IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

WILLIAM T. FUSSELL,

Respondent.
_____/

CASE NO. 60,642

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

Count One in the case sub judice was originated by letter of complaint from Ronald Harper to The Florida Bar, and Counts Two and Three 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, Judge Allen C. Anderson, 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 and Petition 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, immediately 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 serious illness of Respondent's counsel, on November 22, 1982, Respondent requested a continuance of the referenced hearing, attaching affidavits from four attorneys who stated that insufficient time existed in which to prepare.

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, one year after final hearing, 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.

On May 2, 1983, over four months after filing of the Referee's report, Bar Counsel, Steve Rushing, informed Respondent of the Board of Governors' decision to approve the Referee's Report.

On May 10, 1984, Respondent filed his Petition for Review with this court; however, Respondent could not file his brief in support thereof due to The Florida Bar's failure to provide a complete record of the proceedings. Accordingly, 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. This court granted Respondent's Motion for Extension of Time and allowed Respondent fifteen days to serve his brief after completion of the record.

On October 17, 1984, counsel for The Florida Bar provided Respondent with the final transcript to complete the record.

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 years. [R.I. 233]. After a lengthy initial conference, Respondent determined that an insanity defense was viable for Mr. Harper. Respondent then undertook the task by consulting and employing three psychiatrists and one psychologist to examine Mr. Harper and provide other necessary assistance. [R.II. 8,11]. Between September, 1979, and July, 1980, Respondent had eleven meetings or conferences with the various doctors, the last of which occurred on July 9, 1980. [R.II. 11,12]. Additionally, Respondent hired Mr. Ray M. Green, a detective retired from the Tampa Police Department, to conduct an investigation designed to locate witnesses knowledgeable of Mr. Harper's mental condition. [R.II. 12,13].

On August 16, 1980, one month after the final conference with the doctors, Mr. Harper dismissed Respondent and hired substitute counsel to pursue his Motion for Post-Conviction Relief. [R.I. 246]. Respondent never received notice of his dismissal and therefore,

on September 3, 1980, filed a Motion for Post-Conviction Relief on behalf of Mr. Harper. [R.II. 27]. Thereafter, substitute counsel, with assistance from Respondent and utilizing Respondent's work product, refiled the Motion for Post-Conviction Relief which was denied on May 13, 1981, approximately eight months after new counsel was retained. [R.II. 35,36].

COUNTS II AND III

Respondent was retained by Johnny C. Newman to represent Mr. Newman 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]. Subsequent to entering a plea of guilty to the charges and receiving various sentences totalling ten years, Mr. Newman and Respondent discussed a possible Motion for Reduction of Sentence. [R.I. 193,195, R.II. 73]. During this discussion, with Mr. Newman's wife present, Mr. Newman informed Respondent that he had been cooperating with law enforcement officials and had received their assurances that such assistance could foster Mr. Newman's early release. [R.II. 74]. Respondent informed Mr. Newman that, should Mr. Newman be successful in obtaining letters from law enforcement outlining his cooperation, such letters would constitute a basis for seeking a modification of the sentences. [R.II. 74].

During Mr. Newman's incarceration, one Kathleen Mast visited the Respondent at his office to inquire of Respondent as to Mr.

Newman's cooperation with law enforcement. [R.II. 75]. Respondent informed Miss Mast that he had no such knowledge. [R.II. 76]. Miss Mast testified on direct examination that she initially learned of Mr. Newman's cooperation with law enforcement from Respondent and that she had not heard of his cooperation from any other source. [R.II. 51,54]. However, her later testimony revealed that Miss Mast heard of Mr. Newman's cooperation with law enforcement from friends of hers [R.II. 56] and, in fact, she admitted previously signing a sworn affidavit saying she had heard of Mr. Newman's cooperation prior to ever going to Respondent's office. [Def. Exh. 4]. Moreover, Miss Mast recanted her testimony on direct and said she could not be sure where she heard of the referenced cooperation first, but if the affidavit reflected she learned of the cooperation through her friends, she reasoned the affidavit must be correct as it was much closer in time to the events in question. [R.II. 58].

Neither Respondent nor Mr. Newman were able to obtain the letters from law enforcement Respondent deemed necessary to file a meritorious Motion for Modification. [R.II. 74,79,92].

Although Respondent felt he had no basis for a successful claim for post-conviction relief, he agreed to argue Mr. Newman's pro se motion which was thereafter denied. [R.II. 75]. Moreover, Respondent represented Mr. Newman at his parole hearing in Tallahassee. [R.I. 200].

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

THE REFEREE'S FINDING OF GUILT AS TO COUNT I IS NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The Referee recommended that Respondent be found guilty of violating Disciplinary Rules 1-102(A)(6), 6-101(A)(3), and 7-101(A)(2) of the Code of Professional Responsibility (hereafter Code) in Count I of the instant cause. [Referee Report at 3]. In order to sustain the Referee's findings and recommendations, this court must find that clear and convincing evidence existed to support the Referee. The Florida Bar v. Wagner, 212 So.2d 770 (Fla.1968). The Florida Bar v. McCain, 361 So.2d 700 (Fla.1978). However, the Referee's findings should be overturned if clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, supra.

The Referee's findings were predicated upon the testimony of a single prosecution witness, Roland James Harper. Mr. Harper was serving a fifty-year sentence for his conviction on the charge of First Degree Murder when he retained Respondent to represent him in a motion for post-conviction relief.

Respondent took approximately eighteen months to file the motion and, as a result thereof, the Referee recommended he be found guilty of, inter alia, neglect of a legal matter, pursuant to Disciplinary Rule 6-101(A)(3). The Referee made his recommendation without any expert testimony as to how long such a motion should properly take to prepare. Furthermore, substitute counsel was retained on August 16, 1980, and prepared his motion with

Respondent's assistance and utilizing Respondent's motion and work product. [R.I. 246, R.II. 35]. Respondent's work product included eleven (11) conferences with three psychiatrists and one psychologist and the report of Respondent's investigator. ([R.II. 11-15]. Despite the substantial assistance Respondent accorded substitute counsel, it nevertheless took eight (8) months for counsel to have the Motion for Post-Conviction Relief heard. [R.II.35,36].

We respectfully submit that, in the absence of expert testimony as to a reasonable time to file such a complex motion, and with the knowledge that it took substitute counsel eight (8) months to complete the job utilizing Respondent's motion and work product, there was a lack of clear and convincing evidence that Respondent neglected this matter.

The Referee also recommended that Respondent be found guilty of Disciplinary Rule 7-101(A)(2) which states "a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services . . " [Referee Report at 3]. However, the record is absolutely devoid of evidence of such a violation.

First, Mr. Harper's testimony was essentially inconclusive as to such a violation as his major complaint was that Respondent had not filed within the time frames Mr. Harper claimed were set by Respondent. [R.I. 234,236]. Respondent's failure to file within a

time satisfactory to his client may not be pleasing to his client, but it is not evidence of Respondent failing to carry out his contract of employment.

In fact, there was ample evidence introduced to the contrary. Respondent testified that he worked extensively on Mr. Harper's motion and introduced the motion into evidence as proof that he carried out his contract. Although Mr. Harper claims to have dismissed Respondent approximately two (2) weeks prior to Respondent filing his motion, there was no evidence that Respondent received notice of the dismissal, and Respondent testified that he did not. In any event, Respondent had performed the vast majority of the contractual obligation at the time of his dismissal and did not completely carry out his contract simply because his dismissal prevented him from so doing. It is suggested that the conduct of Respondent was not an "intentional" failure to carry out his contract as proscribed by Disciplinary Rule 7-101(A)(2), but simply a failure to satisfy his client.

Finally, the Referee recommended Respondent be found guilty of Disciplinary Rule 1-102(A)(6) [Referee Report at 3] which states "a lawyer shall not engage in any other conduct which adversely reflects on his fitness to practice law". It is respectfully submitted that Respondent's conduct in Count I was not violative of either of the previously referenced rules and is, likewise, not violative of Disciplinary Rule 1-102(A)(6). This rule has been

traditionally cited as a catch-all by The Florida Bar and is parasitic in that it cannot exist without a finding of some other specific violation of the Code. Obviously, any lawyer who has violated a specific Disciplinary Rule has arguably engaged in conduct which reflects adversely on his fitness to practice law. However, this rule standing alone does not put attorneys on notice as to what conduct is improper and therefore is impermissibly vague. Accordingly, as there was insufficient evidence to sustain the Referee's findings as to Disciplinary Rules 6-101(A)(3) and 7-101(A)(2), his recommendation as to Disciplinary Rule 1-102(A)(6) must also be rejected.

Parenthetically, it is important to note that Mr. Harper suffered no prejudice as a result of Respondent's alleged misconduct. Respondent painstakingly prepared the motion and thereafter assisted substitute counsel in preparing his motion. The motion was thereafter heard and denied. Candidly, had Respondent prepared this motion less diligently and more expeditiously, it is likely that Mr. Harper's complaint would have been that Respondent did not adequately prepare his motion.

THE WEIGHT OF THE EVIDENCE DID NOT 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).

In Count II, the Referee found that Respondent violated Disciplinary Rule 4-101(B)(1) of the Code of Professional Responsibility in that Respondent "without the consent of his client, divulged the fact that Mr. Newman had supplied confidential information to the Tampa Police Department to Kathleen K. Mast, a former girlfriend of Mr. Newman's brother". [Referee Report at 2]. The Referee based his finding of guilt solely on the uncorroborated testimony of Kathleen K. Mast. A close analysis of the record shows that Miss Mast's testimony is contradictory, inconclusive, and simply not worthy of belief.

Miss Mast, who had lived with Leroy Newman (brother of Complainant) since 1974, testified on direct examination that she went to Respondent's office with the Newmans' father to discuss the cases of John and Leroy Newman. [R.II. 51]. At that time, Miss Mast claimed that she was informed by Respondent that John had provided information to the State, ostensibly concerning criminal activity. [R.II. 51].

However, Miss Mast confused, diluted, and impeached her own testimony during her cross examination, wherein she admitted to having sexual relations with John Newman, who was married, while being romantically involved with Leroy Newman. [R.II. 53,54]. Furthermore, although Miss Mast initially indicated she had no

idea of John Newman's cooperation and was shocked to hear of it from Respondent, she later admitted to having previously signed an affidavit wherein she stated that she had heard that John Newman was working with the police prior to going to Respondent's office. [R.II. 54,56]. Moreover, in the referenced affidavit, Miss Mast claimed to have gone to Dover, Florida, to inform Mr. and Mrs. Newman of the information revealed by Respondent, contrary to her claim on direct examination that Mr. Newman was present in Respondent's office during the alleged disclosure. She further admitted she remembered who had initially informed her of the cooperation after being "reminded" of their names by Respondent's counsel. [R.II. 58].

Miss Mast's lack of candor during direct examination and the contradictions found in her sworn affidavit raise serious questions as to her credibility. Furthermore, Respondent pointedly denied divulging the information to Miss Mast and at no time did he revise and recant his recollection of the scene in his office, as did Miss Mast. Certainly, the totality of the evidence presented in this count is something woefully short of "clear and convincing evidence" of Respondent divulging a secret or confidence of a client. If anything, there is clear and convincing evidence of Miss Mast's aversion for telling the truth.

Assuming arguendo, that Respondent did divulge to Miss Mast that John Newman had cooperated with authorities, his conduct is not of the ilk which the rule in question seeks to prohibit.

First, Miss Mast was a live-in girlfriend of Leroy Newman who testified that she sat in on attorney-client conversations between John and Leroy Newman and Respondent at the correctional facility. [R.II. 61,53]. Furthermore, she claims to have gone to Respondent's office with the Newmans' father, at the request of both John and Leroy Newman. [R.II. 51]. It appears obvious from the record that Miss Mast was treated as family by the Newmans and thus it is understandable that, if Respondent divulged such information to Katherine Mast, Respondent had ample reason to believe that such information was safe with Miss Mast due to the position of trust she obviously enjoyed with the Newmans. Accordingly, even if this court finds Miss Mast's testimony to be "clear and convincing", which we respectfully submit is unthinkable, it appears any disclosure was understandable, unwitting, and without prejudicial effect to Mr. Newman.

In conclusion, whether Miss Mast's testimony is to be believed or not, there is lack of clear and convincing evidence that the Respondent has committed a breach of Disciplinary Rule 4-101(B)(1).

THE REFEREE'S RECOMMENDATION OF GUILT AS TO COUNT III SHOULD NOT BE ACCEPTED BASED UPON THE WEIGHT OF THE EVIDENCE ADDUCED AT TRIAL.

The Referee's recommendation of guilt should not be accepted as to Count III because the findings of fact are not supported by clear and convincing evidence and the facts do not support the conclusion of guilt for violations of Disciplinary Rule 1-102(A)(4), 6-101(A)(3), or 7-101(A)(2). The Florida Bar Code of Professional Responsibility, D.R. 1-102(A)(4), D.R. 6-101(A)(3), D.R. 7-101(A)(2).

The total evidence presented at trial against Respondent in Count III was the testimony of the complainant. The witness against Respondent is a convicted felon who was unable to have his sentence reduced or modified. This clearly indicates a motive for distorting the truthfulness of his relationship with Respondent. Additionally, the record indicates a substantial question as to whether or not Respondent appeared for his client at a hearing for a motion for modification filed by the client [RI. 217].

For the evidence to clearly and convincingly prove a factual matter, it must substantially outweigh a respondent's presumption of innocence. In fact, by definition, clear and convincing evidence is greater than a mere preponderance of the evidence. Accordingly, the testimony of a singular witness, acknowledged as a convicted felon, under circumstances where his own interests may be served by an allegation of incompetent representation, weighed against a specific denial and explanation by a member of The

Florida Bar, cannot withstand this evidentiary test. Therefore, without a sufficient evidentiary basis, the Referee's findings of fact do not support his recommendation of guilt.

Furthermore, the findings of fact do not support the Referee's conclusions of guilt because they fail to establish the essential elements of each Disciplinary Rule. Specifically, Disciplinary Rule 6-101(A)(3) prohibits an attorney from neglecting a legal matter entrusted to him. Therefore, for an attorney to be guilty of violating this rule, it must be proven that a legal matter was entrusted to him and that he neglected the matter.

The Referee found as fact that Respondent "assured" the client that a Motion for Reduction of Sentence would be filed. [Referee Report at 2]. He further found that the client filed a pro se motion to reduce the sentence and vacate the judgment. [Referee Report at 2]. Also, the Referee determined that the Respondent took no "substantial" action on the client's behalf and was subsequently dismissed by the client. [Referee Report at 3]. Finally, the Referee found as fact that Respondent never filed a post-conviction motion. [Referee Report at 3].

These facts fail to establish that any specific legal matter was entrusted to Respondent. Instead, the facts show that Respondent and his client merely discussed the filing of appropriate motions but reached no specific agreement. These facts do not establish the "entrustment" which the rule requires.

Furthermore, the testimony does not support the Referee's finding that Respondent neglected the legal matter. The evidence presented indicated that Respondent failed to act as expeditiously as his client would have liked.

However, neglect, if it is to be a test for punishment, should prohibit more than untimely action or mere inaction. Otherwise, any attorney who fails to act as quickly as his client wishes or as promptly as is humanly possible may be violating the Code. Furthermore, without a definition or standard as to what length of inaction constitutes a violation of the Code, no attorney is reasonably advised as to what lapse of time subjects him to disciplinary proceedings.

Also, to be a legal and meaningful disciplinary standard, "neglect" should prohibit a substantial and grave error which is a violation of our code of ethics. This prohibition should not be used as a substitute for a civil action. The Florida Bar v. Neale, 384 So.2d 1264 (Fla.1980).

Finally, just as an omission without damage is not negligence, untimeliness without harm is not neglect. Here, no evidence was presented and no finding of fact reached indicating that Respondent's failure to promptly file the motion resulted in any prejudice to his client. In fact, the client was ultimately awarded review by the courts without prejudice for any delay. The motion was

ultimately denied. Therefore, to accept this finding of fact is to establish the principle that inaction, for an undefined period of time, absent any harm or prejudice, is a violation of the Code of Professional Responsibility. Such a holding is not consistent with the mandates of the disciplinary rules, the standards of the ethical considerations, or the intent and spirit of the Code.

Disciplinary Rule 7-101(A)(2) prohibits an attorney from failing to carry out a contract of employment. Accordingly, in order for Respondent to be guilty of violating this disciplinary rule, the facts must prove that Respondent and a client entered into an employment contract for professional services and that Respondent failed to carry out that contract. Inherent in this prohibition against inaction is the obvious, but unstated, defense that should Respondent be unable to carry out his contract or be relieved from this responsibility, then he cannot be guilty of violating this rule.

Here, the Referee found that Respondent "assured" Mr. Newman that he would file a Motion for Reduction of Sentence. [Referee Report at 2]. There was no finding by the Referee of any contractual relationship, either verbal or written, between Respondent and the client. Furthermore, the Referee's findings of fact do not support his conclusion that Respondent failed, due to his own volitional inaction, to file the motion. Instead, the Referee's findings of

fact are totally consistent with a determination that Respondent was relieved of this responsibility by the client prior to the client obtaining the letters from law enforcement necessary to the motion. [R.II. 74].

Therefore, for the Referee to find Respondent guilty of Disciplinary Rule 6-101(A)(3) for neglect, and to also find him guilty of failing to carry out a contract of employment, is totally inconsistent with the testimony and the Referee's findings of fact. Without a determination by the Referee that Respondent entered into a contractual relationship with the client, without a determination that Respondent "assured" the client that the motion would be filed within a specified period of time, and without a determination by the Referee that Respondent failed to file the motion in a manner violative of the Code before the client dismissed Respondent, there is no factual basis to support this recommendation of guilt.

In Count III, the Referee also recommends that Respondent be found guilty of violating Disciplinary Rule 1-102(A)(4). [Referee Report at 3]. That rule prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

A review of the findings of fact in Count III indicates no factual determination by the Referee that Respondent engaged in any dishonest, fraudulent, or deceitful conduct or misrepresented any specific fact to his client. The Referee's recommendation of

guilt is apparently based only upon his conclusion that Respondent "assured" his client he would file a motion and never did. If such facts constitute dishonesty, fraud, deceit, or misrepresentation, then anytime a practitioner agrees to perform a certain act and fails to complete that act, regardless of the circumstances, or directives from his client, he is guilty of dishonesty. Such a rule is not established by the letter or intent of the Code of Professional Responsibility. Therefore, these factual findings do not support the Referee's recommendation of guilt.

Furthermore, the recommendation of guilt for a violation of Disciplinary Rule 1-102(A)(4) is cumulative to the recommendations of guilt for neglect and failure to carry out a contract of employment. It serves only to justify the severe discipline by the Referee. It does not comport with the intent of this specific rule to prohibit dishonesty, fraud, deceit, or misrepresentation, and to provide a basis for prosecution where no other specific rule applied.

Therefore, the Referee's recommendations of guilt as to each charge of Count III should not be accepted.

THE REFEREE IMPROPERLY FAILED TO RECUSE HIMSELF UPON THE LEGALLY SUFFICIENT MOTION OF THE RESPONDENT.

Pursuant to Rule 11.06(5)(H) of the Integration Rule of The Florida Bar (hereinafter referred to as Integration Rule), Respondent filed a Motion to Recuse the Referee in the case below based on a statement made by the Referee at a previous disciplinary trial wherein the Respondent was found not guilty. The referee stated that he hoped he (the Referee) would have no further Bar complaints with Respondent. This statement created a well-founded fear in Respondent's mind that he could not receive an impartial and unbiased hearing before the Referee. The Referee denied Respondent's Motion to Recuse.

Integration Rule 11.06(5)(H) provides that "a referee may be disqualified from service in the same manner and to the same extent that a trial judge may be disqualified under existing law from acting in a judicial capacity". Therefore, Section 38.10 of the Florida Statutes (1981) governed the filing and consideration of Respondent's motion and states in pertitent part:

> Whenever a party to any action or proceeding, shall make and file an affidavit that he fears he will not receive a fair trial in the court where the suit is pending on account of the prejudice of the judge of said court against the applicant, or in favor of the adverse party, such judge shall proceed no further therein . . . and the facts stated as a basis for making the said affidavit shall be supported in substance by affidavit of at least two reputable citizens of the county not of kin to the defendant or counsel for the defendant . . .

In the case sub judice the accompanying affidavits were executed by Respondent and his counsel, B. Anderson Mitchum, who heard the Referee's comment. Accordingly, Respondent's motion appeared to be technically deficient, inasmuch as the attached affidavits were not in compliance with the mandate of Section 38.10. However, it is essential to note that the Referee's comment was made at a confidential hearing wherein the only persons present were Respondent, his counsel, and Bar Counsel.

The courts of this state have addressed the situation of private communication or indication of prejudice in Layne v. Grossman, 430 So.2d 525 (3d DCA 1980). In Layne, the court reasoned that:

> Where the communication alleged to have been made is private . . . and it is therefore impossible for other affiants to attest to the fact of the communication, that technical requirement of Section 38.10 Florida Statutes need not be met. at 526.

Accordingly, the technical requirements should have been waived due to the private nature of the communication and the Referee should have determined that in light of its legal sufficiency the motion must be granted. This is so because it is well settled that a judge (or referee) may not consider the truth and veracity of the affidavit, but may only consider its legal sufficiency. Crosby v. State, 97 So.2d 181 (Fla. 1957). Nor may the judge consider how he feels about the alleged

prejudice. The test of sufficiency was stated in Crosby, wherein the Supreme Court of Florida stated:

> The test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling. at 183.

It cannot be said that Respondent's fear that he would not receive a fair trial was frivolous. It was based upon a statement made by the trier of fact which made it apparent to Respondent that it would not bode well for Respondent if he were to find himself before Judge Anderson again on a disciplinary matter. It matters not that Judge Anderson may have felt that he could preside in an impartial fashion. Respondent harbored a well-founded fear that the Referee could not so preside and thus his Motion to Recuse the Referee was wrongfully denied, and this court should remand this matter for trial before a substitute Referee.

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT IN VIEW OF THE REFEREE'S DENIAL OF RESPONDENT'S MOTION FOR CONTINUANCE.

In November, 1982, Respondent filed a Motion for Continuance with the Referee. [R.I. 5]. The Referee heard argument concerning the motion and thereafter denied the motion and held the trial on November 29, 1982. [R.I. 13].

Respondent alleged in his motion that a continuance was necessary due to the unexpected and serious illness of his attorney. Respondent supported his motion with an affidavit from his attorney setting forth the factual matters of the illness. [R.I. 6]. Respondent also submitted to the Referee affidavits from several attorneys stating that due to the complexity of the trial and the short period of time within which to prepare, it was impossible for them to properly represent Respondent. [R.I. 7,8].

The Florida Bar presented no evidence contradicting these affidavits. Therefore, the uncontroverted facts before the Referee were that Respondent's counsel of record was ill and unavailable for trial. Also, the uncontroverted facts indicated that Respondent was unable to obtain substitute counsel of his choice who could adequately prepare for trial without a continuance.

In civil actions, the decision to grant or deny a motion for continuance is within the discretion of the trial judge. The

Referee is also given discretion to grant or deny Respondent's motion pursuant to Integration Rule 11.06(3)(a), which provides that Bar proceedings are governed by the Rules of Civil Procedure. Moreover, to analogize the discretion of the Referee to that of a civil trial judge also requires the analogous limitation upon that discretionary power. Therefore, the Referee's discretion is limited by the general requirement that he not abuse his discretion concerning motions for continuance.

In determining whether or not an abuse of discretion has occurred in denying a motion for continuance, this court should consider justice and fairness to all parties, any special circumstances, and the injury or prejudice to the opposing party if such a motion is granted. Ford v. Ford, 8 So.2d 495 (1942). More specifically, the illness of an attorney of record has been held to be, in and of itself, sufficient grounds on which a trial judge should grant a continuance. Diaz v. Diaz, 258 So.2d 37 (Fla. 3d DCA 1972) and Western Union Telegraph Co. v. Suit, 15 So.2d 33 (1943). Furthermore, where the illness of an attorney resulted in the party being unable to retain counsel who could become prepared for trial, and absent a showing of unusual prejudice to the opposing party, the courts have held that to deny a motion for continuance was an abuse of discretion. Thompson v. General Motors Corporation, Inc., 439 So.2d 1012 (Fla. 2d DCA 1983).

In this case, no factual dispute existed as to the unexpected and unavoidable serious illness of Respondent's counsel. The

undisputed facts also indicated to the Referee that Respondent was unable to obtain the experienced and knowledgeable representation which he sought due to the lack of adequate time for preparation and the complexity of these matters. [R.I. 6,9]. Therefore, a special circumstance requiring a continuance was established.

Additionally, it should be noted that The Florida Bar requested a continuance on March 23, 1982, which was granted. The grounds for the Bar's Motion for Continuance were substantially similar, although less compelling and more foreseeable, than the grounds propounded by Respondent. In the Bar's motion, it alleged that a continuance was necessary because Assistant Staff Counsel initially prosecuting the case ceased employment with the Bar and therefore substitute counsel was necessary. The Bar further alleged that substitute counsel was unable to adequately prepare for trial within the time limitation. In spite of that foreseeable event, the Referee granted the continuance. Accordingly, fairness and justice required the Referee to grant Respondent's motion based on the similarity of circumstances.

Furthermore, in response to the motion, the Bar offered no evidence or argument that any prejudice would result from the requested trial continuance. The Bar only suggested to the Referee that an inconvenience would occur to the witnesses present for trial. [R.I. 10]. However, the key witnesses for the Bar

were at that time incarcerated within the Florida State Prison system. [R.I. 10]. Therefore, the suggestion that such a continuance would work an undue hardship on the witnesses, relative to the hardship imposed upon Respondent, is indefensible.

Finally, for this court to interpret the Referee's denial of the motion as an indication of attempts by The Florida Bar and the Referee to resolve this disciplinary proceeding within a reasonable time overlooks the extensive delay caused by The Florida Bar and allowed by the Referee. In fact, at the time of the motion, the proceedings were approximately two years old. [R.I. 10]. This was primarily due to the lack of diligence and the continuance by The Florida Bar. Therefore, the minimal delay requested by Respondent should not have given way to any ostensible interest in a timely trial date. Furthermore, the Referee himself failed to file his three-page report until approximately one year after the trial. This too indicates that Respondent's requested continuance was not denied due to legitimate concerns for a prompt resolution of this cause.

The denial of Respondent's Motion for Continuance resulted in a denial of Respondent's fundamental right to counsel in that he was denied the most experienced and knowledgeable representation available to him. This ruling also denied Respondent a fair trial for his trial counsel was forced to represent him without adequate time for preparation. [R.I. 9]. The Referee's decision obviously

failed to consider justice and fairness to all parties in view of the fact that The Florida Bar had received an earlier continuance based upon substantially similar circumstances. Furthermore, the uncontroverted factual basis for the motion required the Referee to grant the continuance absent a showing of prejudice by the Bar. The denial of Respondent's Motion for Continuance was an abuse of discretion by the Referee. Accordingly, justice requires that this court dismiss the charges against Respondent or remand this matter to the Referee level for a new trial.

THE REFEREE'S FINDINGS OF FACT, RECOMMENDATIONS OF GUILT, AND RECOMMENDATION OF DISCIPLINE SHOULD NOT BE ACCEPTED BY THIS COURT DUE TO THE DELAY IN PROSECUTING RESPONDENT.

The responsibility of diligently prosecuting a disciplinary case rests with The Florida Bar. The Florida Bar v. Randolph, 238 So.2sd 635 (Fla.1970). When a disciplinary case is not handled with diligence this court has recognized the principle that the delay may necessitate the mitigation of otherwise proper discipline. The Florida Bar v. Randolph, Id., and The Florida Bar v. Papy, 358 So.2d 4 (Fla.1978). Furthermore, where the delay in prosecution has been found to be substantial and the consequences of that delay have resulted in prejudice or injury to the accused attorney, the Respondent should be entitled to dismissal of the charges. The Florida Bar v. Rubin, 362 So.2d 12 (Fla.1978).

In considering the severity of the delay the court should weigh the actual elapsed time against the applicable time requirements set forth by the Integration Rule of The Florida Bar (hereafter, Integration Rule). Specifically, Integration Rule 11.06 provides that the trial shall be held as soon as possible after the expiration of ten days after the filing of the answer to the complaint. Additionally, Integration Rule 11.06 (9)(a) requires a Referee to file his report within thirty days after receiving the trial transcript, unless he receives an extension of time. Here, the Referee never obtained an extension

of time. Therefore, his report was to have been filed by January 8, 1983. The report was filed in December, 1983, approximately eleven (11) months late.

The record is devoid of the dates of the grievance committee hearings at which probable cause was found. However, the record does indicate that the Respondent's clients presented their complaints to the Bar in June, 1979. [R.I. 199,235]. The complaint was filed in May, 1981. This lengthy passage of time was either caused by not promptly processing the case at the grievance committee level or not promptly filing the complaint after the probable cause finding which would constitute a violation of Integration Rule 11.04(6)(b).

Furthermore, a substantial delay caused solely by The Florida Bar resulted in the record for review being made available to Respondent approximately ten (10) months after filing of the Referee's Report. In total, Respondent has been exposed to the agonizing ordeal of a Bar investigation for five (5) years. During this time the Bar, as the agent for this court charged with prosecuting cases of alleged misconduct, has totally failed to comply with the procedural rules which the court created and enforces.

More importantly, this substantial delay is violative of the spirit and intent of the Integration Rule. This intent to ensure the prompt and diligent processing of disciplinary cases is evidenced by the statement of then President of The Florida

Bar, Burton Young, when he wrote in The Florida Bar Journal:

> "With the powers of the new Disciplinary Rule, those who would trespass upon our ethics can expect to be called on to account immediately. There will be no more two-and-one-half year delays. Final disciplinary action will be completed within approximately six months." The Florida Bar Journal, Vol. 44, No. 6, P. 323 (June 1970).

Additionally, a special committee created by this court, known as the Karl Committee, proposed a speedy trial rule amendment to the Integration Rule. This rule was to codify, in specific time requirements, the intent of the Integration Rule to ensure a prompt prosecution for those charged with disciplinary violations. That rule would have required the dismissal of charges in cases where an accused was not brought to trial within ninety (90) days after filing of the complaint. Supreme Court Special Committee for Lawyer Disciplinary Procedures to Amend Integration Rule, Article II and Article XI, 373 So.2d 1 (Fla.1979).

In rejecting that proposed rule, this court anticipated that the time limitations and streamlined procedures of the Integration Rule would eliminate delays. Supreme Court Special Committee for Lawyer Disciplinary Procedures to Amend Integration Rule, Article II and Article XI, Id. Obviously, however, such delays continue to haunt our Bar.

Furthermore, pursuant to its review authority in discipline cases, this court has reiterated this intent and the necessity of requiring the Bar to handle these cases with dispatch. The Florida Bar v. Randolph, supra, The Florida Bar v. McCain, 361 So.2d 700

(Fla.1978). In considering whether the delay justified only mitigation or is cause to dismiss the charges this court should consider the prejudice to the accused attorney. The Florida Bar v. Rubin, supra.

The consequences resulting from the lengthy delay in this case have caused real and severe harm to Respondent. First, the delay directly caused Respondent to undergo an unusually long term of investigation and to suffer the emotional stress of that investigation. This occurred from mid-1979 when the complaints reached the Bar until 1981 when the Bar filed its Complaint. Next, Respondent suffered the anxiety and stress of one-and-one-half more years while the case crept toward trial. Then, one year after trial, Respondent was brought before the Referee for sentencing. This completely unnecessary delay, between trial and sentencing, would readily be condemned by this court as cruel and unusual in a criminal case. Here, Respondent suffered no less than one awaiting incarceration for it was his livelihood and his entire career that hung in limbo for one year. Then, Respondent awaited the Referee's report and then awaited the Bar to provide him with a record upon which he would seek review. Finally, during the last ten months of this ordeal Respondent suffered under the stigma of public criticism caused by publication of the Referee's report.

Written words cannot accurately describe or sufficiently convey to this court the multiple prejudices and injuries by this delay. Respondent's poor health was arguably affected. Respondent's ability to attract clients was directly affected, especially after the press release. He labored daily under the stress of not knowing what his future held. His ability to continue with his highly successful practice was affected due to his hesitation to accept new cases in view of these pending proceedings. In effect, Respondent has suffered the consequences of suspension from the practice of law combined with the anxiety of not having the matter resolved years ago. In addition to the immeasurable and intangible injuries above, Respondent was prejudiced by the delay in that he was effectively denied his right to counsel on two occasions. His trial counsel was unavailable due to an illness which was not present prior to the trial. Therefore, had the trial of Referee been held within a reasonable time, he could have represented Respondent. Again, after trial, Respondent was denied his choice of representation when an appointment to grievance committee caused the withdrawal of his attorney. This too would not have occurred had the Referee filed his report within thirty (30) days after the trial as required. Integration Rule of The Florida Bar, Integration Rule 11.09.

Finally, this substantial delay has served to eliminate any viable opportunity which Respondent may have had for rehabilitation and to re-establish his practice after suspension. With each passing year that The Florida Bar delayed the ultimate resolution of this case, Respondent's chances of recovery from the effects of this action decreased severely. Obviously, the abilities of an attorney to recover from a suspension from practice are significantly greater in the early stages of his life and career. As his career and ability to actively practice wind down, so does his opportunity to rehabilitate himself, clear his name in the public eye, and rebuild his shattered professional and personal life. Therefore, a speedy and diligent prosecution of the Bar here should have resulted in review of this case in 1980. At that time, Respondent was 55 and in substantially better health. Now, Respondent, if suspended for two years, may never be able to again serve the clients who have trusted him for thirty-four (34) years, provide needed services to the public, and once again bring respect and admiration to his name.

Therefore, this court should consider the substantial delay, the harm and punishment suffered by Respondent, the harsh effects which will result from the recommended discipline, and the lack of benefit to this Bar or the public and should dismiss the charges against Respondent.

IN VIEW OF THE PURPOSES TO BE ACCOMPLISHED BY DISCIPLINARY PROCEEDINGS, AND DUE TO THE ABSENCE OF AGGRAVATING CIRCUMSTANCES AND THE PRESENCE OF MITIGATION, THE REFEREE'S RECOMMENDATION OF DISCIPLINE SHOULD NOT BE APPROVED.

After recommending a finding of guilt with regard to Counts I, II, and III, the Referee recommended this court impose a suspension of two years upon Respondent. It is respectfully submitted that the Referee failed to properly consider the purposes to be accomplished by disciplinary proceedings, the absence of aggravating circumstances, and the presence of mitigation in arriving at his recommendation.

The purposes to be accomplished by disciplinary proceedings primarily include protection of the public, maintaining the integrity of The Bar, and insuring fairness to the accused attorney. The Florida Bar v. Rubin, 362 So.2d 12 (Fla.1978). In determining the appropriate measure to be taken to accomplish these objectives, this court should consider the total circumstances of each disciplinary case, including any aggravating and mitigating factors.

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); The Florida Bar v. Greenspahn, supra; and the gravity of the misconduct to be disciplined.

Traditionally, this court has found more serious discipline necessary when a respondent was found guilty of multiple violations involving several distinct and separate transactions. This circumstance, combined with improper conduct continuing over a substantial period of time, has been viewed as an indication of disregard for the rules governing the conduct of attorneys and, therefore, necessitating more severe discipline.

In this case, Respondent represented two clients within a short period of time. [R.I. 197,233]. The alleged misconduct resulted in a three-count complaint but arose from only two separate representations. This factual situation differs significantly from those which this court has previously found to equal cumulative misconduct. See: The Florida Bar v. Greenspahn, supra, The Florida Bar v. Rubin, supra, and The Florida Bar v. Larkin, 447 So.2d 1340 (Fla.1984). Instead, the facts of this case are consistent with overwork and an inability to promptly handle specific matters during a brief period of Respondent's lengthy term of practice. The Referee's findings do not support a conclusion that Respondent has displayed a disregard for the disciplinary rules or the public which he serves. Therefore, the Respondent should not be severely disciplined on the basis of cumulative misconduct.

Concerning the issue of an accused attorney's candid and honest response to allegations, the record is devoid of any evidence indicating that Respondent was less than candid or untruthful at any time during these lengthy proceedings. In fact, Respondent was at all times candid and cooperative with The Bar. Prior to the trial, Respondent offered to admit and stipulate to specific facts and specific violations. He also openly discussed with assistant staff counsel the representation of these clients. Based on these candid discussions, staff counsel sought to accept Respondent's admissions and negotiated a disciplinary plea of 60-day suspension. However, The Florida Bar, through one representative member acting as designated reviewer for the Board of Governors of The Florida Bar, rejected these attempts at resolving this matter without trial. Therefore, the fact that Respondent fully advocated his defense at trial cannot be viewed as an unwillingness to honestly answer the allegations against him or remedy any professional shortcomings, and, absent any factual finding by the Referee of Respondent's lack of honesty, no aggravating factors exist.

Although Respondent has a prior disciplinary record, it is to be noted that only one previous matter resulted in action more severe than a reprimand. That matter occurred in 1965 and resulted from a factual situation unrelated to any representation of clients. Otherwise, Respondent's record has been clear of

any conduct which this court felt deserving of suspension or even probation. His record indicates a history of minor errors which have occurred on an exceptionally infrequent basis relative to Respondent's lengthy term of membership in The Bar and the thousands of clients which he has represented. Moreover, in view of Respondent's practice as a criminal and domestic relations lawyer, his record of minor misconduct is commendable. This lack of a significant disciplinary record during thirty-four years of active practice indicates an honest, competent, and hard-working practitioner whose record should not be considered as an aggravating factor in this case.

When considering the gravity of misconduct for which a respondent has been found guilty, the injury or lack of injury to the complaining party should be considered. Also, whether or not the misconduct was the result of inadvertence or was an intentional act involving moral turpitude is the key factor. The Florida Bar v. Murrell, 74 So.2d 221 (Fla.1954). In none of the counts for which Respondent was found guilty was any evidence presented to the Referee indicating any injury or prejudice to Respondent's clients. Furthermore, there was no evidence of any intentional misconduct involving moral turpitude. Because each client ultimately received the review which he sought, without prejudice from any delay, the alleged misconduct is of a minimal nature. Also, without any clear and convincing evidence of

Respondent's moral turpitude or intentional misconduct, the alleged violations must be considered the result of inadvertence. Therefore, it is suggested that no aggravating circumstance exists in this case as there is no grave misconduct involving moral turpitude.

Conversely, this court has long recognized the factors of a respondent's health, age, length of practice, and the lack of diligence in prosecution by The Florida Bar as mitigating factors to be considered in determining appropriate discipline. The Florida Bar v. Neale, 432 So.2d 50 (Fla.1983) and The Florida Bar v. Rubin, supra. As further matters of mitigation, this court should consider the amount and conclusiveness of the evidence against Respondent and any rehabilitation which has taken place from the time of the alleged misconduct.

Respondent is currently fifty-nine (59) years of age and has been an active practitioner for thirty-four (34) years. [Referee's Report at 4]. Currently, he suffers from high blood pressure, diabetes, and a dangerous heart condition requiring daily medication. Quite probably his poor health is substantially a result of many years of overwork primarily as a single practitioner in a stressful law practice. His age and health greatly reduce the number of years which he can continue to actively practice. Therefore, just as this court did in The Florida Bar v. Neale, supra, wherein the attorney was sixty (60) years of age, had been

a member of The Bar for thirty-three (33) years, and suffered from failing health, this court should substantially mitigate the recommended discipline.

As further mitigation, this court should note that the alleged violations occurred in 1978. Since that time, no allegations of misconduct have arisen against Respondent. This indicates a meaningful and successful effort by Respondent to rectify any problems which may have existed with his office procedures. This effort at rehabilitation is therefore another reason to reduce the recommended discipline.

In view of these mitigating factors and relatively minor misconduct, the recommended discipline will not in any way serve to protect the public, nor will it in any way enhance the integrity of The Bar. Furthermore, this suspension, in the latter years of Respondent's practice, cannot be deemed fair to an individual who has served his community and Bar for thirty-four (34) years. This discipline, in view of the Respondent's age, is tantamount to disbarment without leave for reinstatement. Therefore, it is totally disproportionate to the misconduct and should be substantially reduced.

As an additional cause for mitigation, this court has recognized the lack of diligent prosecution by The Florida Bar. The Florida Bar v. Rubin, supra, and The Florida Bar v. Randolph, 238 So.2d 635 (Fla.1970). In this case, the inexcusable and

excessive delay in prosecution of these matters is clearly sufficient cause to significantly mitigate the recommended discipline. Nearly five and one-half (5-1/2) years have elapsed since the complaints were filed with The Bar by Respondent's clients. [R.II. 199,235]. Approximately three and one-half (3-]/2) years have elapsed since The Florida Bar filed its complaint. The trial was held approximately two (2) years ago, and the length of delay between trial and ultimate decision by this court will surpass two (2) years.

Due to this delay, Respondent has suffered the pressure brought by a disciplinary investigation for over five (5) years. He has also suffered the stigma of community suspicion and criticism since the publication of the Referee's report in The Tampa Tribune on January 6, 1984. This delay has been totally unjust and unfair to Respondent. It has denied him his right to a speedy resolution of the allegations against him and has denied him his right to due process. Additionally, this delay has done nothing to enhance the confidence of the public in Bar disciplinary proceedings. On the other hand, it has served to undermine the confidence of Bar members in the disciplinary proceedings necessary to deter practitioners from future misconduct. Therefore, any benefit which more severe discipline might have had in furthering the stated interest of this court has been nullified by this lengthy and unnecessary delay.

Accordingly, the recommended discipline of two years' suspension should not be accepted by this court as being appropriate under the totality of the circumstances in this case. This court should substantially mitigate the recommended punishment consistent with its valid concerns of protecting the public, protecting The Bar, being fair to the accused, and allowing the Respondent adequate time for rehabilitation. It is suggested that the previous decisions of this court justify a reduction of the Referee's recommendation to less than a ninety-day suspension. Such a suspension is consistent with the objectives and concerns of this court and is also consistent with its previous decisions. Specifically, in The Florida Bar v. Larkin, supra, this court suspended the attorney for only ninety-one days. There the attorney was found guilty of violations for the third time in a five-year period. Each matter involved the same type of serious violations. Also, in a case involving neglect where the accused was found to have displayed a conscious disregard for his duty to clients, this court imposed only a sixty-day suspension and probation. The Florida Bar v. Neale, supra. In that case, despite the accused's prior disciplinary record, this court found the discipline appropriate in view of respondent's age (sixty years), his term of membership in The Bar (thirty-three years), and his poor health.

Finally, it is suggested that the discipline determined by this court should be made retroactive to a date thirty (30) days subsequent to termination of Respondent's trial by Referee, i.e., the date for filing of the Referee's Report pursuant to The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a). This retroactivity will serve to instill confidence in the disciplinary system by both the public and Bar members by assuring them that undue delay will not be used as additional punishment and that discipline will be prompt. It will better enable Respondent to rehabilitate and re-evaluate his practice by serving to reduce the future time within which he will be unable to practice. It will be fair to Respondent in view of the lengthy delay and prejudice which he has undergone. It will also indicate to those charged with the responsibility of disciplining attorneys that such a delay will not be condoned. Se: The Florida Bar v. Solomon, 409 So.2d 1052 (Fla.1982).

CONCLUSION

The Florida Bar had the burden of proving the allegations of its complaint with clear and convincing evidence. The evidence brought forth by the Bar, which was primarily the testimony of convicted felons, indicated absolutely no prejudice to Respondent's clients and was woefully inadequate to sustain the Bar's burden.

Moreover, the Referee should have recused himself based on prior statements he made indicating bias against the Respondent. That alleged bias manifested itself again upon the Referee's failure to grant Respondent's Request for Continuance after granting the Bar's request under less compelling circumstances.

Finally, the Bar took almost two (2) years to file its complaint after receipt of the letters of complaint, another eighteen (18) months to get to trial after filing its complaint, an additional year to conduct a sentencing hearing, and ten (10) months to provide Respondent with the record in order to file this brief. This unconscionable delay has caused the Respondent in excess of five (5) years of anxiety, financial loss, and loss of reputation.

In light of all of the circumstances attendant to this cause, the Referee's recommendation of a two-year suspension is wholly unjustified and is tantamount to disbarment considering the Respondent's age.

The lack of evidence and the dilatory handling of this matter by the Bar require dismissal of these charges by this honorable court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Initial Brief has been furnished by Hand Delivery this 31 day of OCTOBER, 1984, to: Steve Rushing, Esquire, Bar Counsel, The Florida Bar, Airport Marriott Hotel, Suite C-49, Tampa International Airport 33607.

SCOTT K. TOZIAN, Esquire