement. But the underpinnings of the model rule raise more questions about its scope and meaning.

It is the three "policy" justifications for the rule cited by the Bar (Bar's Answer Brief at p. 42) that have inspired most of the academic debate. Respondent cannot summarize that criticism any better than Professor Winick did. (TR, Vol. IX, pp. 1061-65.) The liberty or property right that is taken by the rule (which the Bar suggests is imponderable – see

Bar's Answer Brief at p. 45) is the lawyer's right to determine the makeup of his or her own future practice, either by accepting certain kinds of cases or by declining them.

Respondent did not, however, make his decision on the night of August 7, 1996, on the basis of scathing academic criticisms of the rule; he made it largely because of his uncertainty about the "indirect preclusion" exception to the rule that DuPont's lawyers insisted upon, and his certainty that the only other choice would have disastrous repercussions for his clients.

CONCLUSION

Principles of res judicata, collateral estoppel and impermissible collateral attack, and the rule against splitting causes of action can and should apply to Bar disciplinary proceedings in the absence of proof of extrinsic fraud, of which there was none in this case.

Respondent has not been "unjustly enriched," has no practical ability to pay, and there is no other basis for upholding the fee forfeiture.

The common law rule of lenity should apply in this case with respect to Rule 4-5.6(b) in August 1996.

The doctrines of duress, necessity and coercion were properly invoked here, where Respondent was faced with uncertainty and chose in effect the lesser of two potential evils for the sake of his clients.

For all of the foregoing reasons, the Referee's recommended fee forfeiture should be rejected but the balance of the sanctions he recommended should be approved in this matter. The record amply demonstrates that Respondent is a good, caring and ethical attorney who had to act under extreme circumstances, made the best choice he could, tried to comply with his duties and obligations, and should be permitted to continue to serve others as an attorney in this community.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true, correct and complete copy of the foregoing was served by Fedex overnight courier on this 12th day of December, 2005, upon: James A.G. Davey, Jr., Esq., John Anthony Boggs, Esq., and John F. Harkness, Jr., Esq., The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300.

By: ____________________________
Roland R. St. Louis, Jr., Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the above and foregoing Initial Brief has been submitted in 14 point proportionately spaced Times New Roman font, and that the Respondent's Reply Brief has been filed in digital format by e-mail in accordance with the Court's Orders. The undersigned further hereby certifies that the electronically filed version of the Respondent's Reply Brief has been scanned and found to be virus-free, using Symantec/Norton Internet Security Anti-Spyware Edition 2005 software.

By: ____________________________
Roland R. St. Louis, Jr., Esq.