IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM T. FUSSELL,

Respondent.

_____/

CASE NO. 60,642

COMPLAINANT'S ANSWER BRIEF

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STATEMENT OF THE CASE

Complainant accepts portions of Respondent's Statement of the Case, revised as follows:

Count I in the case sub judice was originated by letter of complaint from Ronald Harper to The Florida Bar, and Counts II and III by similar correspondence from John Newman, both letters being received on or about June, 1979. [R.II. 235, 199]. Following various exchanges of correspondence and grievance committee hearings, The Florida Bar filed its four-count complaint on May 19, 1981. Thereafter, on July 14, 1981, The Florida Bar sent Respondent a Request for Admissions, to which the Respondent replied with a Motion for Extension of Time on August 6, 1981. On September 1, 1981, Respondent filed a Motion to Recuse and the following day filed his Response to Request for Admissions.

On September 18, 1981, the Referee, Allen C. Anderson, Circuit Judge, denied Respondent's Motion for Extension of Time to Respond to Request for Admissions, denied Respondent's Motion to Recuse, and granted The Florida Bar's Motion for Order Deeming Matters Admitted.

Thereafter, Respondent filed his Motion to Continue on October 29, 1981, to allow this Court to consider his Petition for Writ of Prohibition for Writ of Certiorari which were based upon the Referee's refusal to recuse himself.

Pursuant to Respondent's Motion for Continuance, the final hearing in this cause was rescheduled for March 29, 1982. However, preceding this hearing, The Florida Bar filed a Motion for Continuance based upon counsel of record leaving the employ of The Florida Bar. The Florida Bar's Motion for Continuance was granted.

Thereafter, this cause was set for trial on November 24, 1982, and due to health problems of Respondent's counsel, on November 22, 1982, Respondent requested a continuance of the referenced hearing.

Respondent's Motion for Continuance was denied, and the trial was heard on November 24, 1982, and December 8, 1982.

Thereafter, On December 5, 1983, a sentencing hearing was held, and on December 21, 1983, the Referee filed his report finding Respondent guilty of Counts I, II, and III, and not guilty of Count IV, and recommended Respondent be suspended from the practice of law for two years.

The Board of Governors of The Florida Bar voted to approve the Report of Referee at the March 1984 meeting. Pursuant to oral communications between Bar Counsel and Mr. Robert Foster, an interim appellate attorney for Respondent, and later with Respondent's present appellate attorneys, it was stipulated that there would be an expansion of the time frames of Florida Bar Integration Rule, article XI, Rule 11.09(3) due to the necessity of seeking Board review of the Report of Referee.

On May 2, 1983, Bar Counsel, formally informed Respondent of the Board of Governor's decision to approve the Referee's Report. On May 10, 1984, Respondent filed his Petition for Review with this Court. On June 8, 1984, Respondent filed his Motion for Extension of Time to file his brief in order to receive a complete record with which to work.

In said Motion for Extension of Time dated June 8, 1984, Respondent's Counsel stated:

> 3. However, the record from the Referee proceedings below is incomplete due to transcripts of Referee Hearings which are missing.
>
> 4. Counsel for The Florida Bar and Respondent's counsel have used all due diligence in attempts to obtain the referenced transcripts, however, to date these efforts have proven fruitless.
>
> 5. In the interest of justice, counsel for The Florida Bar, Steve Rushing, has indicated he has no objection to the issuance of a further extension in this cause.

This Court granted Respondent's Motion for Extension of Time and allowed Respondent fifteen (15) days to serve his brief after completion of the record.

On October 17, 1984, counsel for The Florida Bar provided Respondent with a copy of all the transcripts to complete the record, which The Florida Bar had received from the Court Reporters.

STATEMENT OF THE FACTS

Symbols and abbreviations used in this brief are as follows:

R.I. = Page of transcript, November 24, 1982, hearing

R.II. = Page of transcript, December 8, 1982 hearing

COUNT I

Respondent was retained by Ronald J. Harper on or about February 27, 1979, to handle post-conviction matters relating to Mr. Harper's 1978 conviction of First Degree Murder for which he was serving fifty (50) years [R.I. 233]. Respondent was paid $3,000.00 after indicating that he had no doubt he could help Mr. Harper.

In March of 1979, Respondent told Mr. Harper that he would file a Motion for a post-conviction relief within approximately ninety (90) days [R.II. 234]. Respondent failed to reply to several letters from Mr. Harper and failed to keep an appointment to meet Mr. Harper. Thereafter, Mr. Harper wrote a letter to The Florida Bar complaining of Respondent's lack of diligence. Shortly after Mr. Harper wrote to The Florida Bar, Respondent did meet with Mr. Harper and expressed his displeasure with the fact that Mr. Harper had written The Florida Bar, but did promise to file the Motion for Post-Conviction Relief within forty-five (45) days. At this meeting, Respondent requested Mr. Harper to supply him with a detailed

affidavit; Mr. Harper prepared a thirty-five (35) page written detailed statement dated July 2, 1979, which was mailed to Respondent (File in Case. No. 78-3022), [R.I. 236, R.II. 23,24].

In July 1979, Respondent requested an additional $1,500.00, which was paid by Mr. Harper [R.I. 237].

After many unanswered letters to Respondent, concerning the progress of the motion, in August 1979, Mr. Harper wrote letters to the Clerk of the Court for Hillsborough County to find out if any motions on his behalf had been filed by Respondent and learned that none had been filed [R.I. 238, 239, 243]. A letter dated January 5, 1980 to the Honorable J.C. Cheatwood, Chief Judge, was noted in the court file to have been forwarded to Respondent, (Bar Exhibit C).

Respondent admitted contact by the Clerk's office and knowledge of Mr. Harper's concern during the summer of 1979 [R.II. 26-37]. Mr. Harper wrote The Florida Bar complaining of Respondent's lack of diligence, and subsequently received a letter dated January 25, 1980, from the Chairman of the Hillsborough County Grievance Committee 13A indicating that Repondent had appeared before the committee and promised the committee that he would finish the case in a timely manner and would provide Mr. Harper with a detailed statement of his actions in his behalf [R.I. 240, R.II. 222]. At the hearing, Respondent could not present a copy of any written

detailed statement and was unsure if he had ever furnished the promised written detailed statement to Mr. Harper [R.II. 22].

In the spring of 1980, after Mr. Harper had given up on Respondent filing the motion and had filed two pro se motions on his own behalf [R.II. 241], Respondent met Mr. Harper and told him to ask for a two week continuance on his pro se Habeas Corpus Motion "Because during those two week's time ...I'll have your motion filed." [R.II. 242].

After waiting several months without any motion having been filed by Respondent, in a letter dated August 16, 1980, Mr. Harper dismissed Respondent as his attorney. Copies of the letter were sent to and received by the Clerk of the Circuit Court and The Florida Bar [R.II. 246, 247, Court File in Circuit Court Case 78-3022].

On September 3, 1980, Respondent filed the Motion for Post-Conviction Relief [R.II. 27]. Respondent denied ever receiving Mr. Harper's dismissal letter of August 16, 1980 [R.II. 28]. Mr. Harper's new attorney withdrew Respondent's motion and filed his own motion for post-conviction relief which resulted in an Order dated May 13, 1981 which modified the sentence originally imposed [R.II. 35, 36, Court File No. 78-3022].

COUNTS II AND III

Respondent was retained by John C. Newman to represent him on various criminal charges including Possession of Marijuana, Conspiracy to Deliver Marijuana, Delivery of Marijuana, Felon in Possession of a Firearm, and Attempted Third Degree Murder [R.I. 189].

Mr. Newman stated that at the trial level he was induced to plead guilty on June 21, 1978 by Respondent due to certain statements of Respondent including the understanding that there would be an eighteen (18) month sentence [R.I. 191-192]. Subsequent to receiving various sentences totalling ten (10) years at the sentencing hearing on September 1, 1978, Respondent told Mr. Newman he would file motions within sixty (60) days to correct or reduce the sentence in accordance with Respondent's plea negotiations of eighteen (18) months [R.I. 195-196].

Later in the month of September, Respondent indicated to Mr. Newman that he had been busy but would be filing the Motion to Reduce Sentence [R.I. 196].

When no motion had been filed as of January 1979, and Respondent explained he had been too busy with other clients, Mr. Newman requested and Respondent agreed that if Mr. Newman filed a pro se motion, Respondent would represent him in any Court proceedings [R.I. 197]. Mr. Newman filed the pro se motion on January 2, 1979, which was denied on February 22, 1979 after a hearing which Mr. Newman testified Respondent

did not attend [R.I. 197, Court File No. 78-3217].

On May 27, 1979, Mr. Newman filed a pro se Motion to Vacate Sentence and Set Aside Judgment which was denied on May 31, 1979. (Court File No. 78-3217, R.I. 197, 198]. Respondent alleges that he did attend a hearing on one of Mr. Newman's pro se Motions pursuant to a request from Mr. Newman. On June 1979, Mr. Newman filed a complaint with The Florida Bar complaining of Respondent's lack of diligence in his representation of Mr. Newman [R.I. 199]. Pursuant to the complaint being filed, Mr. Newman testified that Respondent told Mr. Newman that if he would withdraw his grievance, that Respondent would work on the case within thirty (30) to sixty (60) days [R.I. 199]. Accordingly, Mr. Newman wrote The Florida Bar on July 17, 1979 requesting The Florida Bar to withdraw his complaint [R.I. 199, 202].

After being unable to communicate with Respondent, Mr. Newman refiled his complaint with The Florida Bar and on September 24, 1979, he filed a Motion with the Court to dismiss Respondent. The Motion for Discharge was set for October 11, 1979. The day before the hearing, Mr. Newman testified that Respondent visited Mr. Newman at the County Jail and requested that if he would drop the grievance that he would straighten out the case. Mr. Newman testified that based upon representations by Respondent that he would file motions within thirty (30) days to sixty (60) days, the Court dismissed his Motion to Discharge Respondent [R.I. 200].

Although Respondent denied that he was representing Mr. Newman during the instant time period, Respondent did admit that he did attend a hearing on a Motion that Mr. Newman had filed pro se [R.I. 80, R.II. 75], that he recalled a conversation with Mr. Newman pursuant to Mr. Newman's Motion for Discharge of Respondent prior to Mr. Newman withdrawing his Motion to Discharge Respondent as his attorney [R.I. 82-83], that he may have received letters from Mr. Newman [R.II. 78], that he visited Mr. Newman at the Polk City Correctional Institute [R.II. 73], and that he flew to Tallahassee, Florida and argued on Mr. Newman's behalf before the Parole Board. [R.I. 200, R.II. 78].

In December 1979, Mr. Newman dismissed Respondent as his attorney [R.I. 200].

During Mr. Newman's incarceration, Kathleen Mast, a former girlfriend of Mr. Newman's brother, visited the Respondent at his office at the request of Mr. Newman and his brother to inquire if Respondent was going to take any of the actions he had said he would do on their behalf [R.II. 51]. Kathleen Mast testified that Respondent told her at that meeting that "its no family secret that Johnny has given information to the State, which has now been proven about ninety percent (90%) effective ..." [R.II. 51, 54]. Kathleen Mast did hear rumors from friends that Mr. Newman had cooperated with the Police, but was unsure whether she had heard them before or after Respondent divulged the information to her at his office [R.II. 56, 58].

Kathleen Mast testified that she had never been told that information previously by Mr. Newman, and when she sought to confirm the fact, Mr. Newman did not waive the attorney client privilege concerning his confidential informant cooperation and denied working with the police [R.I. 229, R.II. 61]. Mr. Newman testified that the only three people, besides the Police Department, that knew he was working with the State were Respondent, Mr. Newman's wife, and Mr. Newman himself [R.I. 221]. Mr. Newman testified that he never gave Respondent permission to divulge his cooperation with the Tampa Police Department to Kathleen Mast and that she had no business knowing that information, [R.I. 222, 225]. Mr. Newman testified that he was apprehensive about the leak of his cooperation as an informant with the Tampa Police Department getting out to the general population at Polk Correctional Institution because it might result in physical harm to him [R.I. 221, 226]. Mr. Newman verified the fact that Kathleen Mast visited him and confronted him with the fact that Respondent had told her in his office that Mr. Newman was working with the Police Department [R.I. 229].

FIRST POINT INVOLVED

THE REFEREE'S FINDING OF GUILT AS TO COUNT I IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

ARGUMENT

After hearing the testimony, observing the demeanor of the witnesses, and reviewing the documentary evidence submitted, the duly appointed Referee found there was clear and convincing evidence of Respondent's violation of The Florida Bar Code of Professional Responsibility, Disciplinary Rule 1-102(A)(6) (A lawyer shall not engage in any other conduct which adversely reflects on his fitness to practice law); DR 6-101(A)(3) (Neglect of a legal matter entrusted to him); and DR 7-101(A)(2) (Failure to carry out a contract of employment entered into with a client) based on the following findings of facts:

> (1) That on or about February 27, 1979, Respondent was retained by Mr. Ronald J. Harper for $5,000.00 to file a Motion for Post Conviction Relief, which Respondent failed to file until September 3, 1980.
>
> (2) At a 13A Grievance Committee hearing on January 15, 1980, which was held pursuant to a letter Mr. Harper sent to The Florida Bar in June 1979, complaining of the lack of action by Respondent, Respondent told the committee that he intended to fulfill his obligation to represent Mr. Harper in a timely and competent manner.
>
> (3) Even after his appearance before the committee, Respondent failed to file any Motion for Post Conviction Relief, and on August 16, 1980, Mr. Harper wrote Respondent dismissing him as his attorney in the Post Conviction proceeding.

(4) Only after having been dismissed as Mr. Harper's attorney on September 3, 1980, did Respondent file the Motion for Post Conviction Relief for Mr. Harper.

This Honorable Court has repeatedly held that the "...fact finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence." The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). See also The Florida Bar v. Wagner, 212 So.2d 777 (Fla. 1968) and The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

There is ample evidence to sustain the Referee's finding as to Disciplinary Rules 1-102(A)(6), DR 6-101(A)(3), and DR 7-101(A)(2). In The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979) the Court held that failure to reply to The Florida Bar's request for admissions constituted an admission of the matter requested to be admitted. Since The Florida Bar's Request for Admissions filed in this matter tracked every factual allegation of the complaint and since the Referee ruled that Respondent's response to the Request for Admissions was untimely and the Referee granted The Florida Bar's Motion for Order Deeming Matters Admitted, the Referee's factual findings on the complaint are legally sufficient by virtue of both the testimony and evidence at trial and the Order Deeming Matters Admitted.

(1) DISCIPLINARY RULE 1-102(A)(6) (ENGAGE IN ANY OTHER CONDUCT THAT ADVERSELY REFLECTS ON HIS FITNESS TO PRACTICE LAW).

Respondent's brief incorrectly states that Disciplinary Rule 1-102(A)(6) "...is parasitic in that it cannot exist without a finding of some other specific violation of the Code." [Respondent's Initial Brief at 10] The term "other conduct" as used in DR 1-102(A)(6) does not refer to a requirement of a finding of another specific violation of the Code, but rather directly refers to "any other conduct" not covered in DR 1-102(A)(1) - (5) that "adversely reflects on his fitness to practice law."

The record is replete with clear and convincing examples of conduct by Respondent that adversely reflects on his fitness to practice law, i.e., his promise to the grievance committee on January 15, 1980 that he intended to fulfill his obligation to represent Mr. Harper in a timely and competent manner after he had been retained for almost a year without filing the Motion for Post Conviction Relief which he did not file until over six (6) months later, and then only after Mr. Harper had already dismissed him; the fact that Respondent promised the grievance committee on January 15, 1980, that he would send a statement to Mr. Harper detailing what he had done on his behalf which letter Respondent could not document or recall ever having written [R.II. 22]; and that after Mr. Harper filed a pro se Motion early in 1980 after no action

from Respondent in nearly a year, Respondent talked Mr. Harper into moving for a continuance or withdrawing the pro se Motion in exchange for his promise to expedite the filing of the Motion for Reduction of Sentence (which motion was not filed until eight (8) months later) [R.I. 242, 243; R.II. 25].

(2) DISCIPLINARY RULE 6-101(A)(3) (NEGLECT OF A LEGAL MATTER ENTRUSTED TO HIM).

Respondent's attempt to side step the obvious neglect in the eighteen (18) months it took Respondent to file the Motion for Reduction of Sentence under all the circumstances is interesting. Respondent attempts to argue that the fact that it took Respondent eighteen (18) months to file the Motion is excused because it took eight (8) months for the (substitute) counsel to "have the Motion for Post-Conviction Relief heard (emphasis added)". This is a fallacious "strawman" argument, since it took Respondent eighteen (18) months to file the motion, and it took substitute counsel less than eight (8) months to do all of the following: file the motion to assume representation; motion the Court to withdraw Respondent's original Motion for Post-Conviction Relief; file the new motion for Post Conviction Relief; have the motion set for evidentiary hearing where testimony was taken; motion the Court for a re-hearing after the Court

originally denied the motion in its entirety; and hold a re-hearing wherein the Court granted Post-Conviction Relief in part by removing a retention of jurisdiction provision from the sentence. [R.II. 35, 36, Court File File No. 78-3022].

Respondent's attempt to create a "smokescreen" defense for the delay is obviously an attempt to conveniently overlook the following facts and circumstances which clearly make Respondent's eighteen (18) months delay in filing the motion inexcusable neglect:

a. Respondent received $3,000.00 from Respondent on February 27, 1979 which was sixty percent (60%) of the requested $5,000.00 fee to represent Mr. Harper. Mr. Harper was sentenced on September 29, 1978 and had written Respondent several letters from December 1978 through January 1979 requesting to retain Respondent's services for Post Conviction Relief [R.I. 232, 233].

b. Respondent was put on Notice of Mr. Harper's concern about the lack of action as early as June 1979 when Mr. Harper filed a complaint with The Florida Bar after Respondent's failure to keep appointments, and failure to take discernable action after having allegedly promised in March 1979 to have the case completed within ninety (90) days. [R.I. 234, 235].

c. In July 1979, at Respondent's request, Mr. Harper sent a thirty-five (35) page letter detailing his knowledge of the facts of his case and at Respondent's request a second check for $1,500.00 towards Respondent's fee. Over one year after having received the thirty-five (35) page detailed statement and $4,500.00, Respondent still had not filed the Motion [R.II. 236-238].

d. The Hillsborough County Criminal Court File in Case No. 78-3022, which was introduced into evidence at the hearing, indicated that Respondent sent letters inquiring about any motions filed by Respondent filed on August 14, 1979, and September 5, 1979. The August 10, 1979 letter, filed August 14, 1979, bore a note from the Clerk of the Court that "Attorney Fussell saw the letter in the Clerk's office and notified us that he will ask for the letter for the Defendant this August 28th of 1979". [R.II. 26]. At the hearing, Respondent admitted that he knew Mr. Harper was inquiring about his filing a motion, and that he advised the Clerk's office that he knew that Mr. Harper was concerned and that he was working on it [R.II.26].

e. The court file in Case No. 78-3022 contains a letter from Mr. Harper to the Honorable C.J. Cheatwood, Circuit Judge, dated January 5, 1980, and filed January 8, 1980, complaining about Respondent's inaction, which bears a notation reflecting that a copy of the letter was sent to Respondent.

f. Between June 1979 and January 1980, Respondent knew Mr. Harper's complaint was pending with The Florida Bar and on January 15, 1980, Respondent appeared before a Hillsborough County Grievance Committee 13A and promised to fulfill his obligation to represent Mr. Harper in a timely and competent manner and to send Mr. Harper a detailed statement of his actions on his behalf. [R.I. 239, 240, R.II. 22].

g. In February 1980, after Mr. Harper had filed a pro se motion that was set for hearing, Respondent talked Mr. Harper into moving for a continuance or withdrawing the pro se motion in exchange for his promise to file the motion. [R.I. 242, 243, R.II. 25].

h. Mr. Harper sent a letter dated August 16, 1980 to the Clerk of the Court, Respondent and The Florida Bar giving notice of his dismissal of Respondent and requesting an accounting of the over $5,000.00 paid to Respondent for fees and costs. Although a copy of the

letter to the Clerk is in the court file, Respondent claims he somehow never received it [R.I. 246, 247, R.II. 27]. It is notable that within two weeks of Mr. Harper's letter dismissing Respondent, and asking for an accounting of the funds, Respondent wrote to Mr. Harper that he had filed the Motion for Post Conviction Relief on August 29, 1980; although it was not actually filed until September 3, 1984 [R.II. 27].

(3) DISCIPLINARY RULE 7-101(A)(2) (A LAWYER SHALL NOT INTENTIONALLY FAIL TO CARRY OUT A CONTRACT OF EMPLOYMENT).

After reviewing the above efforts by Mr. Harper, the Clerk of the Court, and The Florida Bar to encourage, prod and persuade Respondent to carry out his contract of employment with Mr. Harper to file the necessary Post Conviction Motion, the totality of Respondent's lack of action rises above mere neglect and even gross neglect, to a level of intentional behavior. Although denied by Respondent, other independent evidence in the Court file supports Mr. Harper's sworn testimony relating Respondent's string of broken promises, lack of significant action, lack of documentation, failure to communicate with his cleint, and failure to carry out a contract of employment after receiving thousands of dollars from Mr. Harper. The overwhelming evidence clearly indicates a course of intentional, rather than just neglectful conduct by Respondent. Additionally, the Referee, as trier of fact, was able to observe the tone and attitude

of Respondent's demeanor and Respondent's lack of candor, remorse or even acknowledgment of any accountability. The trier of fact correctly concluded that Respondent's actions, as well as his inaction, in the instant matter clearly and convincingly demonstrated Respondent's intentional failure to carry out his contract of employment with Mr. Harper.

In Respondent's closing paragraph on Count I, it is argued that "Mr. Harper suffered no prejudice as a result of Respondent's alleged misconduct." [Respondent's Initial Brief at 10]. Initially, it is submitted that prejudice or lack of prejudice to a client is not a necessary element of any of the Disciplinary Rules cited by the Referee in his findings in Count I. Secondly, it is submitted that Mr. Harper was indeed prejudiced by both Respondent's actions and inaction.

The fact that Mr. Harper paid $4,500.00 in attorney fees for a motion that was not filed for over eighteen (18) months while Mr. Harper was incarcerated and in desperation writing letters to Respondent, the Clerk of the Court, Judges, and The Florida Bar, clearly demonstrates financial and emotional prejudice. The fact that Mr. Harper paid Respondent $4,500.00 in attorney fees for a motion that was filed more than two (2) weeks after Mr. Harper had sent a letter dismissing Respondent as his attorney and requested an accounting of the fees paid (which Respondent never provided), obviously unfavorably impacted upon Mr. Harper.

SECOND POINT INVOLVED

THE WEIGHT OF THE EVIDENCE DOES SUPPORT THE REFEREE'S FINDING IN COUNT II THAT RESPONDENT DISCLOSED A CONFIDENCE OR SECRET OF JOHN NEWMAN IN VIOLATION OF DISCIPLINARY RULE 4-101(B)(1).

ARGUMENT

After hearing the testimony and observing the demeanor of the witnesses the Referee found there was clear and convincing evidence of Respondent's violation of The Florida Bar Code of Professional Responsibility, Disciplinary Rule 4-101 (B)(1) based upon the following findings of facts:

> (1) On or about December 1977, Respondent agreed to represent Johnny C. Newman in criminal case No. 78-3217 in the Circuit Court for Hillsborough County.
>
> (2) During the course of this representation, Respondent learned that Mr. Newman had cooperated with the Tampa Police Department by supplying information to them.
>
> (3) Respondent, without the consent of his client, divulged the fact that Mr. Newman had supplied confidential information to Tampa Police Department to Kathleen K. Mast, a former girlfriend of Mr. Newman's brother.

At the final hearing in this matter, Kathleen K. Mast testified as follows:

> Q. (By Mr. Rushing) When you were at this meeting with Mr. Fussell with his father present, you think in the afternoon, what conversation, best you can recall, did you have with Mr. Fussell and what did he say to you?

A. Okay. He used the words "it's no family secret" that Johnny has given information to the State, which has now proven about ninety percent (90%) effective, and I can't remember word for word. I do know that that was what he had said, and I knew I was shocked when I heard it.

Q. Had you ever been told that from Mr. Newman prior to that?

A. No.

Q. His brother?

A. No, his brother doesn't even know. (R.II. 51-52]

* * * *

THE WITNESS: The only reason I repeated what Fussell said was because I wanted to know why, if it was no family secret, why no one told me. [R.II. 59].

Respondent argues that "the Referee based his findings of guilt solely on the uncorroborated testimony of Kathleen K. Mast." Although the trier of fact certainly has the capacity to make findings of fact based upon the believed, yet uncorroborated testimony of a witness, Kathleen K. Mast's testimony was not uncorroborated as evidenced by the following testimony of John Newman:

Q. (By Mr. Rushing) Now, where were you located during the time that you were helping the Police in these matters?

A. (By Mr. Newman) I was at Polk Correctional Institution, and they brought me back on two occasions to Hillsborough County.

Q. Was there any apprehension in your mind that if it got out to the general population at Polk, that it might endanger you?

A. Most definitely.

Q. Did you tell anybody up there what was going on?

A. Absolutely not. In fact, there were only three people other than the Police Department themselves, me and my wife and Mr. Fussell, that knew about it.

Q. Did you want anybody else to know about it?

A. No. If I did, I would have broadcast it.

Q. Did it come to your attention that someone else did learn about it?

A. Yes, it did.

Q. Who was that?

A. Katherine Mast.

Q. Did you ever give anybody permission to tell her that you cooperated with the police in giving them information?

A. No, I didn't.
[R.I. 221, 222].

* * * * *

Q. Did Mr. Fussell have your permission or consent to relate those facts to Kay Mast?

A. No.

Q. Kathleen K. Mast?

A. No.
[R.I. 222]

Mr. Newman's genuine fears and obvious reasons for not wanting anyone other than his wife and his attorney to know that he was working as an informant with the Tampa Police

Department while incarcerated in the State Prison are pointedly underlined by the following testimony of Mr. Newman:

> Q. (By Mr. Moore) Okay. Mr. Newman, you indicated that Mr. Fussell had disclosed some information which was confidential.
>
> A. Yes, I did.
>
> Q. Exactly what information did he disclose?
>
> A. The information he disclosed was the fact that he was working as a confidential informant with the Tampa P.D. to my brother's girlfriend who had no business whatsoever knowing.
>
> Q. Now, was there anything more specific than that?
>
> A. It doesn't have to be more specific. [R.I. 225].
>
> * * * *
>
> A. The fact that-- again I will make the statement-- I was working as an informant for the Tampa Police Department.
>
> Q. Is that all?
>
> A. That's enough. It could have got me killed.
>
> Q. Is that all? [R.I. 226]

Mr. Newman's continuing desire to keep any information of his cooperation with the police confidential, even after he learned Respondent had divulged his secret to Kathleen Mast, is demonstrated by Mr. Newman's reluctance to disclose

the details of the communication in his initial letter to The Florida Bar [R.I. 226] and his refusal to confirm the veracity of Respondent's disclosure when confronted by Kathleen Mast:

> Q. Did you discuss the alleged revealing of information by Mr. Fussell with Johnny Newman?
>
> A. Excuse me?
>
> Q. Did you ever discuss with Johnny Newman what you said Mr. Fussell told you?
>
> A. Yes, I did.
>
> Q. Did he admit that he was working with the police or deny it?
>
> A. No, he denied it. [R.II. 59, 60]

Although Respondent denied divulging Mr. Newman's confidential informant activities with the Tampa Police Department to Kathleen K. Mast, Respondent did corroborate the allegations of his knowledge of Mr. Newman's cooperation with the State; he further confessed that he had met with Kathleen K. Mast in his office and had discussed Mr. Newman's case with her [R.II. 75, 76]. Additionally, it should be noted that Respondent's trial counsel introduced an affidavit into evidence from Kathleen K. Mast which corroborated her testimony at trial concerning the disclosure of Mr. John Newman's cooperation with the police to her by Respondent. [R.II. 57, 58]. Although Kathleen K. Mast was unsure when she had heard rumors or speculation from friends that John

Newman was working with the police in relation to Respondent's disclosure to her, the fact that Kathleen K. Mast may have heard rumors or speculation on this matter from other people does not excuse Respondent's confirming the fact to her without his client's consent.

Respondent tacitly admits the weakness of his own argument, i.e., that the weight of the evidence did not support the Referee's finding that Respondent disclosed a confidence or secret, by submitting the "fall back" argument that "...any disclosure was understandable, unwitting, and without prejudicial effect to Mr. Newman." (Respondent's Initial Brief at 13).

Kathleen K. Mast was not family, she was only a girlfriend of John Newman's brother. Secondly, it is clear from the record that John Newman did not want her to know about his confidential informant activities and never gave Respondent permission to so inform her. [R.I. 221, 222, 225]. Thirdly, the potential for prejudice was evidenced by the fact that after receiving confidential information from Respondent, Kathleen Mast proceeded to so inform Mrs. Newman, John Newman's mother [R.II. 59] and to confront John Newman [R.II. 59-60]. Finally, the fact that Respondent's disclosure may have been "unwitting" would not eliminate or mitigate the danger to which Mr. Newman would be exposed if other inmates in the prison system learned that he was a police confidential informant while in prison.

THIRD POINT INVOLVED

THE REFEREE'S RECOMMENDATION OF GUILT AS TO COUNT III SHOULD BE ACCEPTED BASED UPON THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

ARGUMENT

After hearing the testimony, observing the demeanor of the witnesses, and reviewing the documentary evidence submitted, the trier of fact found there was clear and convincing evidence of Respondent's violation of The Florida Bar Code of Professional Responsibility, Disciplinary Rule 1-102(A)(4) (Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); DR 6-101(A)(3) (Neglect a legal matter entrusted to him); and DR 7-101(A)(2) (Failure to carry out a contract of employment entered into with a client for professional services), based upon the following findings of fact:

(1) That on or about September 1, 1978, Respondent assurred Mr. Newman that he would file a Motion for Reduction of Sentence.

(2) After no action from Respondent, Mr. Newman filed a pro se Motion for Reduction of Sentence on January 2, 1979, which was denied.

(3) After respondent had taken no action on filing the Motion for Reduction of Sentence, Mr. Newman filed another pro se Motion to Vacate and Set Aside the Judgment on or about May 29, 1979 which was denied.

(4) On or about June 26, 1979, Mr. Newman initiated a complaint with The Florida Bar against Respondent for his lack of action in the matters.

(5) After Respondent had taken no substantial action in the case, Mr. Newman dismissed Respondent from the case on September 20, 1979.

(6) No Motion for Reduction of Mr. Newman's sentence was ever filed by Respondent.

In his brief, Respondent alleges that "the total evidence presented at trial against Respondent in Count III was the testimony of the complainant." (Respondent's Initial Brief at 14). However, it is clear that evidence was presented and corroborated from numerous witnesses, court documents, and exhibits.

Respondent also argues that the record does not show that (a) Respondent was entrusted with a legal matter by John Newman and (b) that Respondent neglected the matter. It is clear from John Newman's testimony that he believed Respondent was his attorney and that he had entrusted Respondent with the legal matter of filing and assisting with a Motion for Reduction of Sentence on behalf of Mr. Newman.

Initially, it is clear that Respondent represented John Newman and his brother at the trial level [R.I. 189], received a fee to represent Mr. Newman [R.I. 190], entered the plea for John Newman on June 21, 1978 and was present at his sentencing on September 1, 1978 [R.I. 195]. Mr. Newman testified that he changed his plea on the morning of trial based upon

Respondent's representation that he would receive an eighteen (18) month prison sentence with probation up to a maximum "cap" of fifteen (15) years. [R.I. 191-192].

At the sentencing John Newman received various concurrent sentences totalling ten (10) years in prison, which was obviously considerably more severe than the eighteen (18) month prison sentence Respondent had indicated he would receive at the time John Newman was induced to enter his plea. John Newman testified that immediately after receiving the expanded sentence he asked Respondent about it and Respondent told Mr. Newman that he would talk to him about it later that afternoon at the County Jail. At that meeting, Respondent assured Mr. John Newman that he would be "...filing motions to get the plea negotiations straightened out 'cause [Mr. Newman] was to receive eighteen (18) months." [R.I. 196].

John Newman testified that Respondent represented that he would be filing a Motion to Reduce Sentence within sixty (60) days. [R.I. 196]. On a subsequent conference at the medical center later in September, Respondent again assured John Newman that he had been busy but would be filing the motion. [R.I. 196]. When no motion had been filed by Respondent as of January, 1979, John Newman contacted Respondent again, and was again told by Respondent that he had been busy but would file the motion as soon as possible. At this time, John Newman asked Respondent if he would represent him in

Court if he filed a pro se motion, and Respondent agreed to the representation [R.I. 196-197]. John Newman filed a pro se Motion for Reduction of Sentence on January 1, 1979 which was denied on February 22, 1979 [Court File Case No. 78-3217]. John Newman testified that he called Respondent from prison on several occasions and spoke with him about the matter [R.I. 197-198]. John Newman filed a pro se Motion to Vacate Sentence and Set Aside the Judgment on May 29, 1979, which was denied on May 31, 1979 [Court File Case No. 78-3217].

In June or July of 1979, John Newman complained to The Florida Bar of Respondent's neglect and broken promises, and Respondent's divulging of client confidences concerning his post conviction relief representation. After filing the complaint, John Newman testified that Respondent assured him that he would proceed with his post conviction relief within thirty (30) to sixty (60) days, if John Newman would withdraw his grievance. [R.I. 198-199]. After the matter was referred to Hillsborough County Grievance Committee 13A on September 27, 1979, and John Newman had a Motion to Discharge Respondent as his attorney set for hearing on October 10, 1979, respondent met with Mr. Newman at the jail and assured John Newman that he would "get the whole thing straightened out" if John Newman would "drop the charges of the grievance with The Florida Bar". [R.I. 199]. At the hearing before

the Honorable Richard A. Miller, Circuit Judge, John Newman was accompanied by Respondent and announced that he was withdrawing his Motion for Discharge of Attorney because he had reached an oral agreement with Respondent. Respondent confirmed that he would be filing Motions for Post Conviction within thirty (30) to sixty (60) days. [R.I. 199-200]. Subsequently, Respondent did go to Tallahassee and appeared on John Newman's behalf in an unsuccessful parole hearing [R.I. 200].

On direct examination at the hearing before the Referee, Respondent testified that he represented John Newman at the trial level, visited him at the Polk Correctional Institute with his wife, attended one of John Newman's pro se motions for Post Conviction Relief and argued unsuccessfully, and had talked to Kathleen Mast about John Newman's case [R.II. 72-77]. On cross-examination, Respondent further admitted the following: that they had an "attorney/client relationship with no money" since John Newman never paid him a retainer for the post conviction relief; that he flew at his own expense to Tallahassee to argue for John Newman before the Parole Board; that he conferred with the Tampa Police officers who were using John Newman as an informant and requested letters from them in John Newman's behalf; that John Newman had in effect, requested his representation in certain legal matters; that he did meet with John Newman prior to the hearing set on

John Newman's pro se Motion to Discharge Respondent as his attorney and did agree to help, whereupon John Newman withdrew his Motion to Discharge; and that he had telephoned John Newman in prison on several occasions [R.I. 77-87].

At the hearing, Valerie Madurski, John Newman's ex-wife, was called by Respondent and testified to facts which corroborated Respondent's having been entrusted with the legal matter of obtaining Post Conviction Relief for John Newman. Ms. Madurski testified to the following: that in January or February of 1977 she visited her then husband John Newman in prison at which time John Newman disclosed his role as a confidential informant to Respondent [R.II. 2]; that Respondent agreed to represent her as her attorney on several legal problems without charge based upon a request to Respondent by John Newman [R.II. 67-68]; and that at John Newman's request she had John Burgess of the Tampa Police Department meet with Respondent [R.II. 70-71].

Finally, Respondent alleges that he did not neglect a legal matter in his representation of Mr. Newman's post conviction relief efforts because the Disciplinary Code does not set a precise length of time that inaction becomes neglect. Fla. R. Crim. P. 3.800(b) mandates that any Motion for Reduction or Modification of Sentence be filed within sixty (60) days after the imposition of a legal sentence where no appeal was filed, as in the instant matter. Since John Newman was

sentenced on September 1, 1978, and Respondent never filed any Motion for Reduction or Modification of Sentence on his behalf, it is clear that Respondent neglected the matter. [R.I. 195-196].

Although a Motion to Vacate, Set Aside or Correct Sentence pursuant to Fla. R. Crim. P. 3.850 may be filed at any time, it is clear that Respondent took no substantial action while representing John Newman on Post Conviction matters from September 1, 1978, when John Newman was sentenced, through October 11, 1979, when Respondent appeared with John Newman at the hearing on the pro se Motion for Discharge of Respondent. [R.I. 195, 199, 200] In fact, Respondent admitted that as of the October 11, 1979 hearing he had not done any investigation into John Newman's grounds for a motion pursuant to Fla. R. Crim. P. 3.850 [R.I. 82-83]. The fact that Respondent had been Mr. Newman's trial counsel and was aware of the underlying facts of the charges, plea and sentencing would indicate that the fact that he never filed for post conviction relief on John Newman's behalf was an inexcusable period of delay. The fact that Respondent never did any investigation during that first year of representation, despite telephone calls, letters, and meetings with Respondent, Mr. Newman's wife, the officer Respondent was cooperating with, and Mr. Newman's brother's girlfriend clearly demonstrates neglect of the legal matter entrusted to him.

Likewise, the Referee's findings as to Respondent's breach of DR 7-101(A)(2) (Failure to carry out a contract of employment entered into with a client for professional services), and DR 1-102(A)(4) (Engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) were shown from Respondent's lack of diligent effort on his client's behalf. Over a year after the sentencing and over six (6) months after John Newman had filed a grievance with The Florida Bar, Respondent had not conducted any meaningful investigation and never filed any motion on his client's behalf.

Respondent's misrepresentations and the resulting prejudice to his client are most pointedly clear in his failure to file a Motion for Reduction or Modification of Sentence within sixty (60) days of sentencing as he promised to do, his failure to appear at the hearing on his client's pro se Motion for Reduction of Sentence held on February 22, 1979 after assuring his client he would appear on his behalf, and his failure to file any Motion for Post Conviction Relief for his client after assuring John Newman that he would file the necessary Motions within the next thirty (30) to sixty (60) days for the purpose of having his client's otion for Discharge of attorney dismissed.

FOURTH POINT INVOLVED

THE REFEREE PROPERLY REFUSED TO RECUSE HIMSELF UPON THE MOTION OF RESPONDENT.

ARGUMENT

Respondent based his motion for recusal upon a statement made by the Referee at the close of a previous disciplinary hearing wherein the Referee had found Respondent not guilty and commented, to the effect, that he hoped he would have no further Bar complaints with Respondent. This simple, well-meaning pleasantry certainly does not establish any bias or prejudice on the part of the Referee whatsoever, much less, demonstrate legal sufficiency to show the degree of personal, extrajudicial bias so as to require recusal.

In Daytona Beach Racing and Recreational Facilities District v. Volusia County, 372 So.2d 417 (Fla. 1978) The Honorable Alan C. Sundberg, Justice of the Supreme Court, refused to recuse himself stating that there were "...no matters set forth in the suggestion for recusal reflecting on my inability to impartially consider the issues presented in this proceeding...".

In Demsey v. State, 415 So.2d 1351 (Fla. 1st D.C.A. 1982) the Court held that the motion to disqualify the trial judge was legally insufficient with the following language:

> First of all, the motion was technically deficient in that there was no certificate of counsel that the motion was made in good faith. Rule 3.230(b), Fla.R.Crim.P. Secondly, the facts set out in the motion and affidavits are insufficient to establish prejudice on the part of the judge against appellant. The documents stated that the trial judge had presided over two previous trials in which appellant had been the defendant and had in each case received verdicts of not guilty, and that the trial judge had shown anger and displeasure toward the appellant earlier that day when the appellant was held in direct criminal contempt because of appellant's appearance in court. For a trial judge to indicate anger and displeasure in a direct criminal contempt proceeding in which the defendant was found guilty does not in and of itself indicate that the trial judge is prejudiced against the defendant. The record in this case reflects that if the trial judge was angry and displeased prior to trial, it was caused by the defendant's conduct. Further, there is nothing in the record to reflect any prejudice of the trial judge during the trial and later proceedings. Id. at 1352.

Besides only having one affidavit attached, it should be noted that Respondent's motion was also legally deficient since it contained no certificate of counsel that the motion was made in good faith as required pursuant to Fla. R. Crim. P. 3.230(b). Secondly, the allegations do not sufficiently indicate that the trial court was prejudiced against Respondent. See also Yesbic v. State, 408 So.2d 1083 (Fla. 4th D.C.A. 1982) (Motion for disqualification of judge on ground of judge's prejudice against defendant's counsel and judge's actions in increasing defendant's bond based on evidence of defendant's threats against a state witness was legally insufficient and record did not justify alleged fear of prejudice)

expressed in the affidavits) and State ex rel Aguiar v. Chappell, 344 So.2d 925, 926 (Fla. 3d D.C.A. 1977) ("...bare allegations of prejudice should not suffice to require a judge from exercising jurisdiction.").

Finally, this matter has already been ruled upon by This Court in that Respondent filed a Petition for Writ of Prohibition and for Writ of Certiorari, Supreme Court Case No. 61,495, based upon the Referee's refusal to recuse himself in October 1981. Said Petition was considered and denied by this Honorable Court on December 15, 1981.

FIFTH POINT INVOLVED

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD BE ACCEPTED BY THIS COURT IN VIEW OF THE REFEREE'S DENIAL OF RESPONDENT'S MOTION FOR CONTINUANCE.

ARGUMENT

On the morning of the trial, Respondent, through Terrence Moore, argued for a continuance based upon the fact that his former attorney, B. Anderson Mitcham, was "...the victim of a heart attack within the past six weeks or so and that his doctor has forbidden him from engaging in any trial activity until January 30, 1983." [R.I. 5,6]

Mr. Moore also stated the following:

> As a matter of exigency, I have completely deserted everything else that I have been doing in the past week in order to prepare for this hearing and do not believe that I would violate Canon Six of the Code of Professional Responsibility by doing so, but do feel that under the circumstances and the serious consequence that could result from this hearing, Mr. Fussell should be entitled to a continuance in this cause so that he can obtain other counsel who have more expertise in these matters. [R.I. 9].

Counsel for The Florida Bar opposed the motion for the following grounds:

> MR. RUSHING: Your honor, the Bar would oppose the motion for continuance for several reasons. First of all, we were given these affidavits, but it was hand-delivered this morning just shortly before the hearing.

Additionally, the Bar has brought in an out-of-state witness from Oklahoma and has brought two prisoners over, one from ZCI, Zephyrhills Institute, one from Polk Correctional Institute.

We've subpoenaed numerous witnesses. This case has been continued several times. I believe the complaint was filed in May of 1981. The case is approaching two years old at this point at the referee level.

I've had conversations with Mr. Mitcham where he was aware that he was not going to be able to handle this case due to the heart attack he had back in early October. At that point Mr. Fussell should have been on notice to start seeking other counsel or at least exploring that with the Court. This was not done.

Mr. Mitcham contacted me around the first part of November or the first week or two in November with the problem. He indicated that he had spoken with the Court. The Court indicated that he had spoken with the Court. The Court indicated that it was not inclined at that time to grant a motion for continuance. This was known to Mr. Mitcham. It was relayed to Mr. Fussell and Mr. Moore.

I've spoken with Mr. Moore several times on the phone in the last week to ten days. He's come over to my office, even though discovery was not provided for within the -- this level of hearing, in Bar matters, I did give him access to the depositions that were-- that we had that were involved in the case and talked about the case.

He indicated that he has been with Mr. Fussell's firm two years. This case has been pending basically for two years in Bar matters. Mr. Moore testified to me that he's Mr. Fussell's right-hand man and he's familiar with the case and has been for some time.

So, I think that under all the circumstances that, first of all, Mr. Moore would be qualified to understand the issues. They're not that complex, I wouldn't submit. The fact that there are three together might make it a little bit more complex than just one case, but each case individually is not that complex.

> Second of all, a motion to sever could have been filed by Mr. Fussell at some time earlier if the complexity was a problem. This has not been done. [R.I. 10-12].

Generally, gross or flagrant abuse of the trial judge's discretion must be demonstrated before the reviewing Court will substitute its judgment for that of the trial Court. See Padgett v. First Federal Savings and Loan Association of Santa Rosa County, Florida, 378 So.2d 58 (Fla. 1st D.C.A. 1979) (Refusal to grant motion for continuance, which was filed one day before trial and which was based on claim that owner's substitute counsel had not had time to properly prepare for trial was not abuse of discretion under the circumstances); Smith v. Hamilton, 428 So.2d 382 (Fla. 4th D.C.A. 1983) (Denial of motion for continuance was not abuse of discretion where counsel waited until commencement of trial to move for continuance after trial court had first set the case for trial six months earlier); and Kasper Instruments, Inc. v. Maurice, 394 So.2d 1125 (Fla. 4th D.C.A. 1981) (Granting of continuance within sound discretion of the trial court and will not be disturbed absent a clear showing of gross or flagrant abuse).

Respondent moved for a continuance by motion filed October 29, 1981, which was granted. The second hearing date of March 29, 1982 was continued on motion by complainant. Respondent's second Motion for Continuance was heard on November 24, 1982 and denied. In Wash-Bowl, Inc. v. Wroton, 432 So.2d 766 (Fla. 2d D.C.A. 1983) the Court

held there was no error in the trial Court's failure to grant their motion for a third continuance since the granting of a continuance is a matter of discretion with the trial judge and "...especially since second and third continuances are looked on with disfavor." Id at 767. (See also McWhorter v. McWhorter, 122 So.2d 504 (Fla. 2d D.C.A. 1960).

Respondent cited Ford v. Ford, 8 So.2d 495 (Fla. 1942) which can be distinquished in that the case involved a continuance via telegram due to the fatal illness of counsel's sister which situation arose immediately prior to the hearing. There the Court held that it did not appear that a continuance would have caused any inconvenience to the defendant and the case had been pending for almost three years. In the instant matter Respondent had ample notice that there would be difficulty with his former attorney representing him due to the heart attack which occurred approximately six weeks before the hearing, the motion was not in the Referee's file at the hearing (although proportedly mailed two weeks before the hearing), the Referee had previously orally indicated early in November that he was not inclined to grant a Motion for Continuance under the circumstances, the motion was not brought up for hearing until the day of the trial, and Respondent had a capable, prepared substitute counsel present.

Additionally, the last minute continuance would have caused considerable inconvenience since there were several witnesses present, with one having been flown to the hearing from Oklahoma, and two others having been transported by order of the Referee from two different State Correctional Institutions, employing various accompanying security measures and attendant Sheriff's officers.

Likewise, Diaz v. Diaz, 258 So.2d 37 (Fla. 3d D.C.A. 1972) and Western Union Telegraph Co. v. Suit, 15 So.2d 33 (Fla. 1943) deal, respectively, with sudden, unexpected illness the day before the trial date, and a "due process of law question" where neither the defendant nor the attorney had received notice that the case was being called for trial and the attorney, who was sick at home, got dressed and went to the courthouse after the trial had concluded.

SIXTH POINT INVOLVED

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD BE ACCEPTED BY THIS COURT DESPITE DELAY IN PROSECUTING RESPONDENT.

ARGUMENT

Ronald Harper filed his complaint against Respondent with The Florida Bar in June, 1979. The processing of the case was delayed due to the fact that there were certain promises made to Mr. Harper by Respondent which caused Mr. Harper to write the Bar requesting to withdraw his complaint, and then reopen the case, when the promises were not kept by Respondent. The complaint was reopened on October 9, 1979 and was forwarded to Hillsborough County Grievance Commitee 13A on October 10, 1979. Delay resulted from the fact that the Grievance Committee delayed action since Respondent promised that he would continue to represent Mr. Harper and would file the necessary motions in a timely manner. After the motion was not filed until September 3, 1980, the Grievance Committee found probable cause on February 10, 1981. The complaint was filed May 19, 1981 with this Honorable Court.

John Newman filed his complaint with The Florida Bar on June, 1969. The processing of the case was delayed due to certain promises made to Mr. Newman by Respondent which caused Mr. Newman to write The Florida Bar requesting to withdraw his complaint, and then reopen the case when the promises were not kept.

The complaint was forwarded to Hillsborough County Grievance Committee 13A, and probable cause was found on January 13, 1981.

After the complaint was filed on May 19, 1981, Respondent filed a Motion to Recuse on September 1, 1981. On September 18, 1981, the Referee denied Respondent's Motion to Recuse. The Referee hearing was set for November 2, 1981. Respondent filed a Motion for Continuance on October 29, 1981, requesting a continuance of the hearing date due to the fact that he had filed a Petition for Writ of Prohibition with This Court seeking a review of the Referee's denial of his Motion to Recuse. The hearing was reset for March 29, 1982. On March 23, 1982, Counsel for Complainant moved for a continuance due to the counsel of record leaving the employ of The Florida Bar. Subsequently, a Joint Stipulation of Facts was entered on April 19, 1982 between Respondent and Bar Counsel. On May 12, 1982, Mr. J. Bert Grandoff, Designated Reviewer for the Board of Governors, rejected the Stipulation of Facts and requested the matter proceed to hearing. On August 31, 1982, present Bar Counsel entered his Notice of Appearance. The hearing was set for November 24, 1982. A Motion to Continue was filed by Respondent and denied. The hearing was held on November 24, 1982. Final Arguments were made without a court reporter on December 29, 1982. The Sentencing hearing was held on December 5, 1983, and the Report of Referee recommending two-year suspension was forwarded on December 20, 1983. Bar Counsel was in

telephonic communication with Respondent's interim counsel and orally agreed to extend time limitations due to the necessity for review by the Board of Governors. The Referee Report was reviewed and approved by the Board of Governors at their March 1984 meeting. Bar Counsel notified Respondent's counsel of the approval by telephone on April 3, 1984 and by written notice on May 2, 1984.

On April 10, 1984, Respondent filed his Petition for Review and Motion for Extension of Time with certificate stating Bar Counsel had no objection. On June 8, 1984, Respondent filed a Second Motion for Extension of Time due to unlocated and untranscribed court reporter notes of the Referee hearings. Since it is evident that delay was incurred at least partly at Respondent's request or for Respondent's convenience at every level of the proceedings in this matter it is clear that the delay was not caused solely by The Florida Bar and does not warrant dismissal of the charges or mitigation of the Referee's recommended sanctions.

The approximate ten (10) month delay in the record for review coming to be available to Respondent should not be held against The Florida Bar since Respondent and his counsel were present at all the hearings and had equal access to the untranscribed court reporter notes which were not readily available. Secondly, in Respondent's Motion for Extension of Time forwarded June 8, 1984 it is acknowledged that "Counsel for The Florida Bar and Respondent's Counsel have used all due diligence in attempts

to obtain the referenced transcripts, however, to date these efforts have proven fruitless." The Florida Bar had no monopoly on the availability of or access to said transcripts.

Respondent's argument that the Referee's Report was filed approximately eleven (11) months late is misplaced. First, although the last day of testimony was December 8, 1982, closing arguments were held December 29, 1982, and sentencing was not held until December 5, 1983. Therefore, since the sentencing hearing was an essential stage in the proceedings, the Referee Report was not due January 8, 1983, but rather no sooner than January 5, 1984 (assuming the Referee had received all transcripts as of December 5, 1983). Since the Referee's Report was forwarded on December 20, 1983, within fifteen (15) days of the sentencing, there was no unreasonable delay in filing the Referee Report pursuant to Integration Rule 11.06 (9)(a).

Since any delay after the hearings of November 24, 1982 and December 8, 1982 could not be argued to prejudice Respondent's defense of the charges, Respondent argues alleged emotional, intangible prejudice. First, since much of the delay lies at the foot of Respondent, it is not reasonable to allow him to "bootstrap" his way out of facing the responsibilities of his own actions. Secondly, Respondent should not be heard to complain about any damage to his career because of the delay. Initially, since Respondent did not voluntarily resign pending

the outcome of this matter and has not served one (1) day of the recommended suspension, he has gained the benefit of being able to practice while the instant matters were pending, and certainly has not complained about the fees he has earned during the pendancy of this matter. Secondly, Respondent did not have an unblemished reputation to be damaged by publication of his conduct in these matters in light of his record of his previous six-month suspension in 1966 and his public reprimand in 1980.

The cases cited in which This Court mitigated the sanctions because of inexcusable Bar delay are readily distinguishable from the instant matter. In The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970), which involved a case in which seven (7) years transpired since the disciplinary process was set in motion and ten (10) years had passed since some of the alleged misconduct occurred, This Court found "unexplained unreasonable delays", and reduced the Board of Governors recommendation of discipline. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), involved offenses occurring in 1970 and 1971, with the grievance committee hearings being held in late 1973 and early 1974, and the hearing having been repeatedly postponed by The Bar for almost two years after the complaint was filed in 1974. This Court considered the inordinate delay caused by The Bar and the fact that Respondent had no previous record of any disciplinary activity in modifying the Referee's recommendation.

The Florida Bar v. Rubin, 263 So.2d 12 (Fla. 1978), is inapplicable since it involved a dismissal based on The Bar withholding a Referee's Report recommending a private reprimand, which it found too lenient, in order to develop additional cases to justify a more severe discipline under cumulative misconduct and The Bar issuing a press release before the time for the Respondent to appeal had elapsed. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) involves discipline of an attorney for misconduct occurring while the attorney held judicial office, where This Court refused to mitigate discipline on the basis of the delay.

SEVENTH POINT INVOLVED

IN VIEW OF THE PURPOSES TO BE ACCOMPLISHED BY DISCIPLINARY PROCEEDINGS, AND IN LIGHT OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES, THE REFEREE"S RECOMMENDATIONS OF DISCIPLINE SHOULD BE AFFIRMED.

ARGUMENT

Complainant would agree that as aggravating factors which may require more severe discipline, This Court may consider the existence of cumulative misconduct, The Florida Bar v. Rubin, Supra; The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980); Respondent's lack of candor in explaining his alleged conduct, The Florida Bar v. Kay, 232 So.2d 378 (Fla. 1970); Respondent's past disciplinary record, The Florida Bar v. Champlin, 222 So.2d 185 (Fla. 1966) and the gravity of the misconduct to be disciplined.

The Referee recommended This Court impose a two-year suspension upon Respondent based on the following aggravating and mitigating factors:

(1) Date Admitted to Bar: 1950
(2) Prior Discipline: The Florida Bar v. Fussell 189 So.2d 881 (Fla. 1966). Respondent received a six-month suspension and was ordered to pay costs for making a knowingly false statement in an application for a home improvement loan which resulted in a felony conviction. The Florida Bar v. Fussell, Case No. 13-73-25. A private reprimand was administered in 1974 for neglect of a legal matter. The Florida Bar v. Fussell, Case No. 13A78003; Respondent received a private reprimand in 1979 for influencing a client to invest in an enterprise in which the Respondent had an interest. The Florida Bar v. Fussell, 390 So.2d 69 (Fla. 1980); Respondent received a public reprimand for being several months late in returning

unearned fees to a former client.

(3) Mitigation: The wide spread of the violations over the years, Respondent's health problems, Respondent's testimony at the hearing as to his character and years of service.

Since Respondent had been previously given a six-month suspension in 1966, a private reprimand for neglect of a legal matter in 1974, a private reprimand in 1979, and a public reprimand in 1980 for being several months late in returning unearned fees to a former client, it was appropriate for The Court to aggravate the sanction to a period of suspension in light of Respondent's obvious failure to respond to the cumulative past disciplinary actions and the serious nature of the three separate counts of misconduct presently before This Court.

Despite Respondent's numerous lapses of memory and outright contradiction concerning the testimony of other witnesses and certain documentary evidence, Respondent claims that Respondent was at all times candid and cooperative with The Bar. Complainant objects to Respondent's introduction in Respondent's Initial Brief as evidence of Respondent's candor any reference to any rejected negotiated "...disciplinary plea for a 60-day suspension.", since evidence of an offer of a plea of guilty is inadmissable in any civil or criminal proceeding. See Metropolitan Dade County v. Wilkey, 414 So.2d 269 (Fla.3d D.C.A. 1982), and Section 90.410, Fla. Stat. (1983). Although Respondent's poor health is regretable, this factor has already been considered by the Referee in mitigation.

CONCLUSION

The Complainant respectfully requests that this Court adopt the Referee's Report as to the findings of misconduct and impose the recommended discipline of a two-year suspension from the practice of law and payment of costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complainant's Answer Brief has been furnished to SCOTT TOZIAN and DONALD A. SMITH, Attorneys for Respondent, Landmark Bank Building, 412 East Madison Street, Suite 909, Tampa, Florida 33602; JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, Tallahassee, Florida 32301; and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301; on this 4th day of December, 1984.

by mail

STEVE RUSHING