IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. SC 09-2360

THE FLORIDA BAR,
Complainant/Appellant,

Vs.

JANE MARIE LETWIN,
Respondent/Appellee.
_____/

ANSWER BRIEF OF JANE MARIE LETWIN INCLUDING CROSS APPEAL

JANE M. LETWIN, Esq.
Pro Se
Florida Bar Number 990329
1550 South Dixie Highway
Suite 209
Coral Gables Fl 33146
Tel: 954 297 4057

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STANDARD OF REVIEW

As to the facts in a Bar disciplinary case, the referee's findings are presumed to be correct unless the appellant demonstrates clear error or a lack of evidentiary support. Absent such evidence, the Court will not reweigh the evidence Or substitute its judgment for that of the referee. ***The Florida Bar v. Rose,*** 823 So.2d 727, 729 (Fla. 2002). The Court has more latitude with regard to the recommended discipline, however, and may disregard a referee's determination if the sanction recommended has no reasonable basis in the case law or in the Florida Standards for Imposing Lawyer Sanctions.

SUMMARY OF THE ARGUMENT

The undersigned Respondent, Jane Letwin, is a Seventy two year old lawyer who achieved membership in the Florida Bar in October of 1993, at the age of 55. This complaint arose from Respondent's litigation tactics during the litigation of a "class action." For purposes of simplification, Respondent has stipulated to the Bar and to the Referee as a relevant fact that the class was "not certified." However, whether a class is pending certification or has been certified is not within the control of Class counsel. Even from the filing of the complaint, the action must be identified as a "class representation", both in Florida procedure and in Federal law. The undersigned complied with court rules and chose to identify the suit as a class action to the putative class members.

The Referee did not find Respondent guilty of ethics violations grounded in false statements of material fact to a third person and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. (Bar brief at page #3.)

In February of 2007, Respondent initiated one of several newsletters for the information of the putative class of teachers in the Board of Education, for the purpose of conveying to them the fact that their job-related pension and social security coverage denied to them by their employer, the Broward

Board of Education might yet be achieved through the lawsuit filed by one of their colleagues in August 2006. That suit was ***Friedlander v. Weintraub, Benefits Manager of Broward County School District, S. D. Fla.,*** Civil #2006-61177. That case was filed August 7, 2006 and closed on February 20, 2008. The later suit which was the subject of the current complaint was ***Tamalavich v. School Board of Broward County, Florida,*** S.D. Fla., Civil #08-61581, removed from Broward Circuit Court to federal court on October 2, 2008, and closed on June 23, 2009. In the interim, Respondent filed an administrative petition in the Department of Administrative Hearings in Tallahassee, Florida, that was DOAH Case 07-2759, ***Tamalavich v. Department of Management Services, Division of Retirement.*** That petition for pension benefits was not successful, but, still hopeful, Respondent appealed in the First District Court of Appeals, again without success. Such an unrelenting series of lawsuits surely demonstrates the budding attorney-client relationship between the putative class members and Respondent. Respondent and the 900 letter-recipients determined to have been "solicited" were not strangers in August of 2008.

While these suits proceeded, counsel received numerous phone calls from teachers who were sincerely interested in having their claims represented in the class action. During the same period from August, 2006 to August 18,

2008, Respondent was the sole caregiver for an elderly spouse, sixteen years her senior, who ultimately became terminally ill around April of 2008 and died, in a state of total life-support, at the age of 86 on August 18, 2008. Counsel visited her spouse in six different hospitals and rehab facilities every day from April of 2008 to the day before his death. Simultaneously, Respondent tried to conscientiously prosecute the claims of the teacher-class with all of her remaining attention.

On August 6, 2008, only ten days after the death of her spouse, Respondent chose to file another suit for the teachers seeking not only pensions and social security but also money damages for the Board's violation of their appellate rights stemming back to August of 2004. To ensure that all potential teachers who might benefit from the suit would be aware of it, Respondent again incurred mailing expenses in drafting and sending more than 900 letters. As the referee said in the hearing, the letter may have been inartfully drawn, in consideration of the stress endured by counsel during that final period of her spouse's illness.

The letter dated August 28, 2008 was the last in a series of newsletters sent by the undersigned to the teachers of Broward County who may have been eligible to benefit from a favorable ruling in the suit filed on August 6, 2008 and which was the subject of the news article in the Fort Lauderdale

Sun Sentinel. In that article, a copy of which is located on the back of the letter, one teacher gave direct responses to the news reporter concerning her disadvantageous circumstances resulting from the omission of Social Security coverage for part time and temporary teachers in the Broward County Board of Education.

Respondent believes it is very important for the Court to view the actual facts of this complaint in light of the concurrent litigation which she undertook as a sole proprietor, because in truth the letter was not a solicitation of clients who had absolutely no connection with Counsel. On the contrary, these addressees shared a unique characteristic, that is, they were teachers who were informed in writing by their employer of the denial of Florida state pension coverage and social security coverage, both in May of 2003 and August of 2004. This case is really one of first impression in the state of Florida, that is, the complaint was filed by the attorney for the defendant in a class action The complaining party was Edward Marko, Esquire, General counsel for the Broward Board of education at that time.

Thus, this communication dated August 28, 2008 was not a general new client solicitation as prohibited by Bar rules without prior approval. Instead, it was a targeted letter addressed to specific persons with a general common interest in a lawsuit filed for the purpose of improving their financial

security.

ARGUMENT

1. The Referee Did not Err in Failing to Find Respondent Guilty of All Ethical Misconduct Based But the Referee Erred in Finding Improper Solicitation of Clients

Prior approval of communications with putative class members was the subject of a case which was finally decided by the Supreme Court of the United States in 1981. In the Fifth Circuit which included the State of Texas and the State of Florida at that date, there was an ongoing dispute between employees of Gulf Oil who claimed discrimination, invoking the government assistance of the EEOC. The employees sought to improve the terms of an agreement between the company and the EEOC on their behalf and initiated a class action in Federal District Court against Gulf Oil. See ***Gulf Oil Company et al v. Bernard et al,*** 452 U.S. 89, 101 S.Ct. 2193, 68 L.Ed. 2d 693 (1981). Jurisdiction rested on the first amendment issues arising from the order issued by the District Court prohibiting all communications between class counsel and class members without prior approval by the District Court. The high Court held that the order of the District Court was an abuse of its discretion under the Federal Rules of Civil Procedure. Also, the ***Gulf Oi***l Court syllabus noted that the restrictive order interfered with efforts by the class counsel and major plaintiffs to inform

potential class members of the existence of the lawsuit and may have been injurious to the class as a whole. ***Id.***

Respondent would urge this Court to accept the premise that Respondent encountered a situation which does not clearly fall into one category, -Advertising, or the other, that is Solicitation of clients. As noted by Attorney Alvin Entin in the hearing on May 17, 2010, the "punishment that the Florida Bar is saying is appropriate for violations of these advertising rules and regulations is a written admonishment." **T-138.** "That was the holding in ***Pape & Chandler***, that was the holding in ***Doe.*** See ***Florida Bar v. Pape & Chandler***, 918 So.2d 240 (Fla. 2002) and ***Florida Bar v. Doe,*** 934 So.2d 160 (Fla. 2005). One of these cases is 2005, the other is 1994."

Continuing, on pages #138 through #139, Mr. Entin says "The only difference between this situation and the situation in ***Pape & Chandler*** and ***Doe***, is her prior disciplinary history. In those cases, they all had no prior disciplinary problem. Here, we have got, the 1995 admonishment, and here we have Judge Thomas' order from about a year and a half ago. I think it was about that long." "I don't have the order in front of me, Judge." (The order came down in March, 2009. It was finalized in July of 2009. The time between March of 2009 and May of 2010 is fourteen months.)

"I appreciate that the Bar is not asking for disbarment. If I were the Bar and I asked for disbarment, I'd be ashamed for the rest of my life, but, I'm glad they're not doing that."

A recent Florida Bar case decided by the Supreme Court addressed advertising violations which did not fit into the customary fact pattern as can be seen as similar to this case. The Court ultimately reduced the discipline from a suspension to a public reprimand. In ***Florida Bar v. Gary Elvin Doane***, this Court imposed a public reprimand on Attorney Doane for using a misleading term which he misunderstood to be allowable. ***Id.*** In the instant case, Respondent also conducted the ongoing complex litigation with the misunderstanding that the unchallenged letters could be sent to putative class members without prior Bar approval. Respondent would urge this Court to take the more lenient view of discipline warranted too.

Finally, the specific circumstances of Respondent's life figured in the decision to draft and send this letter. As stated previously, Respondent's spouse died on August 18, 2008. Attorney Entin asked "So, then, what was the purpose of sending this letter to these individuals.?" T-48 Respondent answered , "Well, I realized that some people--some of the teachers had contacted me with the premise of why do you need my personal information? It's a class action. Aren't we all covered?" Hearing such

questions, I saw a need and attempted to throw more light on the reality of the situation.

"So, I realized that was, certainly, perhaps, a normal assumption, but in this case it was not going to be effective for them because the pension department needed specific name, and a school, and information on each teacher so they could process each claim individually."

The next statement truly reveals the mindset of Respondent regarding the intended goal of this August 28th letter. "I really saw that time was going and I was getting older and so were all the teachers, and I thought, I'd better get this thing going before too much more time ran out, so, that's why I sent this letter." The death of a spouse after twenty five years with his love and companionship is a dramatic reminder that we are all subject to our own personal statutes of limitation.

Finally, on T-51, Attorney Entin asked this question of Respondent, "If you had thought it was advertising, what would you have done? Answer: "I would have submitted it to the Bar for approval, but I didn't think of these letters as advertising. I thought of them as information that these people were entitled to know and needed to know."

One question which might be asked is whether the teachers who received that letter considered that they were being solicited. Respondent already

considered all of the teachers to whom she had sent letters as her clients. Witness Ellen Glanzberg is one of the teachers who received the letter. The unrebutted sworn testimony she gave at the hearing should serve as convincing proof that the letter was an indispensable communication in a developing class action. Witness Glanzberg, on T-79 through 82, testified that "we share information at teacher's meetings and different places. Also, her -- the lawsuit was mentioned at a general teacher's meeting, at one point, and this generated lots of interest, and teachers would share it--teachers in my position would share this or try to, you know, share this information with other teachers." T-80. The Bar did not offer any witnesses from the teachers who said they were offended by the letter. Surely that testimony begged the question of who was offended by the allegedly improper solicitation, and the answer to that question would have been an indispensable element of proof of solicitation.

Pecuniary gain is one factor in the determination of all alleged wrong-doing by attorneys who stand before the Bar when accused of rules violations. In the case at hand, there are several outstanding examples of the lack of pecuniary gain as a motivating force for Respondent. The referee points out that the Respondent offered to "work for free" for any teacher who could not afford to send a modest cost donation. Further, the witness,

Ms.Glanzberg, testified that Respondent worked for the teachers and virtually impoverished herself in the effort. Also unrebutted was the testimony of Respondent that there was no sure-fire promise of attorney fees nor any statutory scheme providing for attorney fees to be awarded for winning the teachers' claims.

II. **The Referee Did Not Err in Refusing to Impose a 91 Day Suspension but the Referee Would Have been Justified in Imposing nothing more than a Reprimand**

Finally, Respondent had not entered into any contingent fee agreement with any of the teachers. The absence of self-interest should surely be a mitigating factor in the evaluation of the total profile of Respondent. See ***Florida Bar. V. David J. Stern,*** Supreme Court 2002. There the Bar offered Attorney Stern the option of a consent judgment for his pattern of conduct which revealed a substantial motivation of pecuniary gain and deceit. A public reprimand was included in the disciplinary plea offered by the Bar.

CONCLUSION

Based on the foregoing, Respondent would therefore disagree with the Referee's factual findings #2 and #3, supporting the conclusion that the letter was an improper solicitation of clients. This complaint was filed by a party opponent in a class action for the benefit of more than one thousand part time and temporary teachers. As such, it presents both a comparison and a contrast to the cases cited as precedent insofar as the facts might be governed by either the advertising regulations or the prohibition against solicitation of clients. Or, perhaps neither regulation applies.

The Bar contends on page #14 of their brief that Standard 7.2 provides 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 Bar has failed to demonstrate any such injury or even potential injury in their brief or in the hearing transcript. The Bar did not present any witnesses' protests from the group of teachers who had received the subject "solicitation" letter. Bar counsel stated that he had a rebuttal witness in the persona of Edward Marko, Esq., general counsel of the Board of Education, the defendant in all of the lawsuits.. Respondent asks that the court adopt that middle view and impose a discipline of not more than a reprimand.

Respectfully Submitted,

Jane M. Letwin, #990329
Pro Se
1550 South Dixie Highway, Suite 209
Coral Gables Florida 33146
(954) 297 4057

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing have been mailed to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee Florida 32399; and to Alan Anthony Pascal, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33323 on this Twenty Sixth Day of October 2010.

CERTIFICATE OF TYPE SIZE and STYLE

The undersigned counsel hereby certifies that the Respondent's Answer Brief and Initial Appellate Brief is submitted in 14 point, Times New Roman font.