

The Florida Bar v. Roth
Reply Brief

SC00-921

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

SUPREME COURT CASE

COMPLAINANT,

NO. SC00-921

v.

ROBERT L. ROTH,

THE FLORIDA BAR FILE

RESPONDENT,

NO. 1999-71,053(11E)

PETITIONER.

_____/

RESPONDENT'S REPLY BRIEF

Respectfully Submitted

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The Bar's argument that there is competent substantial evidence to support the referee's report is based on a confused time line of events. The Bar mistakenly states facts that are contrary to what happened in order to shore up the problems that it has with the underlying law and record.

The bar has taken a similar approach to its argument about the alleged disability of Mr. Petrie, its key and only real fact witness. The Bar appears to be abandoning the basis upon which it argued to the referee below. Instead it now appears to claim some other basis for which no facts were presented below.

Although the referee below accepted many of the Bar's "facts", the Bar had more that it needed to adduce in order to carry its burden of proof.

Even assuming that the violation involved was not of a technical nature, the discipline of disbarment is simply disproportionately harsh to the facts of this case.

**I. THE FLORIDA BAR HAS CONFUSED THE
TIME LINE OF EVENTS AND FACTS.**

Virtually all the evidence in the underlying case comes from the personal testimony of George Petrie, whom the referee has declared to be not worthy of belief. There are only a very few areas where the Bar even attempted to provide independent proof below.

There were two areas of such attempted proof by something other than the discredited testimony of Mr. Petrie. One was the claim that Mr. Petrie was the subject of unqualified legal representation on September 14, 1998, because Mr. Roth admitted going to see Mr. Petrie on that date. The second was the effort to prove that Mr. Petrie was under a legal "disability" when Mr. Petrie made gifts to Mr. Roth and others.

The first of these claims will be the subject of this reply argument. The Bar's sudden change of the legal basis of Mr. Petrie's alleged disability will be the subject of the next reply argument.

The first of the bar's claims has not been fairly set forth in the Bar's brief. At pages 11 and 12 of its Answer Brief, the Bar claims to present the "substantial competent

evidence" which it wants this Court to rely upon. Bar's brief at p. 11, lines 6-7. These facts as stated by the Bar are as follows:

"Shook filed a civil complaint in behalf of Petrie in which he sought to recover Petrie's property from Respondent. Tr.p.32. Respondent was in Europe at the time the civil complaint was filed. Tr.p.33. ...

"Shook later met with Respondent within a week of Respondent's return from Europe. Respondent had his own counsel, Brian Tannenbaum (sic). Tr.35. ...

"Respondent relies solely upon a letter dated August 31, 1998, to argue that Petrie was not represented by counsel when Respondent went to Petrie's house on September 14, 1998. That letter was the sole evidence which contained any reference to intermediary, the basis of Respondent's argument. ...

"Respondent relies upon a different rule, namely, Rule 4-2.2 concerning intermediaries to deny that Petrie was represented by counsel. Rule 4-2.2, however, was not invoked by Shook. ..." Bar's brief at p. 11, line 14 to p. 12, line 11.

These facts are simply not correct. They distort what happened. That the Bar argues them to this Court is unfortunate. The Bar's claims do not accurately represent what happened or what both parties argued to the referee, below.

The August 31, 1998 letter, RR. Ex. D, was presented by the Bar as the sole basis of the Bar's argument that

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Mr. Roth violated Rule 4-4.2. The letter was sent to Mr. Roth while he was out of the country, but he responded through his office. Tr. 33,61. The letter speaks for itself, but it clearly and unambiguously states that Mr. Shook has been hired "in the present function of intermediary to assist in solving the pending issues..." RR. Ex. D.

Mr. Roth had no other notice of the purported role of Mr. Shook other than the letter of August 31, 1998. When Mr. Roth returned from out of the country he first tried to see Mr. Shook, and then on September 14, he tried to see Mr. Petrie. The letter had in fact invited that "[w]e may hear directly from either a representative or from Mr. Roth." RR. Ex. D.

The Bar confuses the time line of events by claiming or implying that on or before that same date Mr. Shook had already filed suit against Mr. Roth.

In fact, suit was not filed until January 25,1999, several months later. Exhibit 2, RR. pp. 5-6.

The Bar also confuses the time line by claiming or implying that Mr. Roth was represented by Brian Tannebaum on the Petrie matter when he went to see Mr. Petrie on

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September 14, 1998. This is not the case.

Until after September 14, when Mr. Petrie falsely accused him of assault, Mr. Roth was not represented by any attorneys. Mr. Roth only hired attorneys (civil and criminal) after that accusation. Tr. 62.

In addition to confusing the time line for such important facts as whether there was a suit filed or whether Mr. Roth had counsel representing him, it is also disingenuous to argue that Mr. Roth is not entitled to rely on the plain language of the Bar's own exhibit.

It was not Mr. Roth who chose to say that Mr. Shook was acting as an intermediary. It was Mr. Shook who said so in plain and unambiguous terms. While the Bar is technically correct that Mr. Shook did not invoke Rule 4-2.2, Bar's brief at p. 12, lines 10-11, his language is both precise and not the customary language of an ordinary retainer letter. There is no other reasonable way to interpret the "function of intermediary."

Even the Bar must concede that the normal and routine "representation letter" used by hundreds of lawyers every day does not qualify the representation as "intermediary."

In effect, the Bar is arguing that its own exhibit and evidence must be interpreted in some way other than by its own plain language. In effect it is arguing that its own exhibit can not be accepted at face value. The Bar is arguing that Mr. Shook' letter can not be believed.

Such an argument is not the fair basis for a prosecution and conviction of an attorney. If an attorney receives a clear and unambiguous letter from another attorney describing the nature of that lawyer's function in a matter, the lawyer receiving the letter should be entitled to believe the lawyer sending the letter.

These facts are not competent substantial evidence of wrong-doing.

**II.THE BAR'S BRIEF ABOUT THE BASIS FOR
MR. PETRIE'S DISABILITY IS INCONSISTENT
WITH ITS EVIDENCE BELOW.**

The other area of proof where the Bar spent enormous effort at the referee hearing was to establish the

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alleged "disability" of Mr. Petrie. The Bar called in two psychiatrists and got Mr. Petrie to waive his privilege.

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The entire thrust of the argument below was to prove to the referee that Mr. Petrie was suffering from a specific incapacity. Now the Bar suddenly seems to notice that it failed to prove that some specific incapacity existed on the dates when Mr. Petrie made gifts to others, although admittedly the bulk of the gifts were to Mr. Roth.

The Bar now claims that the disability is "for some other reason" and that it is not necessary to provide proof of even that standard on a given date. Bar's brief at p. 18, lines 17-21.

There are overriding due process requirements that may not be stated in every statute or rule, but which are required to be proved. One of those basic requirements is that the necessary elements of the violation were present on the date when the alleged actions occurred.

Mr. Petrie may indeed have been depressed on some unspecified dates in the past, but it did not preclude him from being able to make legal decisions either with Mr. Roth, Mr. Shook, or even the Bar. After all, the Bar

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with full knowledge of Mr. Petrie's medical history got Mr. Petrie to make a "knowing waiver" of his patient/psychiatrist privilege.

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The real impairment that Mr. Petrie has is the inability to be truthful. His depression and drug history are not different than what was reported publicly of former Governor Chiles or former President Bush.

Moreover, Mr. Petrie's diagnosis by his psychiatrists is based on lies by Mr. Petrie. Although the Bar points to Mr. Petrie's alleged agoraphobia, Bar's brief at p. 21, line 15, that diagnosis was based on Mr. Petrie omitting all information about his extensive travels.

Likewise, the only active drug prescription and use by Mr. Petrie is after the alleged violations by Mr. Roth. As the Bar rightly points out, Mr. Roth knew Mr. Petrie for 18 years. But what he knew of Mr. Petrie was consistent with a competent person who also happened to have seen a psychiatrist in the past.

III.EVEN IF THE REFEREE MADE FINDINGS FAVORABLE

TO THE BAR, BAR DID NOT MEET ITS BURDEN OF PROOF.

The Bar constantly make reference to facts that the referee agreed with, but which are not proof of a

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violation of the rules regulating the practice of law.

In this context, the Bar refers to the fact that Mr. Roth possessed and carried a weapon. Bar's brief at p. 19 and p. 31.

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While this is true, the Bar well knows that Mr. Roth was fully licensed to have one, as in fact was Mr. Petrie at one time. There was nothing illegal, immoral, or improper about it. It is only intended for unfairly creating an air of bias against the Respondent.

The Bar is always sure it is right and always sure there is a violation. It can even convince a referee to agree. However, that does not mean that the Bar was right. The Florida Bar v. Fitzgerald, 491 So.2d 547, 547-547 (Fla. 1986).

The Bar's burden of proof for claiming its most serious rule violations required proof of a intent, which the Bar did not provide. The Bar tries to distinguish The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992), by arguing that Mr. Roth declined to return assets to Mr. Petrie. Bar's brief at p. 31, lines 3-4. The Bar expounds on this alleged refusal by saying that Mr. Roth only returned assets after "commencement of trial after a

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demand letter." Bar's brief p. 31, lines 7-8. That is only a half truth.

Trial of the civil action never commenced although a suit was filed. Even Mr. Shook testified that the case was resolved quickly despite a false Bar claim in the complaint

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to the contrary. The real cause for delay was never the refusal to return what he had received, it was that the claim was for triple the amount received. Moreover, at that point, Mr. Roth had turned over all deals to his own attorneys, which had become the only thing he could do.

Forgetting for the moment the legal issues of family relationship, we need to put ourselves for a moment in to the shoes of a lawyer who has a friend who claims to be dying. That friend happens to be the former lover of relative of the lawyer by marriage. The lawyer's relative died a horrible death from AIDs. The friend has already given away some of his property to others and now wants the lawyer to draw up documents leaving the bulk of what remains to that lawyer. The lawyer writes to the friend to go to another lawyer. The friend does not remember getting that letter, but states that even if the

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lawyer had told him to seek other counsel, he would not have done so. The lawyer draws up the papers, unaware that Bar rules were changed several years ago to prohibit the lawyer drawing up papers like that except for his own relatives.

From that set of facts the conduct of the lawyer is neither immoral, out of a bad or selfish motive, nor vile.

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That is what really happened below. The Bar only provided proof of the signing of documents that the Respondent was unaware he might not be entitled to draft for Mr. Petrie.

The Bar's argument that the burden was on Respondent to prove that the agreement purporting to convey property from the client to the lawyer is proper, Bar's brief at p. 20, lines 1-5, is accurate in the civil context where the lawyer is seeking to enforce the agreement. That is not what Mr. Roth was trying to do or has been arguing.

IV. WHETHER OR NOT THE VIOLATION ALLEGED WAS MERELY

TECHNICAL, THE DISCIPLINE WAS TOO HARSH.

The undersigned has presented arguments on the issues of law and to demonstrate that there should be

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substantial doubt within the Bar's own language of its rule as to whether Respondent is guilty, and even more so that the guilt would be of a technical rather than a substantive nature. Notwithstanding this, the undersigned recognizes that this Court will avoid reweighing the evidence and substituting its judgment for that of the referee. Florida Bar v. Bustamonte, 662 So.2d 687 (Fla. 1995).

While a referee's recommendation of discipline is

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persuasive, the ultimate responsibility to determine discipline is, however, the province of this Court. Florida Bar v. Reed, 644 So.2d 1355, 1357 (Fla. 1994). The standards for overruling a referee's recommendations are guided by the principles that the "bar discipline must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." Florida Bar v Lawless, 640 So.2d 1098, 1100 (Fla.1994).

This case is on its facts less egregious than for example the multiple acts over many years in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991).

This case is much more like The Florida Bar v. Trinkle, 580 So.2d 157 (Fla. 1991). In that case a lawyer clearly overreached a family member and continued his contact with the relative, even after he clearly knew that the relative had hired a lawyer. Trickle, *supra* at 159.

The discipline for Mr. Trickle was a public reprimand. Id. Likewise, in The Florida Bar v. Nunes, 661 So.2d 1202 (Fla. 1995), a lawyer who contacted the opposing party without that party's lawyer's consent only received a

public reprimand and a 10 day suspension. Nunes, *supra* at 1204. By contrast, the referee's recommended discipline in this case far too harsh.

Similarly, in The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000) a lawyer who had contact with a represented party and lied about to that party's lawyer only received a public reprimand. The undersigned apologizes for the erroneous citation to this case in the Initial Brief. The undersigned intended to argue only that the comment to the rule gave an absolute right to

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contact the other party, and then to add a reference to the Feinberg case.

Nowhere in this case is there any indication of a discipline that is also fair to the Respondent. This is particularly true where the primary witness for the Bar is declared unbelievable, and where there were many unrebutted witnesses who supported the integrity of the Respondent. The undersigned knows also, as does the Bar, and as should this Court know from its own unreported cases that other lawyers who have not only drawn documents for non-relatives, but who have kept the benefits of those documents, have received private reprimands or even not

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been prosecuted.

To disbar this Respondent is to treat him unfairly in all respects.

CONCLUSION

Respondent should at most be found guilty of conduct like that in The Florida Bar v. Trickle, and should be punished at most with a suspension of less than 90 days.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief have been filed by hand-delivery to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that true and correct copies have been furnished by mail to Randolph Brombacher, Esquire, Assistant Staff Counsel< The Florida Bar, Miami Office, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, this 27th day of August, 2001.

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Certification of Font Size and Style

The undersigned counsel does hereby certify that this brief is submitted in 12 point proportionally spaced "Courier New" font.

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