IN THE SUPREME COURT OF THE
STATE OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs. CONFIDENTIAL

MERRELL G. VANNIER, Case No. 61,691

Respondent. (TFB #06C80HF3)

_____/

PETITION FOR REVIEW OF REFEREE'S REPORT AND RECOMMENDATIONS

MORTON J. HANLON, Referee

RESPONDENT'S OPENING BRIEF

Of Counsel on the Brief:
H. PETER YOUNG, ESQUIRE
1821 Wilshire Boulevard Suite 210
Santa Monica, California 90403
(213) 377-5029

BENNIE LAZZARA JR., ESQUIRE
BENNIE LAZZARA, JR., P.A.
610 West DeLeon Street
Tampa, Florida 33606
PHONE: 813-251-2309
and
CARL E. KOHLWECK, ESQUIRE
1821 Wilshire Boulevard,
Suite 210
Santa Monica, CA 90403
PHONE: 213-377-5029

Attorneys for the Respondent
MERRELL G. VANNIER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGES

CASES PAGES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE[1]

This case comes here on petition for review of a referee's report finding that respondent Merrell G. Vannier violated Florida Bar Code of Professional Responsibility Disciplinary Rules 2-103(A), 5-101(A) and 7-102(A)(8) which prohibit solicitation of employment, accepting employment without full disclosure of an adverse interest and knowingly engaging in other illegal conduct in representing a client -- and recommending his disbarment and assessment of costs against him. Respondent's Appendix (hereafter "R. App.") 1-5.[2]

STATEMENT OF THE EVIDENCE

A. Introduction: the Bar's Hearsay and Conclusory Effort to Prove Its Central Allegation of Mr. Vannier's Association With the Church of Scientology of California.

Both the means the State Bar used in prosecuting this case and the substance of its charges present profoundly important constitutional questions bearing great significance for lawyers throughout Florida and, indeed, the entire nation. Through a parade of witnesses bitterly hostile to the Church of Scientology, the Bar presented massive amounts of hearsay and innuendo derogatorily characterizing the Church, which was not there to defend itself and hence was an easy mark, and then,

---

1. Because of the 50-page limit the court imposed on this brief, Mr. Vannier, confronted with a record of several thousand pages, has had to truncate severely his description of the proceedings below.

2. The referee found no clear and convincing evidence that Vannier violated the adverse interest rule, as charged in two of the complaint's counts, by presenting certain documents to his client and advising him to sign them. R.App 4. We therefore do not bother to address in this brief those counts or the evidence relating to them.

again, through hearsay and innuendo, sought to condemn Mr. Vannier because of his religious belief in Scientology. Predictably, the ensuing referee's report, reflected the prejudices with which Bar counsel infected the entire record. That report, in essence, precludes any Scientologist from entering or pursuing the practice of law in Florida solely on the basis of his or her religious beliefs. To preserve the integrity of the Florida Bar, this court in this case must condemn the religious bigotry infecting these proceedings and resoundingly reject the referee's report.

The manner in which this case has been prosecuted--a prosecutor willing and capable of going to extraordinary evidentiary lengths to smear an unpopular defendant--is reminiscent of "a turbulent period known as the 'McCarthy era,'" see In re Stolar, 401 U.S. 23,24 (1970), in which Senator Joseph McCarthy "stirred up anti-communist feelings and fears by his 'investigations' in the early 1950's," which "filled" court dockets "for years with litigation involving inquisitions about beliefs and associations and refusals to let people pratice law and hold public or even private jobs solely because public authorities have been suspicious of their ideas." See Baird v. State Bar, 401 U.S. 1,3 (1970).

There was no dispute below that in 1976 and 1977 Vannier served as a volunteer law clerk in the St. Petersburg office of State Attorney James Russell, who was investigating the Church of Scientology of California, that he undertook as a member of a Clearwater law firm representation of that city's mayor, Gabriel Cazares, and his wife, Margaret, in civil suits they had filed

earlier against the California Church, and that, as the Cazareses' lawyer, he was allowed to review the files of the lawyer representing one Nancy McLean and her son, John, in a suit the California Church had brought against them. Compare, e.g., R. App. ____ (Complaint) with id. ____ (Response). Rather, the linchpin of each charge was whether Vannier was then associated with the California Church,[3] and the trial centered on that issue.[4]

In attempting to support its linchpin allegation that Vannier was associated with the California Church, the Bar, as we shall see, presented massive amounts of what it admitted was documentary hearsay from various sources--none of it cross-examined as shown to be reliable and much of it not even properly authenticated--regarding the alleged activities,

3. The complaint's central allegation, repeated throughout, was that Vannier was "affiliated with or a member of the Church of Scientology of California," and it stated that any mention of the Church of Scientology was a short-form reference to the California Church. R.App 6-5. The adverse interest counts involving Cazares and the State Attorney's office obviously relied on Vannier's connection with the California Church because they rested on allegations that the Church's interests were adverse to those of the Cazareses and the State Attorney and that he knew or should have known they were. Id. The illegal conduct count regarding the McLeans also intrinsically relied on his alleged relationship with the Church since it was based on the claim that Mrs. McLean gave authorization to Vannier to review her legal files but conditioned it on the requirement that no information in those files be revealed to any Scientologist. Id. Finally, the Bar has relied on Vannier's claimed relationship with the California Church as the reason, the motive, for his alleged solicitation of the Cazareses, and, as we shall see, the thrust of Cazares' testimony was that Vannier solicited his employment because he was acting as an agent of the California Church.

4. The Bar represented at trial that "it is Mr. Vannier's membership in that organization which is the subject of these proceedings," 5 T. 69, and, "We are here challenging the conduct of Mr. Vannier and his association with an organization known as the Church of Scientology." 6 T. 229.

policies and ideology of the California Church and, more accurately, of some of its apparent members. Because none of those documents related on their face to Vannier, the Bar resorted to the testimonial conclusions, surmise and conjecture, themselves based on hearsay, of witnesses palpably hostile and biased towards the Scientology religion and the California Church (Cazares, Ms. McLean, her attorney, Walt Logan, and State Attorney Russell) in an effort to show that he infiltrated the legal camps of the Cazareses, the McLeans and the State Attorney's Office as an agent of the California Church. Moreover, even as to these witnesses' nonhearsay testimony about Vannier's conduct towards them, it was clear their perceptions and memories had been indelibly colored by the conclusions they already had reached, again on the basis of hearsay, regarding his alleged ties to the California Church.[5] Since the referee relied primarily on this hearsay and conclusory "evidence" in making his findings, see R. App. 1-5, this court must, in reviewing the evidence, pay particular attention to its inherent unreliability.

5. There was no objective evidence that Vannier had harmed or acted against the interests of the Cazareses, the McLeans or the State Attorney's office. While it spent a great deal of trial time in an unavailing effort to prove such actual damage, the Bar, whenever the defense tried to show Vannier had acted as any conscientious attorney would, objected that such a showing was unnecessary to its case and, indeed, irrelevant to its charges. E.g., 6 T. 221-23, 10 T. 12-13, 22-23. Suffice it to say here that there was no clear and convincing evidence that he acted contrary to the interests of the parties charged as the aggrieved in the Bar complaint. Indeed, the referee made no such finding in his report and acquitted him of the two counts alleging that he had sought to have his client Cazares sign detrimental documents. R.App. 4 For these reasons, we do not bother to detail, the inconclusive evidence presented below regarding whether Vannier's conduct actually harmed anyone.

B. The State Attorney's Office Adverse Interest Count.

James Russell, the elected State Attorney for Pinellas and Pasco counties since 1969, 5 T. 10, was allowed, over the defense's hearsay objection, id. 16-17, to testify, as the only witness on the adverse interest count involving the State Attorney's office ("SAO"), that Vannier served as an unpaid volunteer law clerk in his St. Petersburg office in April and early May, 1976, despite his admissions that he was not acquainted with Vannier, that he could not recall if he ever met him (although he thought, on the basis of a photograph of Vannier he saw in 1980 or 1981, that he might have seen him in the hallway, that he doubted he ever talked to him, that he never saw Vannier work, and that he did not know what work Vannier did for the SAO or even how long he worked there. 5 T. 11-14, 32-34, 37, 45-47. Myron Mensch, then in charge of the SAO's St. Petersburg office and now practicing law in Pinellas County (and hence available as a witness, but never produced), told Russell that Vannier, who was not yet a member of the Bar, had volunteered his services as a legal trainee, and Russell approved the arrangement. 5 T. 14, 35-37, 39, 43, 94. The SAO never employed Vannier, Russell did not know whether he ever applied for a position, there was no application on file in his office, it was not possible to apply for a legal position in 1976 without submitting a written application, and Russell himself interviewed all applicants and made all hiring decisions. 5 T. 14-15, 33-34, 72-73, 86, 91.

Russell claimed that while Vannier worked in the SAO, it was investigating the California Church and that the

investigation was publicly known. 5 T. 12-13. The SAO's investigative files on the California Church were kept secured in its Clearwater office, not the one Vannier worked in, and it was very unlikely that a legal trainee in the St. Petersburg office had access to them. 5 T. 40-41, 84-85, 94-95. Vannier never told Russell he was a member of the Church of Scientology or that he was in intelligence gathering arm of the Church, and, had he Russell would not have allowed him in his office. 5 T. 21-22.

Law enforcement agencies, including Russell's office were then receiving requests from the Church to turn over their files on the Church, and other agencies turned to the SAO for legal advice on how to respond. 5 T. 18-19. Russell claimed he was told, in circumstances he did not remember, by an unknown person of unknown position, "something about" the way Vannier had handled a call to the SAO; he did not recall what or when he was told or whether it was by telephone or personal conversation, he did not know whether that unknown person was the one who had called Vannier or was a law enforcement officer, and he knew nothing about the call Vannier received. 5 T. 48-49, 55-58.

One Doug Crow, with whom Vannier worked and who was not produced at trial, told Russell that the call Vannier took regarded a letter the St. Petersburg Police Department had received from the Church demanding to look at its files, that Vannier had grabbed the call away from Crow, and that the officer who made the call was skeptical of the advice he received. 5 T. 19, 45-46, 54, 61-62. Russell did not remember

the officer's name, nor what inquiry he had made of Vannier. 5 T. 19-20. Bells and gongs allegedly went off in Russell's head, he told Mensch that the office no longer needed Vannier, and Mensch so told Vannier. 5 T. 19-20, 43-44, 55-56, 58-60. Russell gave Mensch no details and he did not know what Mensch said to Vannier or what Vannier's response was. 5 T. 44, 60.

C. The Cazares Solicitation and Adverse Interest Counts.

After discovering in January, 1976 that the group that had bought and moved into the Fort Harrison Hotel was the California Church, Clearwater Mayor Gabriel Cazares made statements unfavorable to Scientology both publicly and to the media. 1 T. 70, 72, 77; 2 T. 158, 161-63; 9 T. 64-65. The Church filed a federal civil rights and defamation suit against Cazares and the city on February 6, 1976. I T. 88-90; 11 T. 43-44. On February 27, 1976 Cazares filed his own state defamation damages suit against the Church, and on March 18, 1976 his wife filed a similar action. 1 T. 88-91, 94-95; C. Exs. 1-C, 1-D.

The Cazareses had a parting of the ways with the attorney who represented them in their state suits, Pat Doherty, in July because the latter thought the chances of recovery were slight, advised them to accept a settlement offer from the Church's lawyer, Clyde Wilson, and could no longer afford to carry the case on a contingency basis. 1 T. 87-88, 90-91, 93-95; 2 T. 204-10, 248-49; 10 T. 16-18, 20-21.[6] Doherty sent the Cazareses a letter on September 1 asking them to find other counsel, Respondent's Exhibit (hereafter "R. Ex.") 4; 1 T.

6. Doherty testified that Cazares was an uncooperative client, who failed to keep appointments and would not respond to interrogatories. 10 T. 10, 14-15, 17-18.

96-97; 10 T. 17-18, 20, filed a motion to withdraw as counsel, citing irreconcilable differences with the Cazareses, and on December 16 wrote them that if his office did not receive a stipulation for substitution of counsel by December 23, 1976, it would begin to bill them for time spent on the case at regularly hourly rates. 1 T. 97; 2 T. 225-26; 10 T. 21-23; R. Ex. 7. On receiving Doherty's September 1 letter, Cazares made several unavailing efforts to find an attorney willing to accept the cases. 1 T. 99, 112; 2 T. 219, 226-29.

Cazares, who, at the time of the hearing below, had, along with his wife, a federal suit pending against Vannier seeking damages for the very allegations at issue in this case, 3 T. 66-69, 7 T. 26-28, testified that Francine Vannier, who was a volunteer telephone worker in his Congressional campaign, introduced Vannier to him as her husband at campaign headquarters in July or August, 1976. 1 T. 100, 103-105, 107-109; 2 T. 270, 244-247; see 9 T. 68-69. In December, Cazares claimed, Vannier called him said he was now a member of the Bar with the Phillips, McFarland firm and was aware that Doherty had decided to leave the case and that the Cazareses were looking for a new lawyer. I T. 109-110. Vannier, he alleged, "solicited the case several times," approximately "a dozen times," usually by telephone but also by visits to Cazares in the city hall. I T. 111-113, 2 T. 279-280. Cazares could not remember the specific dates when Vannier said he would like to become his lawyer in the case, but it was in "November or December, somewhere in there," nor whether anyone other than he or his wife was present when the solicitation

occurred. I T. 111-12; 2 T. 277, 280, 283. The Cazareses kept stalling Vannier, hoping a lawyer they knew would take the case. I T. 112; 2 T. 223.[7]/

Cazares claimed that neither he nor his wife ever sought Vannier's services before Vannier suggested his employment, and, to the best of his recollection, when they agreed to Vannier's employment during the holiday season, Vannier initiated the call. I T. 112-113, 2 T. 280. However, he admitted that they hired Vannier because their backs were to the wall in view of Doherty's deadline for substitution and they had no alternative since other attorneys were not available. I T. 114; 2 T. 226. Cazares authorized Vannier to represent him about December 22, 1976, and went to Vannier's office to sign the papers, and in fact Vannier entered his appearance in the cases the very day of Doherty's deadline. I T. 114, 2 T. 225-26, 282-283; C. Exs. 1-E, 1-F. Cazares also conceded that one of his considerations in hiring Vannier was that he worked for a prestigious firm, one of whose name partners, Lloyd Phillips, Cazares knew. I T. 116-17; 2 T. 283. In fact, Phillips had previously represented Cazares. 9 T. 7, 14, 40.

Cazares testified that Vannier never told him that he was a member of the Church of Scientology. I T. 116. His former lawyer Doherty, testified that people told him the Cazareses thought he, Doherty, was a Scientologist, that he met with Vannier when the latter took over the cases, that he "would have made him aware" that one of the reasons he suspected his

7. Cazares testified that his wife, not a witness below, had told him Vannier had also talked to her by telephone about taking on the cases. 2 T. 280.

clients lost confidence in him was that their suspicion that he might have some connection with the Church, and that Vannier did not disclose he was a Church member to him. 10 T. 8, 37 - 38.

As Cazares' private lawyer Vannier was given access to the files of the insurance company lawyers, John Allen and Walt Logan, who were defending under a reservation of rights clause the suit the Church brought against Cazares as mayor. 4 T. 116-17, 119-21, 123; 6 T. 178 - 81, 195; 7 T. 63, 77-78, 93-96. When Doherty represented the Cazares, he asked for and gained similar access. 10 T. 13-14. The attorney who represented the Church in both the federal suit against the Cazareses and the state cases the Cazareses brought, Clyde Wilson, testified that he received no information or documents that he thought came from other lawyers' files and that he had no indication of any spying. 11 T. 43, 45, 66-67, 75-77.

At the Cazareses' request, after a meeting with Vannier and his firm's name partner, Lloyd Phillips, dismissals without prejudice were entered in their state cases on May 2, 1977. 2 T. 152-53; 3 T. 30, 33, 65.

D. The Mclean Illegal Conduct Count.

Nancy McLean, a Canadian resident who was a member of the Church of Scientology of Toronto from 1969 until 1972 and who since then had been a litigant in 17 suits with the Church, 6 T. 214-16, 256, 8 T. 6-7, testified that when the California Church brought a defamation suit against her and her son in federal court in Tampa, she retained Robert Hayden as her attorney. 6 T. 216; see 9 T. 109; C. Ex. 1-J. McLean had

talked to Cazares about Scientology generally, 6 T. 8, and he referred her to Hayden. 9 T. 131.

By letter of February 22, 1977, Vannier requested Hayden's permission to review his files on Scientology, 6 T. 218-19, C Ex 1-K, and Hayden asked McLean's permission to allow Vannier to review her files. 6 T. 216-18. McLean responded by letter of February 25, 1977 to Hayden that she gave permission for Cazares' solicitors to examine the files and that he should "feel free to convey my information and so long as it is not required to be submitted to any Scientologist beforehand they may make copy." 6 T. 220, 223-24; C. Ex. 1-L.

Hayden did not show McLean's letter to Vannier, and he did not remember communicating its contents to him. 9 T. 114. McLean never requested him to ask Vannier if he was a Scientologist, and he never did ask him. 9 T. 114-115. Vannier came to Hayden's office twice to talk to him about the case and review the files, was given access to thousands of documents in the office library, and, Hayden believed, requested that copies be made. 9 T. 110-11, 124. He never told McLean he was a Scientologist, and neither McLean nor Hayden would have allowed him access to the files had they known he was one. 6 T. 224, 9 T. 122.

E. <u>The Documentary Hearsay and Conclusory Surmise and Conjecture the State Bar Presented Regarding the Church of Scientology of California and Mr. Vannier's Alleged Association With It.</u>

The Bar introduced massive amounts of documentary hearsay regarding the California Church's activities, policies and ideology--in essence putting the Church on trial, although it

was not there to defend itself--and then sought to link them to Vannier through conclusory interpretations of the hearsay documents offered by witnesses who, charitably, may be described as professional anti-Scientologists who have an axe to grind: Cazares and McLean, who, as we have seen, are suing the Church and Vannier for the very misconduct alleged in this proceeding, Logan, who is one of the lawyers for Cazares and McLean in those suits and who wrote the letter of complaint to the Bar leading to these proceedings, 4 T. 117, 132, 7 T. 26-28, 30-31, 33-34, and Russell, whose office investigated the Church and Vannier for that same alleged misconduct and sought to extradite him from California as a witness on the same basis. Vannier v. Superior Court, 32 Cal.3d 163, 185 Cal. Rptr. 427, 650 P.2d 302 (1982). We now describe that hearsay and conclusory surmise and conjecture.

Complainant's Exhibit 1-0, which was attached to the Bar's complaint, purports to be a letter dated March 12, 1976 from "Dick" to "Duke", neither of whom testified below, which listed among "the areas of priority to infiltrate": "2. Mayor" and "6. Florida State Attorney (Russell)." The record contains no testimony as to this sheet's source and it is not linked to Vannier in any way. Nonetheless, Russell was allowed to testify that it referred to him, 5 T. 13, and Cazares that the reference to "Mayor" "appears" to be to him. 1 T. 120-22.

Complainant's Exhibit No. 12A is a 32-page sentencing memorandum, with attached documents, filed by the United States Attorney's Office, which did not appear at trial below, in a criminal case against two Scientologists, Jane Kember and Morris

Budlong in the District of Columbia, which recites a pejorative litany of charges against several Scientologists and includes allegations regarding the California Church's antagonism to Cazares. There is no nonhearsay, nonconclusory evidence in the record below establishing the truth of those allegations, none of which mention Vannier.

Complainant's Exhibit 1A, which was attached to the Bar's complaint, purports to be Vannier's application, made in September, 1980, several years after the period at issue here, to become a staff member of the California Church's Guardian's Office (hereafter "GO"), an acceptance by the GO, and an undated statement from one Peeter Alvet, who was not a witness at trial, that he had known Vannier since October or November, 1979 and that "Before he was a Legal B1 Gas for 4-5 years in the field." McLean testified that the exhibit was submitted by the Church in her own lawsuit in response to a request for Vannier's personnel file, and on that basis she identified it as such. 6 T. 233-34, 8 T. 74. The record does not indicate who in the Church produced the documents, and the Bar presented no evidence that the exhibit was in fact his personnel file, that Vannier knew of its existence or that he agreed with its contents.

Building on these hearsay documents, Mrs. McLean concluded that Vannier made an application to join the GO, which she described as an autonomous organization "put there" to make Scientology well thought of by the public, 8 T. 65, 75, and that Vannier was a "B1-GAS," which she described as "a guardian information bureau. . . operative who is operating as an

undercover agent for Scientology to gain whatever information he has been sent to gain." 6 T. 224-25. The record contains no evidence that McLean ever knew Vannier, and although she testified at great length about the California Church and its GO, her personal knowledge was limited to the Toronto Church and ended more than four years before the period at issue here, 6 T. 214-215, 256, and she had never been a staff member of the GO and never done GO work or intelligence activities. 6 T. 259-260, 8 T. 25-28, 33-35. Indeed, she admitted that her information in that regard was based on documents she had studied after leaving the Church. 8 T. 27-28, 34-35.

Complainant's Exhibit 2 was identified by McLean as excerpts from a book L. Ron Hubbard wrote and she had read introducing his ethics codes for the Church's outer organizations dealing with the public, but not for the autonomous GO. 6 T. 225-226, 239. The book, she said, concerned in part "how to handle attacks when they come to a Scientologist," and she defined attacks as "[a]nything that would threaten Scientology or Scientologists," including the bringing of suits against them or testifying against them. 6 T. 235-36. She claimed that anyone who engages in that sort of conduct becomes a "suppressive person" subject to a "fair game policy" under which he "should be tricked, sued or lied to or destroyed." 6 T. 239. She was familiar with the fair game policy from her research, and although Hubbard ostensibly retracted it in 1968 and the Church ceased declaring persons fair game, she represented, based on her knowledge of GO actions, that he did not cancel the "handling of a suppressive

person." 8 T. 79-81, 93-100.[8]/

McLean, again building on hearsay, testified, on the basis documents she had seen in her own lawsuit, that Vannier was a staff member of the St. Louis Church in 1973-74 and that, as such, she assumed he would have been familiar with the ethics book and would have had to adhere to its doctrine. 6 T. 228-29, 232-33, 8 T. 37-38, 41-42, 90. She could not produce specific documents that were the source of that information because she had read so many, although she was sure she had one, and she had no idea of the Scientology training courses Vannier received in 1973-74. 8 T. 39-40.

It is plain, then, that McLean had no personal knowledge of the California Church's policies in the period relevant here (or even of the GO policies when she was last a Scientologist 14 years ago), much less of Vannier's awareness of those policies, whatever they were, or his adherence to them. Yet no nonhearsay, nonclusory evidence was admitted below regarding these matters.

Complainant's Exhibit 3 consists of a request for admissions made by Logan in McLean's case asking the California Church to admit or deny whether Vannier was a Scientologist--that is, a member of the California Church "or any other Scientology mission, church, franchise, or other entity so as to qualify [him] as a 'Scientologist'"--during the years 1972 through 1981 and currently, and the Church's response, signed

8. McLean had talked to Cazares about Scientology generally, 6 T. 8, and predictably he testified about what the fair game policy was in precisely the same words McLean used, 2 T. 199-20, although he plainly had no personal knowledge of it.

by its attorney, Lawrence Fuentes, that he was from 1974 to 1981. 6 T. 132. Logan identified the document and testified that the Church had committed itself to that position in the McLean case. 6 T. 132, 7 T. 57-58. That response to a request for admissions is not sworn, and the record contains no clues as to the nature and source of the information on which Fuentes, who did not testify below, based the response, what manner of investigation, if any, he conducted or as to whether Vannier concurred in the response.

Complainant's Exhibit No. 5 consists of certain documents regarding the activities of one "Ritz" which the California Church produced in discovery in the McLean case, accompanied by a letter Fuentes sent to the Bar and an affidavit he filed in the McLean case stating the Church could not authenticate the documents, but could only state that they were copies of documents provided the Church by the government, which had represented to the Church that they were copies of documents it had seized from the Church in 1977. Logan claimed these so-called "Ritz" documents were produced by Fuentes in response to a request in the McLean case for all documents referring to Vannier or his code name, 4 T. 173-74; 7 T. 107, 109-110, and he testified that one of them, dated June 23, 1976, contained confidential information from the Cazares defense files in the Allen office. 4 T. 183-87, 6 T. 160-161. However, he admitted that Vannier was never allowed to see those files before December, 1976, when he became Cazares' lawyer, and the information therefore could not have come from Vannier. 6 T. 161-63, 99-104. He still maintained, however, that in

producing the Ritz documents, the Church had told him Ritz was Vannier, 7 T. 109-110, and on the basis of his review of the Ritz documents, he averred that he was sure Vannier was a Scientologist, was the person named Ritz, and acted as the Church's agent, which he deemed appalling. 4 T. 131, 7 T. 58-59, 90-92.

The record contains nothing as to the basis for Fuentes' representation to Logan, if it was that, that the Ritz documents pertained to Vannier, and nothing regarding their authentication. There is no nonhearsay, nonclusory evidence showing that Vannier was Ritz, for the documents do not mention him. Moreover, there is no such evidence as to who their authors were, whether their contents are accurate, or whether Vannier ever knew of them or agreed with their contents.

Complainant's Exhibits 6A and 6B consist of the transcript and videotape of the deposition of Peter Joseph Lisa taken by Logan in the McLean case on September 25, 1984, 4 T. 132, in which Lisa, a California Church GO official in Clearwater in 1976 and 1977, testified that he did not know Vannier then, that he had no idea then who Ritz was, that he never met Ritz, that one Don Alverzo supervised Ritz, that his information regarding Ritz, whom he understood to be Cazares' attorney, came from Alverzo's superior, one Tom Ritchie, but that he knew now, on the date of the deposition, that Ritz was Vannier and he identified those Ritz documents he had written or received.

The Lisa deposition transcript and videotape are themselves hearsay, and it is quite clear that at least a second level of hearsay is involved, for it is plain that Lisa's deposition

testimony that "now" he knew Vannier was Ritz was based on hearsay information he gained after his stint as a GO officer in Clearwater, Logan having refrained from eliciting how he knew Vannier was Ritz. See C. Ex. 6A. Neither Alverzo nor Ritchie were called as witnesses at trial, and there is no nonhearsay, nonconclusory evidence regarding the accuracy of the information they gave Lisa.

Lisa made himself available at the trial, but the Bar declined to call him during its case as to the matters covered in the deposition, choosing to rely on the transcript and videotape of the transcript instead. 8 T. 14-17, 115-16, 155-56. Lisa did, however, give limited testimony during the defense's case, but it did not relate to the matters discussed above except he did testify that it was not his responsibility in the Clearwater GO to oversee the work of those covertly attempting to gather information on Cazares, that Alverzo, his subordinate, was responsible for subordinates in the field, that he had identified documents under oath at the deposition, that he is acquainted with Vannier and thought Vannier was now a Scientologist, and that he, Lisa, is a Scientologist now. 8 T. 155-57, 160-63.

Finally, Complainant's Exhibit No. 9 consists of a declaration of Federal Bureau of Investigation Special Agent Philip E. Mostrom, stating that he had received a packet of materials from the Bar and that, based on a review his unit conducted, he had concluded that a number of the documents the Bar provided were described by Bureau reports and inventory logs prepared shortly after the search and seizure of documents

at the Church of Scientology in Los Angeles, California on July 8 and 9, 1977. Attached to the declaration were copies of the Bureau's reports and logs and copies of the Bar-provided documents which Mostrom concluded were related. Neither Mostrom nor any members of the unit which conducted the review or any of the agents who prepared the reports and logs were produced at trial.

F. The Non-Hearsay, Non-Conclusory Evidence Regarding Mr. Vannier and His Belief in the Scientology Religion.

In his response to the complaint, Vannier "[d]enied that he was a member of the Church of Scientology during the time material to this complaint," stated that he was "unable to admit or deny the allegation that he was 'affiliated with' the Church of Scientology of California" because of the "vague and general nature of the word 'affiliated'", but admitted that "he was a Scientologist", that "his own personal religious preference at times material to the Complaint was to the teachings and doctrines of the Church of Scientology." R. App. 19.

Vannier also disclosed in his application to the Florida State Bar that from May, 1973 until August, 1974--long before he moved to Clearwater--he had been employed by the Missouri Church of Scientology in St. Louis, Missouri and described his position there as "Odd Jobs". Exhibit 4.

At the Bar's request, Vannier gave limited testimony that he had been admitted to the Florida Bar in July, 1976, last practiced law in Florida in October, 1977, was also a member of the Missouri Bar, was now living in California with his wife

and daughter, had passed the California Bar and was awaiting admission pending the conclusion of these proceedings. 12 T. 4-6.

Norris Gould, the partner in the Phillips, McFarland firm who hired Vannier, supervised him on the Cazareses' cases and shared responsibility for them, 9 T. 4-5, 14-15, 41-45, testified that Vannier never told him he was a member of the Church, 9 T. 34, that he left the firm's employment in a hurry with no notice given and no forwarding address, and that his departure coincided with public revelation that Vannier was a Scientologist. 9 T. 43-45. However, Vannier did discuss with him problems with his mother-in-law that would take him out of town, and Gould believed that close to the time Vannier left, his mother-in-law, who owned a couple of farms, was having problems with her marriage, and he had to go help her. 9 T. 57-58, 60. Moreover, the notice for leaving attorneys is always short, and Vannier did communicate with Gould after he left. 9 T. 51-52.

John G. Peterson, a Beverly Hills, California lawyer who was coordinating counsel for the Church of Scientology, testified that Vannier was, at the time of trial, a parishioner of the California Church, that is, one who attends Church services as opposed to a staff member who is paid, but was not employed by the Church and did not live on Church property 11 T. 4-6, 38-39. There are, he testified, a great number of rulings by state and federal courts that the Church of Scientology is a religion, including two (later admitted into evidence, R. Exs. 30, 31) from the federal district court

in Tampa and the circuit court in Pinellas County, and there has been no ruling that it is not a bona fide religion. 11 T. 10, 14-17.

In 1976 individual churches of Scientology, including the California Church and the Missouri Church, were independent corporations with separate articles and by-laws and completely separate boards of directors, and the California Church had no form of corporate control over their membership and recruiting, what they did with their money, whether they sued or got sued, the day-to-day running of the organization. 11 T. 8-9, 20-21. Rather, the California Church was considered to be the mother church and had ecclesiastical control over the others, setting the policy of the religion to ensure that uniform services were provided to parishioners and that the technology of the religion remained pure. 11 T. 20-21, 33. All the individual parishes, as distinguished from parishioners, adhere to the principles Hubbard enunciated. 11 T. 39. All churches paid a 10 percent tithing to the Mother Church, but Peterson did not know whether it went to the California Church or the Worldwide organization. 11 T. 21-23. The GO was in charge of gathering information through its Bureau through both covert and overt means, but the Missouri Church did not have a GO. 11 T. 23, 35. The information thereby gained was not made available to all Scientologists or all organizations involved in litigation; there was no standard procedure on that. 11 T. 35-37.

Counsellor Peterson knew for a fact that Vannier did not render legal services to the California Church in 1976 and 1977, and Vannier was not part of an intelligence operation in Clearwater in 1976.

ARGUMENT

I. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE, IN SUSTAINING THE BAR'S CENTRAL ALLEGATION THAT MR. VANNIER ACTED AS AN AGENT OF THE CHURCH OF SCIENTOLOGY, HE RELIED ON THE BAR'S PRESENTATION OF MASSIVE AMOUNTS OF HEARSAY, INCLUDING UNAUTHENTICATED DOCUMENTS AND CONCLUSORY SURMISE AND CONJECTURE BASED THEREON, THEREBY VIOLATING FLORIDA EVIDENTIARY LAW AND FLORIDA AND FEDERAL GUARANTEES OF DUE PROCESS.

In sustaining the Bar's linchpin allegation that Vannier acted as an agent of the California Church, the referee substantially relied on the huge amount of documentary hearsay, none of it authenticated, and the conclusory surmise and conjecture, itself based on that hearsay, which the Bar put before him. Not only did the referee explicitly cite that "evidence" in his report, R.App.1-5, but also the Bar's hearsay and conclusory "evidence" was so pervasive and overwhelming--so thoroughly permeated the case--that, inevitably, it indelibly colored the referee's impressions and hence his report.[9]

A. The Referee's Reliance on the State Bar's Presentation of Massive Hearsay, Including Unauthenticated Documents, and Conclusory Surmise and Conjecture Based Thereon Violated Florida Evidentiary Law

The Bar told the referee at a pretrial conference that this case was "a quasi-administrative proceeding" that, "as ground rules that we hope to be using in the trial of the case," it

---

9. The "evidence" we here object to includes Russell's testimony, described in Section B of the Statement and Facts, and the hearsay documents and derivative conclusory testimony described in that statement's Section E. Obviously, that "evidence" was offered for the truth of the matters asserted therein--to show that Vannier was an agent of the California Church--for otherwise it would have been irrelevant. The defense repeatedly raised objections to the Bar's presentation of its case on the grounds it constituted hearsay and conclusory surmise and conjecture and had not been authenticated. In fact, it filed a written motion to strike such evidence on the grounds we assert here. R.App. 131-63.

rules that we hope to be using in the trial of the case," it "should not be held to the same rules of evidence as those that pertain to the Civil or Criminal Proceedings" relying on State ex rel. Florida Bar v. Dawson, 111 So.2d 427 (Fla S.Ct. 1959)[10], and that it therefore did not "want to bog the trial down with continuous argument and spiels about the admissibility of evidence and the predicate." Transcript of Proceedings of January 11, 1985 at pp 3-8,13-14, 31. And, on the morning the trial began, the Bar declared to the referee that this "is an administrative proceeding and the Court is going to receive an awful lot of hearsay and, uh, evidence that you wouldn't ordinarily receive in civil or criminal, specially not a criminal proceeding." 1 T. 122. That was a proposition on which it relied throughout the trial. E.g., 5 T. 11-12, 108; 7 T. 107-108.[11]

Even if, as the Bar contended below, disciplinary proceedings against a lawyer are administrative and need not accord with the standards of criminal or civil judicial proceedings--a proposition with which we disagree--what the Bar

---

10. Although these proceedings had been pending for several years, it is quite apparent that Bar counsel was unprepared for the trial and therefore chose to rely on inadmissible evidence in prosecuting the case. On January 3, 1985, just four weeks before the trial began, Bar counsel wrote a letter to one of Vannier's counsel urging that Vannier resign from the Bar "without leave to reapply, ever," on the grounds that "the evidence is very damaging and the climate unfavorable to leniency," and requesting an "answer within 10 days, before the Bar incurs the additional expense of arranging for witnesses to attend the trial who presently reside outside the state of Florida." R. Ex. 40.

11. The Bar also relied almost exclusively on the hearsay documents and the conclusory testimony based thereon during its closing argument to the referee. 12 T. 20-45.

did below is totally unacceptable. First, Section 120.58 of the Florida Administrative Procedure Act provides, "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Byer v. Florida Real Estate Comm'n, 380 So.2d 511, 512 (Fla.App. 1980)[12] Here, however, the Bar put the cart before the horse and turned the law topsy-turvy: it sought to use "other" -- that is, nonhearsay -- evidence to supplement or explain the massive hearsay it presented, making hearsay the foundation of its case.[13]

---

12. In that case the Commission found that a real estate agent, one Nettie Byer, had improperly solicited advance listing fees by quoting unrealistically high prices at which the property could not be sold. The evidence showed that Ms. Byer worked for Continental Marketing Services as a broker salesman, that a caller who represented herself as Nettie Byer telephoned two property owners and stated that upon payment of an advance listing fee Continental would list the property, advertise it and sell it for several times the original purchase price, and that in fact the advance fees were paid, contracts were executed and the property was advertised. Reversing the Commission, the court noted that neither of the property owner witnesses were able to identify the voice of the caller other than by the caller's statements that she was Nettie Byer, that the caller's statements were incompetent hearsay, and that those statements were insufficient to sustain a finding that the caller was in fact Nettie Byer. 380 So.2d at 512.

13. True, the Bar, in presenting the hearsay documents and the conclusory testimony based on them, promised the referee that if it "can't tie it up, at the conclusion of the case, you can disregard it altogether," e.g., 1 T. 122, and that it would later produce evidence tying Vannier to the hearsay Church documents subject to an ultimate ruling by this court on admissibility. E.g., 2 T. 132-34, 6 T. 230. Predictably, those promises proved worthless, for the Bar failed entirely to furnish the foundational evidence which would allow admission of any of the massive hearsay it presented, whether or not it related to Vannier, and also failed absolutely to produce nonhearsay and nonconclusory evidence tying to Vannier the mass of "evidence" it presented regarding Church activities and ideology which on its face did not relate to him. At trial the (footnote cont.)

Second, Florida law prohibits indiscriminate resort to hearsay in administrative proceedings. In Jones v. City of Hialeah, 294 So.2d 686, 687 (Fla. Ct. App. 1974), the court disapproved a prosecutor's "conclusion that hearsay is strictly admissible in a quasi-judicial administrative hearing called to determine whether or not an individual is entitled to keep his job," and, although it denied on the facts of the particular case the defense contention that the prosecutor's view, including his statements "on numerous occasions that hearsay evidence was permissible," created "a hearsay free-for-all at the hearing," it declared that it did "think that a danger may have been established for the admission of unfair and prejudicial hearsay evidence in future cases." The Bar here created exactly the "hearsay free-for-all" Jones condemned.

Third, the Jones court also declared:

> "whether or not hearsay should be permitted at a particular administrative hearing boils down to a question of fundamental fairness. And, while in our state technical rules of evidence clearly do not apply in the same sense before administrative tribunals as they do in courts, we do not think the hearsay rule ought to be totally discarded, particularly in cases where individuals are threatened with serious deprivations, such as the loss of a job." 294 So.2d at 687-88.

At the very least, where a man's career is at stake, the

13. (cont.) Bar argued that "if the record doesn't support that Merrell Vannier was a member of the Church of Scientology and acting as the individual known as Ritz during the appropriate times, then I have been somewhere else during these proceedings." 6 T. 230. We defy the Bar to produce a single piece of nonhearsay and nonconclusory evidence which indicates that Vannier was "Ritz" or that he was, "during the appropriate times" (while he represented Cazares), a member of the Church. In fact, it is clear that the Bar was aware that the evidence that Vannier was "Ritz" was pure hearsay. See 6 T. 245-252.

"fundamental fairness" of which Jones speaks should require that the Bar, as the proponent of the hearsay, demonstrate "factors that . . . assure [its] underlying reliability and probative value." Cf., e.g., Richardson v. Perales, 402 U.S. 389, 402, 410 (1971). Such indicia of reliability include the identity of the hearsay declarant or author, whether he or she has any possible motive for untruth or bias, whether the contents of the statement are such as to reveal its credibility, whether the circumstances in which it is made or written are such as to inspire reliance, whether the statements are written, signed and sworn as opposed to being oral, anonymous or unsworn, whether the hearsay is corroborated, whether the declarant is subject to subpoena and cross-examination, whether the statement was routine or spontaneous, whether it made assertions about past fact, whether it could have been the subject of faulty recollection or puffing, and the credibility of the witness testifying to the hearsay. See, e.g., id. at 402-406; Calhoun v. Bailar, 626 F.2d 145, 146, 150 (9th Cir. 1980), cert. denied, 452 U.S. 906 (1981); cf., e.g., Dutton v. Evans, 400 U.S. 74, 87-89 (1970). Suffice it to say here that the Bar did not provide sufficient assurance of the reliability of the masses of hearsay it presented below.[14]

Fourth, this court warned in Florida Bar v. McCain, 361

14. We have seen that Logan was mistaken in interpreting the Ritz documents. Russell also testified that one of the Ritz documents contained factual errors. 5 T. 87-93. Had it had the opportunity to examine the authors of the Ritz documents as to their personal knowledge, the defense might well have elicited evidence that they are totally unreliable.

So.2d 700, 707 (Fla. 1978), that the Bar must not take "an excessively broad approach" in disciplinary proceedings and ought "to early abandon counts that could not be proved."[15] Regrettably in this case, "the entire matter [has been] . . . poorly and illogically planned by the Bar," and "[it] has been

---

15. The Bar's reliance below on the 1959 Dawson opinion was sadly misplaced, for, on its facts, it should not be read as authorizing admission of hearsay in Bar disciplinary proceedings, and it certainly is not authority for the Bar's massive resort to hearsay in this case. That case involved a charge (among others irrelevant here) that Dawson solicited professional employment through an intermediary, one Griffin, a photographer who, alerted by a police radio, visited accident scenes and made photographs of them. 111 So.2d at 428-429. Griffin himself testified at the hearing that "he never referred a potential client to Dawson unless his advice with reference to a good lawyer was requested," but "there was a substantial volume of testimony before the referee to the effect that Griffin pursued potential plaintiffs, suggested the advisability of employing an attorney and then recommended Mr. Dawson as a capable negligence lawyer." 111 So.2d at 429. Dawson objected that this testimony -- which "dealt primarily with conversations between Griffin and various individuals who subsequently employed Dawson as their lawyer pursuant to Griffin's recommendations" -- "was hearsay and should have been excluded." 111 So.2d at 430-31. The Dawson court held that "a disciplinary proceeding . . . is neither criminal nor civil in nature," that "[i]t is not circumscribed by technical rules of evidence usually attendant on the trial of an action in the courts," that "[i]t is more nearly in the nature of a quasi-judicial administrative hearing until it reaches this court for decision," and that "[t]here was no error in the ruling of the referee regarding the admissibility of evidence." 111 So.2d at 431. Significantly, the court did not say explicitly that hearsay was admissible in disciplinary proceedings; indeed, it did not even say that it agreed with Dawson's contention that the testimony he challenged was in fact hearsay. There was good reason that it did not do so, for that testimony was not hearsay. It is hornbook law, of course, that evidence of out-of-court statements is hearsay only when it is offered to prove the truth of the matters asserted therein, and not when offered only to prove that the statements were in fact made regardless of their truth or falsity. And it is obvious that in Dawson the witnesses' testimony as to Griffin's statements to them was offered and used only to prove that the statements were made, that solicitation occurred, not to prove their truth, and therefore did not constitute hearsay. Dawson, then, is at best shaky dictum for the proposition that hearsay is admissible in disciplinary proceedings.

largely a trial by insinuations, inferences, and innuendoes accompanied by a minimum of evidence of a clear and convincing degree." McCain, 361 So.2d at 708 (concurring opinion quoting with approval report of referee in bar disciplinary proceedings).[16]

The upshot is that Vannier found himself "confronted with a hodge-podge of acts and statements by others which he . . . never . . . authorized or intended or even [knew] . . . about." See Krulewitch v. United States, 336 U.S. 440, 453 (Jackson, J. concurring) (1949). This court should not "propose to be the first . . . [to hold] in an administrative proceeding or any other kind that one person can be held responsible for the actions and statements[s] of another in the absence of a conspiracy or agreement." General Foods Corp. v. Brannan, 170 F.2d 220, 225 (9th Cir. 1948). [17]

---

16. This court has said that "[t]he Florida Bar acts for and is an agency of this Court," and that "[w]hen the child falters the parent shall correct." McCain, 361 So.2d at 705. The concurring opinion in that case declared that "[t]he Florida Bar as an arm of this Court is charged to act responsibly" and that "[i]f it acts irresponsibly this Court has the power and the duty to impose appropriate sanctions against the offending members. 361 So.2d at 708.

17. The Bar never urged the co-conspirator exception to the hearsay rule below, and, indeed, it could not have, since before it introduced hearsay under that exception it would have had to show by substantial independent nonhearsay evidence that the hearsay declarants and Vannier were both members of the conspiracy. See, e.g., Fla. Stats. § 90.803 (18)(e); Dinter v. Brewer, 420 So.2d 93, 935 n. 4 (Fla. Ct. App. 1982); United States v. Nixon, 418 U.S. 683, 701 and n. 14 (1974). For "[o]therwise hearsay would lift itself by its own bootstraps to the level of competent evidence." See e.g., Glasser v. United States, 315 U.S. 60, 74-75 (1942).

The Bar however, did assert two hearsay exceptions below: the business records exception as to what McLean claimed was Vannier's personnel file, and the unavailability exception as

Not only was the "evidence" the State Bar relied upon hearsay, but also it was conclusory surmise and conjecture, based upon that same hearsay. Several Bar witnesses below--Cazares, Logan and, particularly McLean--were allowed to testify as to their interpretations of alleged California Church policies and activities, sometimes on the basis of documentary hearsay, on other occasions on the basis of what was alleged to be personal knowledge but which was admittedly geographically limited and stale. The Bar elicited what was, in essence, expert testimony, not based on personal knowledge, from McLean, Logan and Cazares regarding Church policies and

17. (Cont.to the Lisa deposition transcript and videotape. C. Exs. 1-A, 6-A, 6-B;_____. However, it failed to present proof satisfying either exception. First, the business records exception requires that the custodian or other qualified witness testify as to the reliability of the records and bars evidence in the form of an opinion in that regard. See, e.g., Fla. Stats. § 90-803(6)(a), (b); Beasley v. Mitel of Delaware, 449 So.2d 365 (Fla. Ct. App. 1984). McLean, of course, was not the custodian of the alleged personnel file and, since her experience was limited to the Toronto Church at a time ending long before the period at issue below, she was not otherwise qualified to testify in that regard.

Second, Lisa appeared at the trial and hence his deposition does not meet the unavailability exception. See, e.g., Fla. Stats. § 90-804(1)(e); Fla. Rules of Civ.Proc. §1.330 (a)(1), (3); Schwind Harvesting v. Boatman 424 So.2d 948 (Fla. Ct. App. 1983); Collonades, Inc. v. Vance Baldwin, Inc., 318 So.2d 315 (Fla. Ct. App. 1975); Haverley v. Clann, 196 So.2d 38 (Fla. Ct. App. 1967). Moreover, Vannier had no opportunity or motive to develop Lisa's deposition testimony. See, e.g., Fla. Stats. §90.804 (2)(a); Dinter v. Brewer 420 So.2d at 934 and n. 1, 935 n. 4. The Lisa deposition, as we have seen, was taken by Logan in an entirely different proceeding, the McLean case, and, while one of Vannier's counsel, Bennie Lazarra, was present, he was there as counsel for Lisa himself, as the deposition transcript makes clear. C.Ex. 6-A. Moreover, as Logan admitted below, he crossed off the name of Vannier's other counsel, Carl Kohlweck, who lives in the same area as Vannier in California, some 3,000 miles from Florida, from the list of attorneys to be served, with notice of the deposition, although Kohlweck was then an attorney of record in the McLean case.

activities and Vannier's alleged connection with them. The law is, however, that lay witnesses may only testify to facts which they personally observed and may not testify in terms of inferences, opinions or suppositions based on those facts, for that would invade the trier of fact's province. E.g., Jones v. State, 44 Fla. 74, 32 So.2d 793 (1902); Scott v. Barfield, 202 So.2d 591 (Fla Ct. App. 1967). The Bar did not bother to try to qualify any of its witnesses as experts; indeed, it could not have, for Cazares, Logan and Russell obviously were never Scientologists and had no personal knowledge as to Church documents and Vannier's alleged relationship with the Church. The only other Bar witness, McLean, was a Scientologist for three years, but her experience was confined to the Toronto Church, not involved in this case, and pre-dated the time period at issue here by more than four years. Clearly -- even if the Bar had bothered to make the effort -- none of its witnesses would have qualified as experts in the field of knowledge about which they testified. See, e.g., Fla. Stats. § 90.702; Devore v. State, 429 So.2d 1329, 1330 (Fla. Ct. App. 1983).[18]

---

18. The defense also repeatedly objected at trial on authentication grounds to the documentary evidence we mention including chain-of-custody questions in this brief (except Vannier's Bar application). The only attempts the Bar made to authenticate the massive amounts of hearsay documents regarding alleged California Church activities, and, more importantly here, Vannier's alleged association with the Church, were entirely hearsay: the letter from Fuentes to the Bar which explicitly refused to authenticate the Ritz documents, the transcript and video tape of Lisa's deposition, in which he identified some of the alleged Ritz documents, and the FBI agent's declaration regarding the documents the Bar sent to him. This state's law, however, requires a showing that the documents are genuine. DeLong v. Williams, 232 So.2d 246 (Fla. Ct. App. 1970), which, in turn, requires that the authenticator has knowledge of the facts and that his source of

The gross impropriety of what the Bar sought to do below is most plainly shown by an old California criminal case, People v. Ware, 67 Cal.App. 81, 89, 226 Pac. 956 (1924), which involved a criminal syndicalism charge based on an allegation of membership in another unpopular organization, International Workers of the World. There the court insisted that the trier of fact "must not be led astray by hearsay evidence and incompetent conclusions." The Bar did below precisely that which Ware condemned more than 60 years ago. [19]

18. (Cont.) knowledge is subject to the test of cross-examination by the opposition. E.g., Leighton v. Harmon, 111 So.2d 697, 701-02 (Fla. Ct. App. 1959).

19. The Ware court held:

> "The testimony of a witness as to talks which he had with persons whom he believed to be members of the organization, whether such belief be founded upon membership cards shown to the witness or upon declarations made to him by such supposed members, and in which talks the persons whom the witness so believed to be members made statements of what purported to be the purposes, objects, principles or teachings of that organization, is hearsay testimony and as such is inadmissible. [Citations omitted.] It may be that the persons quoted by the witness were not members of the organization, though they claimed to be. They may have obtained their membership cards through some species of fraud or it may be that they were not acquainted with the principles and teachings which they professed to know. These are matters which the defendants in such actions have the right to search out by cross-examining the persons who vouchsafed the information given to the witness." 67 Cal.App. at 86.

The Ware court went on to hold that to prove the organization's character, a witness might permissibly testify "to statements, speeches or declarations made in his presence by members of the [International Workers of the World, the allegedly unlawful organization], at recognized meetings or in (Footnote cont.)

B. The Referee's Reliance on the State Bar's Presentation of Massive Hearsay and Conclusory Surmise and Conjecture Based Thereon Violated State and Federal Guarantees of Due Process of Law.

We submit here that admission of the hearsay against Vannier without affording him the opportunity to confront the hearsay declarants violated his right to due process of law guaranteed by the fourteenth amendment of the United States Constitution and, independently, by Article I, Section 9 of the Florida State Constitution. The United States Supreme Court

19. (Footnote cont.) places and upon occasions which have received the organization's sanction and countenance, or to conversations had with officers or leaders whose membership and rank have been proved by competent evidence and whose official positions are such as to carry authority to make on behalf of the organization declarations of its purposes, objects, principles and teachings." 67 Cal.App. at 87. But even such a witness, the court ruled,

> "must not give his inference as to the meaning of the language heard by him, but must confine his testimony to recounting the substance of the statements, speeches, declarations or conversations, so far as his memory will enable him to recall it. That is to say, a witness to such speeches, declarations or conversations may give the substance of the language as he remembers it, but he may not give his inferences drawn from what was said to him or in his presence. He must not be allowed to place his construction upon the language by stating what he understood it to mean. It is for the jury, not the witness, to determine from the language used at the meetings or in the conversations with the authorized leaders or officers what were the teachings or principles promulgated or what were the objects or purposes had in view by the organization. The general rule is that a witness may not state his impression as to the meaning of the language heard by him or as to the intention of the speaker." Id.

The same rule, the court noted, "forbids a witness to place his interpretation upon language . . . read by him or to give his inference as to the meaning of . . . written words." 67 Cal.App. at 89.

has ruled: "The extent to which procedural due process must be afforded [one who is the subject of administrative proceedings] . . . is influenced by the extent to which he may be 'condemned to suffer grievous loss,' [citation omitted], and depends upon whether [his] interest in avoiding that loss outweighs governmental interest in summary adjudication." E.g., Goldberg v. Kelly, 397 U.S. 254, 263 (1969); Richardson v. Perales, 402 U.S. at 401-02. The loss resulting from bar disciplinary proceedings may, of course, be catastrophic. "[F]or most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine," and "[f]urthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment -- loss of professional reputation," the "stigma" of which "can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions." Erdmann v. Stevens, 458 F.2d 1205, 1210 (2nd Cir. 1972), cert. denied, 409 U.S. 889 (19__); United States v. Hicks, 37 F.2d 289, 293 (9th Cir. 1930); see Spevack v. Klein, 385 U.S. 511, 516 (1967).

Undoubtedly, these considerations led the United States Supreme Court to hold that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer," that state disbarment hearings are "adversary proceedings of a quasi-criminal nature," and that the lawyer subjected to them "is accordingly entitled to procedural due process, which includes fair notice of the charge." In re Ruffalo, 390 U.S.

544, 550, 551 (1968). In a case involving denial of an application for admission to a state bar, that Court, relying in part on a Florida decision, declared that "the requirements of procedural due process must be met before a State can exclude a person from practicing law," and that "the need for confrontation is a necessary conclusion from the requirements of procedural due process in a situation such as this." Willner v. Comm. on Character & Fitness, 373 U.S. 96, 102, 103, 104 (1963), citing Schware v. Bd. of Bar Examiners, 353 U.S. 232, 238, 239 (1957), and Coleman v. Watts, 81 So.2d 650 (Fla. 1955). Three concurring justices in Willner declared that "[o]f course, if the denial [of the bar application] depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination should be afforded." 373 U.S. at 108 (Goldberg, J., joined by Brennan, J. and Stewart J.) Those justices would have upheld a denial of confrontation only, "for example, when the derogatory matter appears from information supplied or confirmed by the applicant himself, or is of an undisputed documented character disclosed to the applicant, and it is plain and uncontradicted that the committee's recommendation against admission is predicated thereon and reasonably supported thereby." Id.

If, as the Willner court held, confrontation and cross-examination of witnesses who furnish derogatory information are required before denial of an application for admission to the bar, a fortiori they are required in disciplinary proceedings in which the bar seeks to terminate an

admission already granted. See Richardson v. Perales, 402 U.S. at 406-07 (distinguishing Goldberg, 397 U.S. 254, 269-70, in which the Court held that welfare recipients have the rights to confrontation and cross-examination before the state terminates their benefits, in part on the ground that Perales concerned an application for disability benefits, not "termination of disability benefits once granted"). Hence, in a disciplinary proceeding, too, "a fair opportunity to interrogate the witnesses testifying against" the lawyer is an "indispensable" requirement. United States v. Hicks 37 F.2d at 292. Indeed, the Florida Supreme Court has declared that when the trial in disciplinary proceedings commences, the State Bar must "establish its allegations by sworn testimony and other competent evidence," and that the charged attorney "will then be entitled to confront the witnesses and cross-examine them." State ex rel. Florida Bar v. Grant, 85 So.2d 232, 238 (Fla. 1956).

The need for cross-examination and confrontation of the hearsay declarants is obvious. As the Court observed in Goldberg v. Kelly, 397 U.S. 254, 269, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. In Richardson v. Perales, 402 U.S. at 407, where the Court approved the admission of hearsay medical reports in hearings on applications for disability benefits, it held inapplicable the confrontation and cross-examination requirements set down in Goldberg 397 U.S. 254, largely because the hearsay reports

did not present the specter of questionable credibility and veracity," because there was "no attack" upon their authors' "credibility or veracity." That may not be said here.[20]

What the State Bar did below this court condemned almost 30 years ago in a remarkably prescient opinion. In re Integration Rule of the Florida Bar, 103 So.2d 873 (Fla. 1956). There this court considered petitions for amendments to State Bar rules which would have made the assertion of the privilege against self-incrimination by a lawyer accused of membership in the Communist Party grounds for automatic disbarment or, at least, prima facie evidence of unfitness to continue the practice of law. 103 So.2d at 874-75. The court held that the proposed amendments violated state and federal constitutional guarantees because of "the importance of adhering to the doctrine long established by this court that the

---

20. It is quite clear that in Dawson parties to the out-of-court conversations--Griffin and the clients he solicited--took the witness stand at the disciplinary hearing, 111 So.2d at 429, 430-31, and thus there was no question that admission of the testimony regarding the out-of-court statements deprived Dawson of his rights to confront and cross-examine the witnesses against him. For the fair opportunity to cross-examine at the hearing the maker of the earlier out-of-court statement satisfies the federal constitutional confrontation requirement even in a criminal case. E.g., California v. Green, 399 U.S. 149 (1970). That opportunity was afforded Dawson, and it was for that reason that the Dawson court did not even mention the rights of confrontation and cross-examination but said only that disciplinary proceedings are not bound to follow "technical rules of evidence." See 111 So.2d at 431 (emphasis added). On the other hand, admission of hearsay without affording the accused lawyer the opportunity to confront and cross-examine the makers of the out-of-court statements -- the situation presented in this case -- presents not merely a question of "technical rules of evidence," but a question going to the accuracy of the truth-determining process, to the very integrity and fairness of that process. See Goldberg v. Kelly, supra, 397 U.S. at 270. Dawson, then, carries no precedential weight here.

investigation and trial of a lawyer for unprofessional conduct must be a judicial proceeding, in the manner provided by law or this court," id. 875, because "the seriousness" of disciplinary proceedings against a lawyer "entitles the accused to due process," the "essential ingredients" of which are "confrontation and cross-examination and fair trial." 103 So.2d at 876. Said this court:

> "Confrontation and cross-examination under oath are essential to due process because it is the approved method to test the probity of the evidence and discredit or eliminate that which is spurious or of doubtful veracity. Where the evidence is conflicting there must be a clear preponderance against the accused, since the end result of the trial is to deprive him of one of his most priceless possessions -- the privilege to practice law." Id.

The State Bar did not, on the face of it, resort to Vannier's invocation of the self-incrimination privilege as proof of guilt, but in substance it did the equivalent, through massive hearsay and conclusion, thereby depriving Vannier of his due process rights of cross-examination and confrontation.

When the defense in this case challenged the Bar's reliance on hearsay, it responded, "the evidence will show that because of the type of organization that we are dealing with it is very difficult to garner cooperation from them in a disciplinary proceeding of this type and we have brought to the Court the best available evidence the Bar has." 2 T. 128. This breathtaking and novel basis for the admissibility of hearsay should be rejected outright. One shrinks from the crudity of that justification, since "[t]here can be no compromise on the footing of convenience or expedience, or because of a natural

desire to be rid of harassing delay [or difficulty of proof], when [the] minimal requirements [of due process and confrontation have] been neglected or ignored." Cf. Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304 (1937). For that reason, this court must disapprove what was done below.

II. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE THEY VIOLATED STATE AND FEDERAL GUARANTEES OF FREEDOM OF SPEECH, RELIGION AND ASSOCIATIONAL PRIVACY THAT REQUIRED HIM TO JUDGE MR. VANNIER SOLELY ON THE BASIS OF CONVINCING AND SUBSTANTIAL EVIDENCE THAT HIS OWN CONDUCT AND INTERESTS RATHER THAN THOSE ALLEGED TO BELONG TO THE CHURCH OF SCIENTOLOGY OF CALIFORNIA.

We here adopt and incorporate by this reference the argument we made below in pages 7 through 27 of "Respondent Vannier's Closing Memorandum of Law," R.App. 84-106. There we argued that the freedom of association requires that Vannier should be judged only on the basis of admissible and convincing evidence of his own conduct and interests, rather than the hodge-podge of hearsay the Bar foisted on the referee, because of the lack of convincing evidence that he had knowledge of the California Church's alleged policies and activities and that he had the specific intent to implement them. We further argued there that if Vannier is judged on the basis of admissible evidence of his own conduct and interests -- which consists of his own disclosure on his Florida Bar application, made before the period at issue here, that he had worked as an "odd jobs" man for the Missouri Church of Scientology and his own admission in his response to the Bar's complaint that while he was not a member of the Church, he did believe in Scientology

as a religion--state and federal constitutional principles foreclose imposition of any penalty on him.

It is plain that the referee's report and recommendations violate constitutional principles, and we earnestly request that this court read and digest the incorporated argument -- contained in Respondent's Appendix at pages 84 through 106, before it reads the remainder of this brief because arguments build on that incorporated argument.

III. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE THEY WERE BASED ON HIS ARBITRARY OPINION THAT MR. VANNIER'S ALLEGED ASSOCIATION WITH THE CHURCH OF SCIENTOLOGY FOREVER DISQUALIFIES HIM--AND THEREFORE ALL LAWYERS OR PROSPECTIVE BAR APPLICANTS WHO BELIEVE IN THE SCIENTOLOGY RELIGION -- FROM BAR MEMBERSHIP IN VIOLATION OF STATE AND FEDERAL GUARANTEES OF SPEECH, ASSOCIATION AND RELIGION.

The referee stated in his report that "[o]rdinarily, based on the nature of the charges on which guilt has been found," he "would only recommend suspension for a limited period of time, especially in view of Respondent's exhibits 37, 38 and 39," all affidavits attesting to Vannier's good character, "and the further fact that some punishment has already been inflicted on the Respondent because of the length of this proceeding." R.App. 5. However, he recommended disbarment "because the record in this case fully supports the conclusion that the Respondent would place his Scientology commitment, allegiance and ethics . . .above the ethics on which the Florida Bar is founded and on which all members of the profession depend." R.App. 5. That conclusion was based on the referee's findings that "[t]he policies, tenets and doctrine as found by L. Ron Hubbard were binding, and adhered to by all

members of the Church of Scientology," that Vannier "reapplied for a staff" position with the Church in September of 1980 notwithstanding his prior ethical problems which are directly attributable to his commitments to the Church of Scientology," that "[t]he 'fair game' policies of the Church of Scientology . . . are repugnant to all fair minded people," that Vannier "fully participated in the fair game policy once, [and] there is no showing that he will not do so in the future," for, as the referee repeated, "[t]he policies, tenets and doctrine as found by L. Ron Hubbard are binding and adhered to by all members of the church." R.App. 1,5.

That ruling--obviously based solely on the documentary hearsay and the conclusory testimony of McLean, a professional anti-Scientologist--thrusts on Vannier, and any other Scientologist who is a member of the Bar, a law student or even one considering the study of law the choice between renouncing his or her religious beliefs and, on the other hand, giving up a career in the law. For if the referee's recommendations become the law of this case, Vannier and any other Scientologist would have to prove to the Bar that he or she does not believe in or has renounced the religion of Scientology.[21] The referee's ruling not only violates the free exercise clauses of the First Amendment and Article I, Section 3 of the Florida State Constitution, see e.g., Sherbert v.

21. Although the Bar below refused to concede that the Church was a religion, the courts have held, on the basis of an examination of its creed, that it is a religion. See, e.g., R. Exs. 30, 31; Barr v. Weise 412 F.2d 338, 340 (2nd Cir. 1969); Founding Church of Scientology v. United States, 409 F.2d 1146, 1154, 1160-61 (D.C. Cir. 1969), cert. denied, 396 U.S. 963 (1969).

Verner, 374 U.S. 398 (1963), but also is a classic example of the resort to "guilt by association" which the United States Supreme Court and this court have roundly condemned, as noted in Respondent Vannier's Closing Memorandum of Law, which is incorporated in this brief. App. 84-106[22] See e.g., Schware v. Bd. of Bar Examiners, 353 U.S. 232; Baird v. State Bar, 401 U.S. 1 (1970); In re Stolar, 401 U.S. 23; Law Students Civil Rights Research Council v. Wadmond, 401 U.S. 11 (1971).

IV. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE THEY WERE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

"To sustain a charge of professional misconduct, there must be clear and convincing evidence free of substantial doubts or inconsistencies." Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). In Slomowitz v. Walker, 429 So.2d 797 (Fla. App.Ct. 1983), the court held that "clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue," and that "[t]he evidence must be of such weight that it produces in the mind of the trier of fact belief or conviction, without hesitancy, as to the truth of the

22. The referee's report, were this court to uphold it and make it law, would smack of a bill of attainder because it would condemn as unfit for Bar membership any Scientologist who is a lawyer, law student or prospective lawyer or law student, without an individual trial. See e.g., United States v. Brown, 38 U.S. 437 (1965); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 142-49 (1951) (Black, J. concurring); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

allegations sought to be established." This court must also consider the motives and biases of the witnesses in determining the sufficiency of the evidence. Florida Bar v. Thomson, 271 So.2d 758, 760 (1972) (finding of guilt could not be upheld "considering the great interest of the witness" in the proceeding and "the admitted penchant for perjury, the animosity voiced for Thomson, and the lack of any other evidence").

The bias and self-serving nature of the Bar's four witnesses--all avowed antagonists to the Church of Scientology, two of them seeking damages in suits against the Church, the third the lawyer for those two in those suits, and the fourth one who has pursued criminal investigations. All stood to gain should the referee issue an opinion against Vannier and the Church, particularly if it connected him to the Church.

The documents evidence the Bar introduced lacked any indicia of reliability. They were hearsay, mostly multiple hearsay, and they were not authenticated. This is hardly the kind of clear and convincing evidence upon which findings may be based.

A. The Cazares Solicitation Count.

The only witness who testified against Vannier on the Cazares solicitation count was Cazares himself, whose prior lawyer, Doherty, had filed a motion to withdraw and was pressuring the Cazareses to seek other counsel. The Cazareses were, in fact, seeking other counsel over a four month period. Doherty, their lawyer, issued them an ultimatum to substitute counsel by December 23, 1976 or pay him an hourly rate. R. Ex. 7. Vannier entered his appearance the very day of Doherty's

billing deadlines, R. Ex. 1-E. Obviously, the Cazareses were in desperate need of an attorney, and, since Cazares was a former client of Vannier's firm, there is substantial doubt--no clear and convincing evidence--that Vannier solicited the Cazareses. See Florida Bar v. Thomson, 271 So.2d at 760. Cazares was evasive and inconsistent as to whether Vannier actually initiated contact, an essential element of violation of the disciplinary rule. Fla. Bar Code Prof. Resp., D. R.2-103(A). On direct examination Cazares did not testify that Vannier initiated contact; he only testified that he "never" initiated contact, and his response was to the question, "Who initiated or did you at any time initiate or seek the services of Merrell Vannier before he suggested his employment to you?" (T. 1-113) The Bar did not produce Margaret Cazares, his wife and Vannier's client in a case arising out of precisely the same allegations of her husband made in his case. Cazares testified to conversations between Vannier and Mrs. Cazares, but, disingenuously, he never testified as to whether or not his wife contacted Vannier regarding his employment.

Thus, even Cazares' self-serving statements fail to clearly and convincingly establish a finding of solicitation; a critical element was not established, and the testimony was not "precise and explicit," as Slomowitz requires.

B. The Cazares Adverse Interest Count.

The Bar had the burden to prove clearly and convincingly that the Vannier's own financial, business, property or personal interests were adverse to those of Cazares when he was employed. There was absolutely no showing of an adverse

financial, business, or property interest, and hence the Bar's burden was to prove an adverse personal interest. The only competent evidence, in this regard, consists of Vannier's bar application disclosure that he had worked for the Missouri Church of Scientology in St. Louis in 1973-1974 and his admission that he was a Scientologist in the sense that at times material here his religious preferences were to the teachings and doctrines of the Church of Scientology. The evidence further showed that Missouri and California Churches were independent corporations and that the California Church had no form of corporate control over the Missouri Church (see p. 19). Therefore, there was no competent evidence to show that Vannier had any prior dealings, direct or indirect, with the Church of Scientology of California. Hence, the only possible basis for a showing that Vannier had an adverse personal interest lies in his admitted religious beliefs.

Apart from the constitutional problems which arise from the application of Fla. Bar. Code Prof. Resp., D-R.5-10 to this case, see App.___, the Bar has failed to prove Vannier had an adverse personal interest. It would be preposterous to suggest that an adverse interest automatically arises due to the mere coincidence of the religious beliefs of a lawyer and the adverse party opposing his client. The Bar must prove a specific, personal interest which is adverse to his client's interests for example, an employee or agency relationship, an observable, concrete interest in having the opponent prevail against his own client, steps taken against his client's interest. There must be clear and convincing evidence of

palpability, something beyond speculation and surmise. The Bar has failed to supply the necessary proof. Instead it relied upon biased witnesses, massive, undifferentiated hearsay in the form of unauthenticated documents and pejorative testimonial comments, all calculated to appeal to the potential prejudices of arbiters.

C. The Mclean "Illegal Conduct" Count.

The Referee found Vannier guilty of violating Fla. Bar Code Prof. Resp., D.R. 7-102(A)(8), which states "In his representation of a client, a lawyer shall not knowingly engage in other illegal conduct or conduct contrary to a disciplinary rule" because he failed to disclose his alleged association with the Church to McLean and her lawyer. The Bar made no showing that Vannier engaged in any illegal conduct. The record merely shows that he, as attorney for the Cazareses, viewed the files of Mrs. McLean's attorney. Indeed, since he and that attorney were representing clients with a common adversary, it was entirely proper that they collaborate. The Referee found that McLean's attorney would not have allowed Vannier access to his files had he known that he was a Scientologist. But Vannier made no affirmative misrepresentation to anyone; nor is there any evidence that McLean's attorney showed her letter to him or told him about its contents. There was no clear and convincing evidence below that Vannier committed any "illegal conduct" while representing a client.[23]

---

23. We submit that the term "illegal conduct" in Fla. Bar Code Prof. Resp. D-R-7-102 (A)(8)--the sole basis on which the referee sustained the McLean count--is unduly vague. See e.g. Landry v. Daley, 280 F.Supp. 938, 955 (N.D. Ill. 1968), rev'd on other grounds sub nom. Boyle v. Landry, 401 U.S. 77 (1971).

D. The State Attorney's Office Adverse Interest Count

Everything Russell--the only witness on this count--testified to was pure hearsay, and therefore hardly clear and convincing. Moreover, Russell never met or talked to Vannier; one Myron Mensch, not produced at trial, was the SAO supervisor who dealt with Vannier. This count was based on nondisclosure of an adverse interest. Vannier hardly could have disclosed to Russell, a person with whom he never conversed, any adverse interest. According to Russell's hearsay testimony, it was Mensch who dealt with Vannier, and it was he whom the Bar should have called to show Vannier's alleged non-disclosure to the SAO of an adverse interest.

Moreover, Fla. Bar. Code Prof. Resp., D.R. 5-101(A) only prohibits "employment" by one who has an adverse interest, and there is no evidence in the record that the SAO ever employed Vannier as an attorney or otherwise. In fact, Russell's testimony was that Vannier was never hired or employed.

V. THE REFEREE'S FINDINGS AND RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE, IN CRUCIAL ASPECTS, THEY WERE NOT ONLY UNSUPPORTED BY THE EVIDENCE BUT ALSO CONTRARY TO IT.

The referee's findings on crucial matters are not supported by the evidence, or worse, in some instances they are contrary to the evidence. Quite independently of our argument relating to the sufficiency of the evidence supporting his findings, we here address those findings that are contradicted by the evidence and, hence, simply mistaken. We list them now.

1. Vannier "examined the files and notes maintained by attorney Walter Logan . . . [and] there is no explanation how

some of these same notes and comments of Mr. Logan get into the Scientologist's records." The evidence showed that the document Logan relied on was dated more than six months before Vannier met with him. As Logan himself testified, Vannier could not have been responsible for the alleged transmission to the California Church.

2. "All Scientology Churches were affiliated by information gathering and storage, etc." John Peterson, Church counsel, testified that information and files gathered by the Church's GO was not shared with other Scientologists or Scientology organizations involved in litigation. There was no other evidence in the record regarding this finding.

3. "The policies, tenets and doctrine as found by L. Ron Hubbard were binding and adhered to by all members of the Church of Scientology." McLean made this representation on direct examination, but conceded on cross-examination that not all Scientologists were trained on all of the policies, tenets and doctrine.

4. The Church of Scientology now maintains a "fair game policy directed against those persons who do not embrace their tenets and are deemed to be enemies; it permits members to trick, cheat and lie to obtain results against enemies of the Church; and the Respondent participated in the policy." McLean, whose personal knowledge of the Church was limited geographically to Toronto, Canada and chronologically to 1972, more than four years before the events at issue here, was the sole witness whom the referee could have relied upon in making this finding. She had no personal knowledge of Church

policy after 1972, and there is no evidence in the record as to whether the Church maintained that policy in the relevant time-period, 1976 and 1977, much less now. It should be noted that no documentary evidence regarding the so-called fair game policy was produced by McLean or any other witness below.

5. Vannier would place his "Scientology commitment, allegiance and ethics above the ethics on which the Florida Bar is founded." This finding, which the referee made the sole basis of his recommendation of disbarment, as opposed to "suspension for a limited period of time," explicitly relied on Complainant's Exhibit 1-A, a hearsay document that included a contract Vannier allegedly signed in 1980, long after the period at issue here, agreeing to its terms. But the contract itself explicitly stated that Vannier agreed to follow the Church's then existing policies in 1980, as to which there is no evidence in the record, and, by its terms, the contract expired September 7, 1982. Moreover, Church coordinating counsel Peterson provided the only evidence of Vannier's current religious status: Vannier was a Church parishioner but was not an employee or staff member and did not live on Church property.

VI. THE REFEREE'S RECOMMENDATIONS SHOULD BE DISAPPROVED BECAUSE DISBARMENT IS FAR TOO HARSH A PENALTY IN LIGHT OF THE CIRCUMSTANCES PRESENTED HERE.

Even if the referee's findings of guilt are allowed to stand, disbarment is clearly too harsh under the circumstances. "This Court has long considered disbarment as a proper discipline in only the most extreme cases." Florida Bar v. Thomson, 271 So.2d 758. "The penalty assessed should

not be made for the purpose of punishment, Florida Bar v. King, 174 So 2d. 398 (Fla. 1965), "and neither prejudice nor passion should enter into the determination." Florida Bar v. Bass, 106 So.2d 77 (Fla.1958). "The purpose of assessing penalties is to protect the public interest and to give fair treatment to the accused attorney." State ex rel. Florida Bar v. Ruskin, 126 So.2d 142 (Fla.1961). "The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injury suffered, and the character of the accused." Holland v. Flournoy, 142 Fla. 459, 195 So. 138 (Fla. 1940).

In this case, while the charges are serious, there was no injury to the SAO, the Cazareses or the McLeans. The only evidence regarding Vannier's current character was entirely favorable. R.Exs. 37-39. Furthermore, Vannier had just finished law school when the events at issue here took place. He has had no prior or subsequent ethical problems, and the relevant events occurred almost 10 years ago. These proceedings have been ongoing since 1980, and he has thereby been effectively suspended from the practice of law for six years.

His conduct, if actionable, was an isolated act as to which there is no competent evidence suggesting its possible recurrence. "For isolated acts, censure, public or private, is more appropriate," "[o]nly for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be given, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record

free from offense like that charged against him." State ex rel. Florida Bar v. Murrell, 74 So.2d 221 (Fla.1954).

Accordingly, we respectfully ask this court to reject the referee's findings and recommendations entirely, but, if it upholds any finding, that it reject the referee's recommendations and privately reprimand Vannier, for that is the just and proper sanction under the circumstances.

CONCLUSION

For all the reasons stated above, this court should disapprove the referee's findings and recommendations.

Dated: March 4, 1986

Respectfully submitted,

BENNIE LAZZARA, JR., ESQUIRE
BENNIE LAZZARA, JR., P.A.
610 West DeLeon Street
Tampa, Florida 33606
PHONE: 813-251-2309
and
CARL E. KOHLWECK, ESQUIRE
1821 Wilshire Boulevard,
Suite 210
Santa Monica, CA 90403
PHONE: 213-820-4676

Attorneys for the Respondent
MERRELL G. VANNIER

Of Counsel on the Brief:
H. PETER YOUNG
1821 Wilshire Boulevard,
Suite 210
Santa Monica, Ca 90403
PHONE: 213-820-4676

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of RESPONDENT'S OPENING BRIEF has been furnished by United States Mail to DIANE VICTOR KUENZEL, Bar Counsel, THE FLORIDA BAR, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 and JOHN FERNANDEZ, ESQUIRE, 918 Drew Street, Clearwater, Florida 33515, on this the 4th day of March, 1986.

BENNIE LAZZARA, JR., ESQUIRE