

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**JANE MARIE LETWIN,**

**Respondent.**

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**Supreme Court Case  
No. SC09-2360**

**The Florida Bar File  
Nos. 2009-50,256(17B)  
2009-50,513(17B)**

**THE FLORIDA BAR'S INITIAL BRIEF**

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## **PRELIMINARY STATEMENT**

The Florida Bar is seeking review of a Report of Referee recommending that respondent be found not guilty of the certain charges advanced in The Florida Bar's complaint and the recommended discipline by the referee. Throughout this Initial Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR \_\_\_\_ (indicating the referenced page number). The transcript of the final hearing conducted on May 17, 2010 as TT (indicating transcript volume number), followed by \_\_\_\_ (indicating the referenced page number). [By example, a reference to transcript on page 38 will be set forth as TT, 38.] The Florida Bar will be referred to "the Bar." Respondent Jane Marie Letwin will be referred to as "respondent."

## **THE 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. *The Florida Bar v. Mason*, 826 So.2d 985, 987 (Fla. 2002).

## **STATEMENT OF THE CASE**

The Referee held a final hearing on May 17, 2010. The referee found respondent guilty of ethical misconduct involving improper client solicitation and conduct in connection with the practice of law that is prejudicial to the proper administration of justice. The referee further found the respondent not guilty of ethical rules involving her making false statements of material fact to a third person and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. The Bar sought a 91 day suspension in light of respondent's prior disciplinary history, The Florida Standards for Imposing Disciplinary Sanctions and controlling case law. The referee recommends a 90 day suspension for respondent's misconduct. The Bar seeks review of the referee's findings of guilt and the recommended discipline to be imposed.

## **STATEMENT OF THE FACTS**

The respondent sent out over 1,000 solicitation letters and newsletters on multiple occasions to potential clients seeking them to retain her as counsel in a purported class action suit against the School Board of Broward County. Specifically, these individuals were part-time school board employees whose contact information was obtained by respondent for the purpose of soliciting them as clients (lists of employees were provided to the referee as The Florida Bar's Exhibit B at final hearing).

Starting in May 2003 through August 2004, respondent began obtaining names and sending out solicitation letters and newsletters to part-time school board employees to join in a purported class action suit involving claims for pension and Social Security monies against The Broward County School Board. Respondent admitted at the final hearing that she sent 1,150 letters for one mailing and 1,800 letters on another mailing (TT, 21). Respondent also sent out newsletters concerning this purported class action suit in February 2007 (TT, 22) and July 2007 (TT, 25) to these same prospective clients. Respondent conceded that she never had any of these solicitation letters or newsletters approved by The Florida Bar.

The solicitation letter that was sent on or about August 2008 became the basis for the case at bar, (See Exhibit A, filed with The Florida Bar's Complaint,

TT, 27). Respondent filed a lawsuit in Broward County only 20 days before sending out this solicitation letter. The respondent further testified that the recently filed action was too new to be certified as a “class action” by the trial court. (TT, 34). Regardless of the fact that no class had been certified by the court, the respondent sent out her solicitation letter with the material misrepresentation announcing that a “class action” suit was filed and pending. This representation was false.

Respondent admitted that she sent out approximately 900 solicitation letters in her August mailing. Respondent further admitted that she never had this August letter approved by the Florida Bar. (TT, 36). These 900 letters were not marked advertisement as required by the Rules Regulating The Florida Bar. (TT, 36). The letter also contained a contract provision not marked as a “sample” as required by The Florida Bar Rules. The letter also contained other false and misleading statements meant to induce prospective clients to retain the respondent.

First, the letter asserted that “I need to have your express acceptance of my legal representation, or the COURT will not recognize your claim.” (See Florida Bar’s Exhibit A) This statement was false. The respondent admitted at the final hearing that a prospective client could hire another attorney other than herself to pursue a claim against the school board. (TT, 35). Respondent also stated that if a prospective client did not send their information to her that “you will NOT BE



REPRESENTED IN THESE CLAIMS” (The Florida Bar’s Exhibit A). This was another misleading statement meant to induce a prospective client to hire respondent.

Respondent admitted that this solicitation letter garnered approximately 40 new clients (TT, 40). Bar counsel argued that all ethical misconduct found within the Bar’s complaint had been proven by clear and convincing evidence (TT, 55-60). While the referee found respondent guilty of ethical misconduct involving improper solicitation and conduct prejudicial to the proper administration of justice, the referee did not find respondent had violated ethical rules encompassing false statements to third parties or having engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

The Referee then heard arguments on the appropriate recommended discipline to be imposed against respondent. The Florida Bar presented the appropriate Florida Standards for Imposing Lawyer Sanctions, the respondent’s prior disciplinary history, and applicable case law supporting at least a 91 day suspension. However, the referee recommends a 90 day suspension as appropriate discipline. The Bar has petitioned for the Court to review the findings of guilt and the recommended discipline in this case.

## SUMMARY OF THE ARGUMENT

The referee erred in failing to find respondent guilty of all charges found within the Bar's complaint; and the referee further erred in failing to recommend an appropriate sanction against respondent. The Bar presented clear and convincing evidence of all ethical rule violations at the final hearing of May 17, 2010. The referee's finding that respondent was not guilty on rule violations related to dishonesty and misrepresentation was contrary to the substantial and competent evidence introduced at trial. In the end, the referee clearly erred by failing to find guilt for serious ethical misconduct substantiated by the evidence and the record.

The following ethical violations were proven through clear and convincing evidence:

By the conduct set forth above, respondent violated R. Regulating Fla. Bar **3-4.2** [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline]; **4-4.1(a)** [In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.]; **4-7.4(a)** [Except as provided in subdivision (b) of this rule, a lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit in the lawyer's behalf. A lawyer shall not enter into an agreement for, charge, or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes (i) any written form of communication

directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule, and (ii) any electronic mail communication directed to a specific recipient and not meeting the requirements of subdivision (c) of rule 4-7.6. Subsection (b) provides as follows: (b) Written Communication Sent on an Unsolicited Basis. (1) A lawyer shall not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, an unsolicited written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if: (A) the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication; (B) the written communication concerns a specific matter and the lawyer knows or reasonably should know that the person to whom the communication is directed is represented by a lawyer in the matter; (C) it has been made known to the lawyer that the person does not want to receive such communications from the lawyer; (D) the communication involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence; (E) the communication contains a false, fraudulent, misleading, or deceptive statement or claim or is improper under subdivision (c)(1) of rule 4-7.2; or (F) the lawyer knows or reasonably should know that the physical, emotional, or mental state of the person makes it unlikely that the person would exercise reasonable judgment in employing a lawyer. (2) Written communications to prospective clients for the purpose of obtaining professional employment are subject to the following requirements: (A) Written communications to a prospective client are subject to the requirements of rule 4-7.2. (B) The first page of such written communications shall be plainly marked "advertisement" in red ink, and the lower left corner of the face of the envelope containing a written communication likewise shall carry a prominent, red "advertisement" mark. If the written communication is in the form of a self-mailing brochure or pamphlet, the "advertisement" mark in red ink shall appear on the address panel of the brochure or pamphlet and on the inside of the brochure or pamphlet. Brochures solicited by clients or prospective clients need not contain the "advertisement" mark. (C) Written communications

mailed to prospective clients shall be sent only by regular U.S. mail, not by registered mail or other forms of restricted delivery. (D) Every written communication shall be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service shall be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred. (E) If a contract for representation is mailed with the written communication, the top of each page of the contract shall be marked "SAMPLE" in red ink in a type size 1 size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line. (F) The first sentence of any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall be: "If you have already retained a lawyer for this matter, please disregard this letter." (G) Written communications shall not be made to resemble legal pleadings or other legal documents. This provision does not preclude the mailing of brochures and pamphlets. (H) If a lawyer other than the lawyer whose name or signature appears on the communication will actually handle the case or matter, any written communication concerning a specific matter shall include a statement so advising the client. (I) Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication. The disclosure required by this rule shall be specific enough to help the recipient understand the extent of the lawyer's knowledge regarding the recipient's particular situation. (J) A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; **4-8.4(c)** [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.]; and **4-8.4(d)** [A lawyer shall not

engage in conduct in connection with the practice of law that is prejudicial to the administration of justice...].

The Bar also provided the referee with case law and the appropriate Florida Standards for Imposing Lawyer Sanctions warranting at least a 91 day suspension based on the ethical misconduct of the respondent. Again, the Bar would respectfully request that this Court enter the appropriate discipline based on all ethical misconduct as found in the record for your review. The Bar recommends this Court find the respondent guilty of all rule violations, and suspends the respondent for at least 91 days based on the Florida Standards for Imposing Lawyer Sanctions and relevant case law.

## ARGUMENT

### **I. THE REFEREE ERRED IN FAILING TO FIND RESPONDENT GUILTY OF ALL ETHICAL MISCONDUCT BASED ON THE CLEAR AND CONVINCING EVIDENCE PRESENTED BY THE BAR AT THE FINAL HEARING.**

A referee's finding of fact regarding guilt carries a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Vining*, 761 So.2d 1044 (Fla. 2000). Furthermore, this Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt." *The Florida Bar v. Cueto*, 834 So.2d 152 (Fla. 2002), citing *The Florida Bar v. Jordan*, 705 So.2d 1387 (Fla. 1998). The party contesting the referee's findings of fact and conclusions of guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or evidence to establish that the record clearly contradicts such findings and conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), quoting *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998). In the instant case, as the referee failed to find ethical misconduct proven by the evidence and the testimony, this Court must now review the record on appeal, coupled with the evidence and testimony and find the respondent guilty of all the ethical misconduct charged by the Bar.

An examination of the record reveals that the Bar presented competent substantial evidence which supported a recommendation of guilt for all ethical violations found within the Bar's complaint. The respondent testified to her repeated attempts to improperly solicit clients through misleading representations found within her letters. (TT, 16-46). This fact coupled with her solicitation letter containing material misrepresentations meant to induce clients to retain her requires a finding of guilt on all ethical misconduct found in the The Florida Bar's Complaint.

**II. THE REFEREE ERRED BY FAILING TO MAKE AN APPROPRIATE RECOMMENDATION OF DISCIPLINE TO THE COURT FOR SERIOUS ETHICAL VIOLATIONS. THE REFEREE SHOULD HAVE RECOMMENDED THAT RESPONDENT BE SUSPENDED FOR AT LEAST 91 DAYS BASED ON FLORIDA STANDARDS IMPOSING LAWYER SANCTIONS AND FLORIDA CASE LAW.**

While a referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986); and *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); and *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994).

In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998); and *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). The Court will not second guess a referee's recommended discipline "as long as that discipline has a reasonable basis in existing case law." This standard applies in reviewing a referee's finding of mitigation and aggravation. *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003).

The referee correctly expressed the seriousness of respondent's ethical misconduct in her final report of referee:

Florida Case law and The Supreme Court of Florida has deemed that a suspension is an appropriate sanction for an attorney who engages in improper solicitation of clients and for conduct clearly prejudicial to the proper administration of justice. The Florida Supreme Court has firmly held that "The solicitation of business by members of The Bar, all of whom are officers of the Court, has been and is universally condemned. The Canons of Professional Ethics in empathetic terms denounce such conduct and the language used cannot be misunderstood by either the young and inexperienced or the old and experienced members of the Bar. By whatever means employed, solicitation of professional business is unethical and warrants the imposition of appropriate discipline." The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967).



In The Florida Bar v. Barrett, 897 So.2d 1269 (Fla. 2005), The Supreme Court held that although cases involving unethical solicitation of clients have imposed a wide variety of discipline depending on the facts of the case, suspension is appropriate when respondent's actions are knowing, intentional and potentially injurious to a client, the public or the legal system as a whole. Respondent's knowing and intentional misconduct in sending over 900 letters involving improper solicitation justifies the recommended discipline in this case. (RR 9-10).

In addition, The Florida Standards for Imposing Lawyer Sanctions provide a reasonable basis for this Court to impose a 91 day suspension on the respondent. Florida Standards for Imposing Lawyer Sanctions 7.0 addresses violations of duties owed as a professional.

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. Clearly, the respondent's ethical misconduct involving repeated improper solicitation involving misrepresentations and dishonesty warrants a 91 day suspension from the practice of law.

Florida Standards for Imposing Lawyer Sanctions 8.0 addresses how a referee should consider prior disciplinary orders when recommending a sanction. Standard 8.2 provides that suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the

public, the legal system, or the profession.

Respondent has engaged in similar prior misconduct involving conduct prejudicial to the proper administration of justice, contempt of court, and misrepresentation on 2 prior occasions. The Court has already imposed a public reprimand and a 90 day suspension as discipline against the respondent for the protection of the legal system and the public. However, the referee has deemed that another 90 day suspension is appropriate.

This Court has held that it deals more harshly with cumulative misconduct than it does with isolated misconduct. *The Florida Bar v. Bern*, 425 So.2d 526 (Fla. 1982). The Court can take judicial notice of the aforementioned discipline along with your prior court orders in reviewing the disciplinary history of the respondent. It is respectfully requested that the Court reviews respondent's history of ethical misconduct when considering an appropriate discipline in this case.

Finally, the referee found aggravating factors in determining the appropriate discipline. Florida Standards for Imposing Lawyer Sanctions 9.22 enumerates aggravating factors that may increase the degree of discipline imposed. The aggravating factors that were found by the referee were the following:

- (a) prior disciplinary offenses;
- (c) a pattern of misconduct; and

(d) multiple offenses. (RR 10).

The Florida Bar would respectfully request that the Court find an additional aggravating factor pursuant to the record. Florida Standards for Imposing Lawyer Sanctions 9.22(i) substantial experience in the practice of law. The respondent was admitted to The Florida Bar in October 1993. (RR 10). Therefore, the respondent had substantial experience in the practice of law at the time of her misconduct in the instant case.

Respondent also testified during the discipline phase concerning her prior misconduct. The referee found mitigation; however, that mitigation does not overcome the aggravators and the ethical misconduct found in this case.

Bar counsel argued in summation that this disciplinary case, and her prior disciplinary cases, involved misrepresentation, being held in contempt of court, and further being sanctioned by numerous courts (both federal and state) for failing to abide by court orders and rules. Bar counsel proffered that when judges' orders, rules of the court, or Florida Bar Rules interfered with respondent's goals, she simply disregarded the rules of the game and did what she wanted. (TT, 119-133) Bar counsel also pointed out to the referee that the prior discipline involved misconduct from 2005 and 2006, and the case at bar was from August 2008. Two separate and distinct periods in time requiring the referee's consideration and understanding when recommending appropriate discipline.

Respondent testified that her husband was ill and passed away during all of her ethical misconduct found in this case and the prior case. The referee seemed to have thought that this fact mitigated all of her egregious ethical misconduct over a three year period of time. The referee found that she was under severe emotional distress for a three year period of time and deserved another 90 day suspension (RR 11). The Florida Bar argues and requests that this Court's discipline comport with The Standards for Imposing Lawyer Sanctions and the case law and suspends the respondent for at least 91 days for the protection of the public and the legal system.

Based on the foregoing, the Bar respectfully requests that this Honorable Court orders that the respondent be suspended for at least 91 days based on the egregious ethical misconduct of the respondent. A 91 day suspension is warranted given the ethical misconduct involved in this case and is supported by The Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in similar cases brought before the Court.

### **CONCLUSION**

The referee erred in failing to find respondent guilty of all the Bar's charges found within its complaint. The Bar provided the referee with relevant case law and the appropriate Florida Standards for Imposing Lawyer Sanctions that supports at least a 91 day suspension as an appropriate discipline based on the ethical

misconduct of the respondent. Again, the Bar would respectfully request that this Court find the respondent guilty of all rules violations; and suspends her from the practice of law for at least 91 days based on the Florida Standards for Imposing Lawyer Sanctions and relevant case law for the protection of the legal system and the public. It is also requested respondent pay all reasonable Bar costs in this case.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY the original and 7 copies of The Florida Bar’s Answer Brief has been furnished via regular U.S. mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and has been electronically filed; true and correct copies have been furnished by regular U.S. mail to Alvin Ernest Entin, Esq., Respondent’s Counsel, Entin & Della Fera, P.A., 110 SE 6th Street, Suite 1970, Fort Lauderdale, Florida 33301 and to Kenneth Marvin, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 on this \_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
ALAN ANTHONY PASCAL

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

Undersigned counsel hereby certifies The Florida Bar’s Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

\_\_\_\_\_  
ALAN ANTHONY PASCAL