IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 6 1986
CLERK, SUPREME COURT
By ______ Deputy Clerk

THE FLORIDA BAR,

Complainant,

Supreme Court Case No. 67,546

v.

SCOTT WILLIAM KATZ,

Respondent.

______________________________/

ANSWER BRIEF OF THE FLORIDA BAR

JACQUELYN PLASNER NEEDELMAN
RICHARD B. LISS
Co-Bar Counsel
The Florida Bar
Galleria Professional Building
915 Middle River Drive, Suite 602
Ft. Lauderdale, FL 33304
(305) 564-3944

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301-8226
(904) 222-5286

TABLE OF CONTENTS

	PAGE
Table of Citations ------------------------------	ii
Preface --	v
Statement of the Case and Facts -----------------	1
Issues Presented for Review ---------------------	9
Summary of Argument -----------------------------	10
Argument	
I. THE REFEREE'S FINDINGS OF FACT AS TO COUNTS I, II AND III ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD THEREFORE BE UPHELD BY THIS COURT.	15
II. THE REFEREE WAS CORRECT IN REFUSING TO ALLOW INTO EVIDENCE RESPONDENT'S EXHIBIT A FOR IDENTIFICATION, CRIMINAL DIVISION RECORD SEARCH REGARDING MICHAEL FIELD. ----------------------------------	25
III. ALLEGATIONS REGARDING GRIEVANCE COMMITTEE MEMBERS ARE IRRELEVANT AND UNTIMELY AS SAID ALLEGATIONS WERE NEVER RAISED BEFORE THE GRIEVANCE COMMITTEE OR REFEREE. ------------------------------	27
IV. THE DEPOSITION OF THE HONORABLE NORMAN C. ROETTGER, JR., UNITED STATES DISTRICT JUDGE, WAS PROPERLY ADMITTED INTO EVIDENCE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.330(a)(3). -----------	30
V. IN LIGHT OF THE SERIOUS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT, THE REFEREE'S RECOMMENDATION OF DISBARMENT IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.	34
Conclusion --------------------------------------	39
Certificate of Service --------------------------	39

TABLE OF CITATIONS

CASES	PAGE
Altchiler v. State of Florida Department of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983)	27
Bailey v. State of Florida, 173 So.2d 708 (Fla. 1st DCA 1965)	27
Coca Cola Bottling Company v. Clark, 299 So.2d 78 (Fla. 1st DCA 1974)	27
Colonnades, Inc. v. Vance Baldwin, Inc., 318 So.2d 515 (Fla. 4th DCA 1975)	12, 33
Ford v. Piper Aircraft Corp., 436 So.2d 305 (Fla. 5th DCA 1983)	18, 19
Hillsborough County Board of County Commissioners v. Public Employee Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982)	11, 27, 28
In Re Maltby, 202 P. 2d 902 (Ariz. 1949)	17
Mann v. State Road Department, 223 So.2d 383 (Fla. 1st DCA 1969)	28
Sears, Roebuck & Co. v. Stansbury, 375 So.2d 1051 (Fla. 5th DCA 1979)	18, 19
Seashole v. F & H of Jacksonville, Inc., 258 So.2d 316 (Fla. 1st DCA 1972)	27
State of Florida, Department of Health and Rehabilitative Services v. Bennett, 416 So.2d 1223 (Fla. 3d DCA 1982)	33
The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967)	15
The Florida Bar v. Apgar, 394 So.2d 405 (Fla. 1981)	13, 36
The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981)	13, 15, 16, 34

PAGE

The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983) ------------------------ 13, 35

The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982) ------------------------ 15, 16

The Florida Bar v. Dodd, 118 So.2d 17 (Fla. 1960) ------------------------- 13, 36

The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984) ------------------------ 15, 16

The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978) ------------------------ 15, 16

The Florida Bar v. Kastenbaum, 263 So.2d 793 (Fla. 1972) ------------------------ 13, 35

The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1982) ----------------------- 15, 16

The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) ------------------------ 15, 16

The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) ------------------------ 13, 34

The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968) ------------------------ 10, 15, 16

Tyson v. Aikman, 31 So.2d 292 (Fla. 1947) ------------------------- 27

Wright v. State, 446 So.2d 208 (Fla. 3d DCA 1984) ----------------- 26

FLORIDA CONSTITUTION

Article V, §15 ------------------------------------ 1

FLORIDA STATUTES

Florida Statute §57.105 ---------------------------- 20

Florida Statutes §90.610 --------------------------- 10, 25, 26

PAGE

FLORIDA RULES OF APPELLATE PROCEDURE

9.210 -- 1, 3

FLORIDA RULES OF CIVIL PROCEDURE

1.330(a)(3) -- 30, 32

FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES

1-102(A)(1) -- 35

1-102(A)(4) -- 20, 21

1-102(A)(6) -- 20, 21, 35

7-105(A) --- 35

FLORIDA BAR INTEGRATION RULE, ARTICLE XI, RULE

11.02(3)(a) -- 20, 35

11.06(3)(a) -- 30

11.06(9)(a) -- 10, 15

11.09 -- 1

11.09(3)(c) -- 3

11.09(3)(e) -- 15, 24

11.09(6) --- 3

OTHER AUTHORITY

Black's Law Dictionary 1160
(4th Ed. 1968) ------------------------------------- 21

PREFACE

For purposes of this brief, The Florida Bar will be referred to as "the Bar" and Scott William Katz will be referred to as "Respondent". The following abbreviations will be utilized:

T - Transcript of final hearing conducted on November 8, 1985, to be followed by appropriate page and line number.

TFB Ex - Exhibit of The Florida Bar admitted into evidence at final hearing on November 8, 1985, to be followed by appropriate exhibit number.

RR - Report of Referee

SRR - Supplemental Report of Referee

ARA - Answer to Requests for Admission, followed by number of request.

STATEMENT OF THE CASE AND FACTS

The Florida Bar is compelled to submit a Statement of the Case and Facts since Respondent has failed to do so despite the rather clear and express requirements of Fla. R. App. P. 9.210(b)(3).

This is an attorney disciplinary proceeding conducted under the appropriate provisions of the Integration Rule of The Florida Bar. The Supreme Court of Florida has jurisdiction in this original proceeding by virtue of the Court's jurisdiction over attorney discipline. Art. V, §15, Fla. Const. and Fla. Bar Integr. Rule, art. XI, Rule 11.09.

Respondent was the subject of three separate investigations which resulted in findings of probable cause by a duly constituted grievance committee of The Florida Bar. These findings of probable cause culminated in the filing by The Florida Bar of a three count complaint against Respondent on August 26, 1985.

The Honorable John G. Ferris was appointed as Referee by order of the Chief Justice of the Supreme Court of Florida entered September 5, 1985. This cause came on for final hearing on November 8, 1985. At the conclusion of the final hearing, written closing and disciplinary argument by the respective parties was requested by the Referee and thereafter submitted to him by the parties.

The Referee, having reviewed the transcript and written argument of the parties, transmitted his Report of Referee to the Chief Justice on December 19, 1985 which was received by the Court on December 26, 1985. In his Report, the Referee recommended that Respondent be found guilty of various violations of the Code of Professional Responsibility and the

Integration Rule of The Florida Bar as more specifically enumerated therein and that he be disbarred. The Florida Bar filed a Motion to Supplement the Record and Motion for Clarification of the Report of Referee on December 24, 1985. The relief sought was granted and a Supplemental Report of Referee was executed by the Referee on January 9, 1986 and initially received by the Court on January 13, 1986.

The Board of Governors considered the Report of Referee in this cause at their next regularly scheduled meeting which was held on January 8-11, 1986. The Board voted to approve the Report of Referee. The Court and Respondent were so notified by letter dated January 13, 1986 from Co-Bar Counsel. The Court and Respondent were additionally notified by letter from Co-Bar Counsel dated January 31, 1986 that The Florida Bar approved both the original Report of Referee and the Supplemental Report of Referee and that no Petition for Review would be forthcoming from The Florida Bar.

Respondent initiated these proceedings by filing a Petition for Review which was received by The Florida Bar on February 11, 1986 and by the Court on February 19, 1986. This initial Petition for Review also included, as an attachment, Respondent's prior written submission to the Referee which was styled MEMORANDUM IN SUPPORT OF DEFENDANT'S CASE. Said memorandum was, of course, already part of the record but was apparently used by Respondent in lieu of the required brief to be filed in support of his Petition for Review. Respondent subsequently filed a second Petition for Review which was received by The Florida Bar on February 26, 1986 and by the Court on February 27, 1986.

Since Respondent has not filed anything else of record, it must be presumed that Respondent's two Petitions for Review filed in this cause and the aforesaid Memorandum are meant to constitute Respondent's brief in support of his Petition for Review. Such a brief is required by Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(c). The Florida Rules of Appellate Procedure are made applicable to these proceedings by Fla. Bar Integr. Rule, art. XI, Rule 11.09(6). It is readily apparent, by even the most relaxed standards, that the required contents of an initial brief as set forth in Fla. R. App. P. 9.210(b)(1), (2), (3), (4) and (5) have been totally and completely ignored by Respondent. His entire submission to this Court would therefore be properly subject to a Motion to Strike. This is especially true because Respondent was directed by the Clerk's office to file a proper brief and given additional time to do so. He has failed to properly comply with that request in that his second Petition for Review still does not contain the contents required of an initial brief as set forth above.

The facts as established at the final hearing must be set forth herein with particularity since, as mentioned above, Respondent has failed to provide same as required by Fla. R. App. P. 9.210(b)(3).

Count I of the Bar's complaint involves Respondent's representation of the then Karen Spera Freeman (hereinafter referred to as "Mrs. Freeman") in a dissolution of marriage proceeding. The pleadings reflect that Respondent filed a Petition for Dissolution of Marriage on behalf of Mrs. Freeman and the petition was date stamped January 26, 1981. (TFB Composite Ex. 10). A final Judgment of Dissolution of

Marriage was entered by the presiding judge on February 25, 1981 and provided therein for child support as well as other relief (TFB Composite Ex. 10). The court file further reflects that Respondent filed a Motion to Modify Final Judgment of Dissolution of Marriage on behalf of Mrs. Freeman, date stamped March 12, 1981, wherein he sought to modify the final judgment so that Mrs. Freeman's maiden name would be restored (TFB Composite Ex. 10). Respondent also filed a Motion for Contempt on behalf of Mrs. Freeman, date stamped February 4, 1982, wherein various arrearages in child support were alleged to justify the relief sought. (TFB Composite Ex. 10). Respondent then commenced proceedings on behalf of Mrs. Freeman's former husband by filing a Supplemental Petition, date stamped September 10, 1984, styled Motion to Modify the Final Judgment for Dissolution of the Parties and seeking therein a reduction of child support payments - part of the very relief sought and obtained by Respondent on behalf of Mrs. Freeman in the original dissolution proceedings (TFB Composite Ex. 10). Mrs. Freeman testified at the final hearing that she did not consent to Respondent's representation of her former husband (T. 131, lines 4-7) nor would such consent have been given if sought by Respondent (T. 134, lines 3-6).

Count II of the Bar's complaint pertains to Respondent and certain events that transpired with his former client Michael Patrick Field (hereinafter referred to as "Field"). Respondent was initially retained to represent Field on a charge of driving while intoxicated (ARA 2.A.). A plea of guilty was entered to said charge on behalf of Field (ARA 2.B.). Field thereafter attempted to withdraw the plea on the basis of

"the incompetence of my lawyer" (TFB Composite Ex. 3, letter to the Honorable James T. Carlisle dated August 1, 1983). Respondent took exception to this letter and directed a letter to Field dated December 9, 1983 wherein he demanded the sum of One Thousand Dollars ($1,000.00) as compensation for Field's "slanderous" letter (TFB Ex. 1). An agreement was entered into between Respondent and Field on December 12, 1983 whereby Field was to pay Respondent the sum of Five Hundred Dollars ($500.00) in weekly installments of Fifty Dollars ($50.00) (TFB Ex. 2). Field testified that Respondent never advised him to seek independent legal counsel before he executed the aforesaid agreement (T. 47, lines 10-14). Field further testified that he entered into the agreement because he felt threatened by Respondent that if he did not do so he would suffer adverse consequences (T. 24, lines 14-18 and T. 25, lines 1-3) and he was not sure of his legal position (T. 24, lines 21-26). Respondent communicated with Field, after not receiving the first payment, and demanded payment within forty-eight (48) hours or legal action could be commenced and garnishment of wages effectuated (TFB Composite Ex. 4, second letter).

Subsequent to his entering into the agreement with Respondent, Field received independent legal advice from attorney Duncan (T. 24, lines 19-20). Mr. Duncan advised Respondent, by letter dated December 27, 1983, that Field had authorized him to inform Respondent that no payments would be made under the agreement (TFB Ex. 5). Respondent replied, by letter dated December 28, 1983, that suit would be filed unless payment under the agreement was forthcoming (TFB Ex. 6). A

Statement of Claim, date stamped February 27, 1984, was filed by Respondent against Field to enforce the terms of the agreement (TFB Composite Ex. 3). Respondent's action came before the court for a non-jury trial on April 30, 1984. At the close of Respondent's case a motion to dismiss was made by Field's attorney and granted. Accordingly, a final judgment was entered against Respondent on May 11, 1984 with jurisdiction retained to entertain a Motion for Costs (TFB Composite Ex. 3, Final Judgment for Defendant). Respondent was ordered to pay costs in the amount of One Hundred Five Dollars and Nine Cents ($105.09) after consideration of Field's Motion for Costs (TFB Composite Ex. 3, Order Granting Motion for Costs). Field's attorney also filed a motion seeking an award for attorney's fees pursuant to F.S. §57.105 in that Respondent's claim constituted a complete absence of a justiciable issue of either law or fact. The motion also stated that Respondent, as an attorney licensed in Florida, should be held to a higher standard of knowledge on Florida law regarding defamation and should have known that Field's letter to Judge Carlisle was in effect a pleading filed during the course of judicial proceedings making it a privileged communication (TFB Composite Ex. 3, Motion for Defendant's Attorneys Fees). The court granted the motion finding that Field's letter was privileged and awarded attorney's fees in the sum of Three Hundred Dollars ($300.00) (TFB Composite Ex. 3, Order Amending Previous Order Entitled Order on Costs and Attorney Fees). Respondent paid the costs and attorney's fees that were assessed against him (TFB Composite Ex. 3, Satisfaction of Judgment).

Count III of the Bar's complaint involves Respondent's representation of Cadet Joseph K. Barbara. Cadet Barbara had been the subject of a proceeding which resulted in the recommendation that Cadet Barbara be separated from the United States Military Academy on October 17, 1983 for violations of the honor code (ARA 3.A.). On or about October 17, 1983, Respondent filed a sworn motion for the issuance of a Temporary Restraining Order (ARA 3.C.). The aforesaid pleading contained the representation that the defendants had no objection to the issuance of a Temporary Restraining Order (TFB Composite Ex. 7, Motion for the Issuance of a Temporary Restraining Court Order). The judge hearing the matter on an ex parte basis entered an order staying Cadet Barbara's dismissal from the United States Military Academy until further order of the court (TFB Composite Ex. 7, Order entered by United States District Judge Norman C. Roettger, Jr.). The aforesaid order specifically references Respondent's representation in his motion as to the position of the West Point authorities. The United States Attorney's Office, on behalf of the Department of the Army, filed a motion to dissolve the temporary restraining order and a memorandum in support thereof (TFB Composite Ex. 7, Emergency Motion to Dissolve Temporary Restraining Order and Memorandum in Support of Motion to Dissolve Temporary Restraining Order). It was alleged, as grounds for the relief sought, that the Temporary Restraining Order was improper and contrary to law and that the affidavit upon which the Court based its Order contained intentional misrepresentations of the facts. The Honorable James C. Paine, United States District Judge, granted the Motion for Dissolution of the Temporary Restraining Order (TFB Composite

Ex. 7, Order entered October 20, 1983). Judge Paine's order stated that the evidence presented to him supported the government's contention that Judge Roettger was under a misapprehension of fact regarding West Point's consent to the entry of the Temporary Restraining Order and that Judge Roettger was under the impression that defendants had consented to the entry of the Temporary Restraining Order. Judge Roettger personally confirmed, during the course of his deposition taken October 18, 1985, that he was indeed under the impression that there was no objection to the issuance of the Temporary Restraining Order based upon Respondent's own motion and that the Temporary Restraining Order would never have been issued but for his belief that the military agreed to Respondent's motion (TFB Ex. 9 - page 5, lines 4-12; page 6, lines 24-25; and page 7, lines 1-3).

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S FINDINGS OF FACT AS TO COUNTS I, II AND III ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD THEREFORE BE UPHELD BY THIS COURT.

II. WHETHER THE REFEREE WAS CORRECT IN REFUSING TO ALLOW INTO EVIDENCE RESPONDENT'S EXHIBIT A FOR IDENTIFICATION, CRIMINAL DIVISION RECORD SEARCH REGARDING MICHAEL FIELD.

III. WHETHER ALLEGATIONS REGARDING GRIEVANCE COMMITTEE MEMBERS ARE IRRELEVANT AND UNTIMELY AS SAID ALLEGATIONS WERE NEVER RAISED BEFORE THE GRIEVANCE COMMITTEE OR REFEREE.

IV. WHETHER THE DEPOSITION OF THE HONORABLE NORMAN C. ROETTGER, JR., UNITED STATES DISTRICT JUDGE, WAS PROPERLY ADMITTED INTO EVIDENCE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.330(a)(3).

V. WHETHER IN LIGHT OF THE SERIOUS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT, THE REFEREE'S RECOMMENDATION OF DISBARMENT IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

SUMMARY OF ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AS TO COUNTS I, II AND III ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD THEREFORE BE UPHELD BY THIS COURT.

"The Referee's findings of fact enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a). Further, this Court has held that the Referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

The record of these proceedings supports the Referee's findings of fact regarding Respondent's conduct in Count I concerning a conflict of interest, Respondent's extortionate conduct in Count II and Respondent's making of false sworn statements in a pleading submitted to a Federal District Judge in Count III. The findings of the Referee are correct and clearly supported by the record and should be upheld by this Court.

II. THE REFEREE WAS CORRECT IN REFUSING TO ALLOW INTO EVIDENCE RESPONDENT'S EXHIBIT A FOR IDENTIFICATION, CRIMINAL DIVISION RECORD SEARCH REGARDING MICHAEL FIELD.

Pursuant to Florida Statute 90.610, the only convictions that can be introduced into evidence are convictions of a felony or crimes involving dishonesty or a false statement. According to Respondent's

proffered Exhibit A, Michael Field's convictions only involved misdemeanors not involving dishonesty or a false statement. Therefore, the Referee was correct in refusing to allow into evidence said inadmissible documents.

III. ALLEGATIONS REGARDING GRIEVANCE COMMITTEE MEMBERS ARE IRRELEVANT AND UNTIMELY AS SAID ALLEGATIONS WERE NEVER RAISED BEFORE THE GRIEVANCE COMMITTEE OR REFEREE.

Throughout these proceedings, Respondent has not requested a review into any allegation of bias by any members of the grievance committee presiding over Respondent's cases. Respondent cannot raise this issue for the first time on appeal as it is a fundamental principal that an appellate court can only properly review determinations of lower tribunals based on the record established below. Hillsborough County Board of County Commissioners v. Public Employee Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982). Additionally, Respondent has improperly attached items that were not presented to the Referee and not made a part of the record.

The first time this claim of bias of grievance committee members surfaced was in Respondent's Petition for Review. There is no support for Respondent's spurious claim, and it appears that Respondent is attempting to cast aspersions on others to camouflage his guilt.

Additionally, the Referee appointed in this cause independently heard all the evidence and found the Respondent guilty and, therefore, no prejudice could have resulted to the Respondent from his claim of bias. This frivolous tactic of Respondent should be disregarded by this Court.

IV. THE DEPOSITION OF THE HONORABLE NORMAN C. ROETTGER, JR., UNITED STATES DISTRICT JUDGE, WAS PROPERLY ADMITTED INTO EVIDENCE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.330(a)(3).

Respondent was duly noticed of the taking of The Honorable Norman C. Roettger, Jr.'s deposition. (Appendix A). The Respondent claims that The Florida Bar had not made an independent showing outside of the deposition that Judge Roettger was more than 100 miles away from the place of trial. Colonnades, Inc. v. Vance Baldwin, Inc., 318 So.2d 515 (Fla. 4th DCA 1975) establishes that the trial court has broad judicial discretion and is not precluded from relying solely upon deposition testimony for establishing the predicate for use of the deposition.

Accordingly, it was certainly properly within the Referee's discretion to allow Judge Roettger's deposition into evidence. Additionally, Judge Roettger's testimony concerned the fact that Respondent's misrepresentations misled Judge Roettger, (TFB Ex. 9). However, the Respondent's actual misrepresentations were proved through the testimony of other witnesses and documentary evidence. (T. 71-92, 99-124, and TFB Exs. 7 and 8).

V. IN LIGHT OF THE SERIOUS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT, THE REFEREE'S RECOMMENDATION OF DISBARMENT IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee found that The Florida Bar established the allegations contained in its complaint by clear and convincing evidence. The three separate acts engaged in by Respondent, of representing a client adverse

to the interests of a former client in an action substantially related to the initial representation and absent informed consent of the former client, coercing an agreement to pay damages from a former client on a claim which had no legal basis, and misrepresenting material facts in a sworn pleading in order to obtain the relief sought, constitute cumulative misconduct which is dealt with more severely by the Supreme Court of Florida in attorney discipline cases. The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

Respondents have been disbarred for engaging in extortionate activity as evidenced in Count II of The Florida Bar's complaint. The Florida Bar v. Kastenbaum, 263 So.2d 793 (Fla. 1972). Additionally, Respondent has received a Private Reprimand for misconduct similar to that in Count II. (Appendix B) This Court stated in The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983) that the Court deals more severely with cumulative misconduct for similar misconduct. Id., at 528.

Count III concerns the filing by Respondent of a sworn false pleading. This Court has disbarred attorneys for their involvement with presenting false testimony. See The Florida Bar v. Dodd, 118 So.2d 17 (Fla. 1960) and The Florida Bar v. Apgar, 394 So.2d 405 Fla. 1981).

The misconduct committed by Respondent regarding Count III of The Florida Bar's complaint, committing perjury to mislead a federal judge, in and of itself warrants disbarment. However, combined with the additional and cumulative misconduct of Counts I and II, and Respondent's prior discipline, disbarment is the only appropriate discipline in this cause.

In making his recommendation that the Respondent be disbarred, the Referee stated:

> 1. The cumulative guilt of the three (3) different transgressions indicated a gross callousness and indifference to the entire Code of Professional Responsibility.
>
> 2. In Count I, he must be presumed to have divulged secrets to his client's adversary.
>
> 3. In Count II, he outrageously and successfully pressured his client to wrongfully agree to pay him money when his client had no legal obligation to do so. Certainly moral extortion if nothing else.
>
> 4. He deliberately lied under oath to a federal judge who relied upon such falsehood in issuing the order. Certainly a lawyer can do little more culpable and destructive to the court system. The example set by Respondent must be dealt with harshly to prevent those considering such conduct in the future. (See RR, Pages 4-5).

Accordingly, The Florida Bar requests that this Court uphold the recommendation of the Referee and disbar the Respondent from the practice of law.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AS TO COUNTS I, II AND III ARE SUPPORTED BY THE RECORD AND BY CLEAR AND CONVINCING EVIDENCE AND SHOULD THEREFORE BE UPHELD BY THIS COURT.

The Respondent is required to meet a heavy burden when seeking to overturn a Referee's findings of fact. Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a) provides in pertinent part that, "the Referee's findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Further, Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e) provides that "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified."

The Referee has the advantage, as the trier of fact, of having the witnesses before him when evaluating the evidence which is ultimately presented to this Court. Furthermore, the Referee is in a more suitable position to judge the witness's character, truthfulness and candor. The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967). "Evidentiary findings and conclusions of the trier of facts when supported by legally sufficient evidence should not lightly be set aside by those possessing the power of review." Id at 460.

Applicable decisions of this Court are in accord with the aforementioned Integration Rules. The Referee's findings of fact should be accorded substantial weight and should not be overturned unless

clearly erroneous or lacking in evidentiary support. The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla. 1982); The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla. 1982); The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978); The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978); The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla. 1968).

After due consideration of the pleadings, testimony and the documentary evidence presented by The Florida Bar, the Referee has found that Respondent, by nature of the "cumulative guilt of the three different transgressions (has) indicated a gross callousness and indifference to the entire Code of Professional Responsibility." (RR, P. 4).

As to Count I of the complaint, the testimony of Mrs. Freeman and the exhibits presented support the findings that Respondent represented Mr. Freeman against Mrs. Freeman without her consent. (T. 131). Respondent was initially retained by Mrs. Freeman to obtain a dissolution of marriage, custody of the children and child support (T. 126), all of which Respondent secured for Mrs. Freeman. (See TFB's Composite Ex. 10). The evidence presented established that there had been an attorney/client relationship between Respondent and Mrs. Freeman. The evidence further demonstrated that Respondent filed a motion on behalf of Mr. Freeman to modify the final judgment of dissolution which sought a reduction of child support payments, part of the very relief sought and obtained by Respondent on behalf of Mrs. Freeman. (TFB's Composite Ex. 10).

In Re Maltby, 202 P. 2d 902 (Ariz. 1949) presented a similar situation where an attorney initially secured a divorce judgment which awarded his client, the wife, custody of the minor children and he thereafter represented the former husband in seeking a change of custody which was denied. The attorney defended on the basis that facts and circumstances had changed and that he had obtained no evidence while he represented the wife that he could now use against her. The Supreme Court of Arizona rejected that argument and made a finding that goes to the heart of this matter:

> It should go without saying that a lawyer must not represent clients antagonistic to one another in the same case. Even though Mrs. Isaacs was not damaged she might well have been. A lawyer must not only avoid evil, he must also avoid the appearance of evil when placed in a position of trust and confidence by a client. Id at 903.

It is a fatuous argument to suggest that the prior representation of Mrs. Freeman and the current representation of her former husband involves two different matters and is, therefore, ethically permissible. The present proceeding is the progeny of the prior proceeding and Respondent is seeking to undo that which he obtained on behalf of Mrs. Freeman. The two proceedings are so substantially related and so intertwined by virtue of the identity of the parties and the issues presented that Respondent has violated the ethical proscription against representing a new client against a former client when their interests are adverse.

Having established through the evidence presented that there was at one time an attorney/client relationship between Respondent and Mrs. Freeman, the case law is clear that the existence of such a relationship raises an irrefutable presumption that confidences were disclosed. Ford v. Piper Aircraft Corp., 436 So.2d 305 (Fla. 5th DCA 1983) and Sears, Roebuck & Co. v. Stansbury, 374 So.2d 1051 (Fla. 5th DCA 1979).

In addition to Respondent's apparent position that no client confidences were revealed, he seemingly takes the position that the representation of the former husband is a new matter unrelated to his former representation of Mrs. Freeman. It is unfortunate that Mrs. Freeman did not have the financial resources to hire an attorney licensed in Florida to represent her and file the appropriate motion to disqualify Respondent. Be that as it may, neither Mrs. Freeman nor The Florida Bar should be penalized because she did not have the financial wherewithal to pursue the matter of Respondent's disqualification in court. The Florida Bar is satisfied that under the facts presented Respondent would be disqualified if the matter had ever been brought up on appropriate motion. Further, Respondent should not have placed Mrs. Freeman in the untenable position of having to undo his unethical conduct through the filing of a motion to disqualify. The burden is on Respondent not to commit an unethical act in the first place.

Both Ford v. Piper Aircraft Corp. and Sears, Roebuck & Co. v. Stansbury, supra, stand for the proposition that before a client's former attorney will be disqualified from representing a party whose interests are adverse to those of the former client, there must be a

showing that there is a substantial relationship between the current and former relationship. It is hard to envision a more substantial relationship than the one presented whereby Respondent is attempting to undo the very relief he obtained for Mrs. Freeman when he represented her in this same case.

The foundation of the attorney/client relationship is built upon the knowledge that confidences and secrets reposed in the attorney remain inviolate. It is axiomatic that such a relationship could not survive if the client were presented with the omnipresent danger that his or her attorney could represent an adversary on the same matter with impunity. While it is conceded that Mrs. Freeman did not testify to any specific revelations of confidences or secrets, she was not and is not privy to discussions had between her former husband and attorney for such discussions are now cloaked with the same privilege that she felt obtained between herself and Respondent.

Respondent, in his Petitions for Review states certain statements supposedly made by The Honorable Edward Rodgers in the dissolution proceeding. However, the record is devoid of any testimony of Judge Rodgers or anyone else on this point. Additionally, the fact that Respondent used information he heard as counsel for Mrs. Freeman to the advantage of Mr. Freeman and to the detriment of Mrs. Freeman demonstrates the conflict of interest in this case.

Count II involves misuse by the Respondent of his position as an attorney to coerce a former client into agreeing to pay damages for an alleged slander. It is uncontroverted that the client made a privileged

communication to a judge in an effort to vacate a sentence imposed upon him while being represented by Respondent on a charge of driving while intoxicated (TFB's Composite Ex. 3). Respondent wrote to his former client, Michael Fields, on December 9, 1983, accusing him of slander and demanded payment of one thousand dollars ($1,000.00). Said letter threatened litigation and garnishment of wages and bank accounts (See TFB's Ex. 1). Based on Respondent's threats, Fields agreed to pay five hundred dollars ($500) in fifty dollar ($50) weekly installments which Fields did not pay after receiving legal advice.

Respondent then sued Fields to enforce the agreement. The lawsuit was dismissed by the Court and attorney fees assessed against Respondent pursuant to Florida Statutes, Section 57.105 on the basis that the Court found that there was a complete absence of a justiciable issue. (TFB's Ex. 2, 3, 4 and 5).

The Florida Bar proved the allegation against Respondent in Count II by clear and convincing evidence. See testimony of Michael Field, (T. 6-48) and Douglas Duncan, Esquire (T. 49-70). The Referee found that:

> While such outrageous actions by Respondent may not have reached the status of criminal extortion under the provisions of Section 836.05, F.S.A., such conduct certainly was moral extortion, unethical, and grossly flagrant, and cannot be excused by casting aspersions on his client's character (RR, Pages 2-3).

Regarding Count II the Referee found the Respondent guilty of violating Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a) (conduct contrary to honesty, justice or good morals) and Disciplinary Rules

1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 1-102(A)(6) (any other conduct that adversely reflects on one's fitness to practice law). (RR, p. 3). Certainly, Respondent's actions can be termed moral extortion as stated by the Referee. (RR, p. 2).

Respondent's conduct in Count II clearly involved conduct contrary to honesty, justice or good morals and dishonesty, fraud, deceit or misrepresentation. Black's Law Dictionary (4th Ed. 1968), at 1160, defines moral law as

> MORAL LAW. The law of conscience; the aggregate of those rules and principles of ethics which relate to right and wrong conduct and prescribe the standards to which the actions of men should conform in their dealings with each other. Moore v. Strickling, 46 W.Va. 515, 33 S.E. 274, 50 L.R.A. 279.

The Referee's findings of moral extortion regarding Count II is in accordance with the definition of moral law and Respondent's conduct was not in conformity with the law of conscience and rightful conduct. Respondent acted against good morals when he attempted to coerce his former client, Field, to pay monies to him that Respondent was not entitled to receive by threatening him with frivolous and harassing litigation worded in a manner to frighten him into submission and agreement to pay monies. Respondent knew or should have known that any statements made by Field to a judge concerning a court case was a privileged communication that Field could not be sued for. However, Respondent did not inform Field of said privileged communication nor did he advise Field to obtain independent legal advice before entering into

an agreement to pay damages to the Respondent. Instead, Respondent sent a threatening letter to Field to intimidate Field into making payments to the Respondent that the Respondent was not entitled to receive. The Florida Bar submits that it could not conceive of a clearer situation constituting moral extortion than this one.

Count III is the most egregious of Respondent's ethical violations. Respondent had been retained to represent a cadet at the United States Military Academy. In conjunction with the cadet's imminent dismissal from the Academy, Respondent prepared a motion for the issuance of a temporary restraining court order. The aforesaid pleading was sworn to and subscribed by Respondent before a notary public and was the basis upon which the Honorable Norman J. Roettger, Jr. issued, on an ex parte basis, a temporary restraining order. (TFB's Ex. 7). The pleading is replete in paragraphs three (3), four (4) and five (5) and the conclusory prayer for relief with a known misrepresentation of a material fact -- that the defendants had no objection to the issuance of a temporary restraining order. (TFB's Ex. 7). Lieutenant Colonel Douglas Sims, Major George C. Baxley and Gregory Allen Gay testified before the grievance committee and that testimony had been admitted into evidence in the Referee proceeding by stipulation of the parties (TFB's Ex. 8). In addition, Mr. Gay appeared and testified before the Referee on November 8, 1985 at the final hearing. (T. 99-124). The testimony of these individuals established that the aforesaid portions of the sworn pleading subscribed by Respondent were false.

Further, the deposition testimony of Judge Roettger, which is also in evidence, establishes the material nature of those false representations in that the judge testified that he would not have issued a temporary restraining order but for the belief that the defendants did not oppose same. (TFB's Ex. 9). Also in evidence is the order entered by the Honorable James C. Paine, United States District Judge, whereby the temporary restraining order issued by Judge Roettger was dissolved. (TFB's Ex. 7). Judge Paine heard the matter because Judge Roettger was on vacation but Judge Roettger testified that he fully agreed with the action taken in dissolving the temporary restraining order. (TFB's Ex. 9).

In his cross-examination of Mr. Gay, Respondent attempted to divert attention from his own wrongdoing by pursuing irrelevant matters. Similarly, Respondent takes the same position in his Petition for Review by casting aspersions on Mr. Gay and Colonel Sims. It is respectfully submitted that the only relevant portion of Mr. Gay's testimony related to the truth or falsity of Respondent's representations in the subject pleading. It is inconceivable that Respondent would suggest in his cross-examination at final hearing and in his Petitions for Review that he was misled by Mr. Gay and Colonel Sims as to the appropriate legal remedy to be pursued in order to keep Respondent's client from being dismissed from the Academy. As Mr. Gay so aptly pointed out in his testimony, Respondent was the lawyer and it was his responsibility to ascertain the appropriate course of action to pursue on behalf of his client. (T. PP. 115-124). Gratuitous advice given by a non-lawyer hardly takes the place of the legal research that one would expect a

reasonably prudent attorney to undertake. One would also reasonably expect that a lawyer would not deliberately mislead a court as Respondent did in order to obtain certain legal relief sought on behalf of a client.

Even if Respondent was laboring under a misconception as to the appropriate manner to proceed in his representation of a client, said misconception does not excuse Respondent's filing a false sworn pleading with the Federal Court. Such conduct cannot be tolerated by an attorney who is an officer of the Court. The Florida Bar proved Count III regarding Respondent's false sworn pleading by clear and convincing evidence. In his findings of fact regarding Count III, the Referee found:

> In support of his petition, Respondent filed his own sworn motion, which contained several false, material statements calculated to mislead District Judge Norman Roettger into granting the TRO. Judge Roettger granted said TRO (without notice to the Army) relying on the false statements of Respondents in his sworn motion, and more particularly, that the Army and West Point had no objection to the TRO. The clear and convincing evidence is that they emphatically did have objection. Judge Roettger testified that he would not have granted the TRO had he been informed of the correct position of the Army and he was in full accord with the dissolution of the TRO by Judge Paine when the truth surfaced. (RR, PP. 3-4).

In summary, The Florida Bar has pointed to specific portions of the record which support the Referee's findings while the Respondent, who has the burden of proof imposed on him by virtue of Fla. Bar Integr. Rule, art. XI, Rule 11.09(3)(e), has totally failed to rebut the presumption of correctness or demonstrate that the findings of the Referee are without support in the record.

II. THE REFEREE WAS CORRECT IN REFUSING TO ALLOW INTO EVIDENCE RESPONDENT'S EXHIBIT A FOR IDENTIFICATION, CRIMINAL DIVISION RECORD SEARCH REGARDING MICHAEL FIELD.

Respondent erroneously contends that the Referee erred in refusing to admit a criminal conviction record of Michael Field. Respondent attempted to introduce said matters to impeach the credibility of Mr. Field (T. 25-26).

Florida Statute §90.610 governs the admissibility of conviction of certain crimes as impeachment and provides as follows:

> 90.610 - Conviction of certain crimes as impeachment.
>
> (1) A party may attack the credibility of any witness, including an accused, by evidence that the witness has been convicted of a crime if the crime was punishable by death or imprisonment in excess of one (1) year under the law under which he was convicted, or if the crime involved dishonesty or a false statement regardless of the punishment, with the following exceptions:
>
> (a) Evidence of any such conviction is inadmissible in a civil trial if it is so remote in time as to have no bearing on the present character of the witness.
>
> (b) Evidence of juvenile adjudications are inadmissible under this subsection.
>
> (2) The pendency of an appeal or the granting of a pardon relating to such crime does not render evidence of the conviction from which the appeal was taken or for which the pardon was granted inadmissible. Evidence of the pendency of the appeal is admissible.
>
> (3) Nothing in this section affects the admissibility of evidence under §90.404 or §90.608.

Accordingly, pursuant to Florida Statutes §90.610 the only convictions that could be introduced would be a conviction of a felony or crimes involving dishonesty or a false statement. Respondent's proffered Exhibit A, clearly shows that Field's convictions only involved misdemeanors not involving dishonesty or a false statement. There was no conviction regarding the only felony charge against Field as a withhold of adjudication is reflected. Respondent's Exhibit A was therefore inadmissible and the Referee made a proper ruling. Additionally, in Wright v. State, 446 So.2d 208 (Fla. 3d DCA 1984), the Court held that convictions for misdemeanors not involving dishonesty or false statements were inadmissible. Accordingly, the Referee correctly refused to allow into evidence Respondent's Exhibit A.

Furthermore, Field's criminal record or credibility is not relevant to the charge against Respondent in Count II, in that the exhibits without Field's testimony clearly demonstrated Respondent's improper conduct (See TFB Exs. 1, 2, 3, 4, 5 and 6).

III. ALLEGATIONS REGARDING GRIEVANCE COMMITTEE MEMBERS ARE IRRELEVANT AND UNTIMELY AS SAID ALLEGATIONS WERE NEVER RAISED BEFORE THE GRIEVANCE COMMITTEE OR REFEREE.

The Florida Bar is loathe to comment on Respondent's allegations of bias against two (2) grievance committee members for to do so would tend to dignify his allegations. The Florida Bar would point out, however, that the allegations are irrelevant to these proceedings and are an ill-disguised attempt to obfuscate the issue to be decided by this Court.

Further, Respondent has totally failed to establish a record below upon which he could raise this issue. Throughout these proceedings, Respondent has not requested a review into any allegation of bias by any members of the committee presiding over Respondent's cases, and the lack of such request is reflected in the record of proceedings before this Court. Accordingly, Respondent cannot raise this issue for the first time on appeal.

It is a fundamental principal that an appellate court can only properly review determinations of lower tribunals based on the record established below. Tyson v. Aikman, 31 So.2d 272, (Fla. 1947); Bailey v. State of Florida, 173 So.2d 708 (Fla. 1st DCA 1965); Seashole v. F & H of Jacksonville, Inc., 258 So.2d 316 (Fla. 1st DCA 1972); Coca Cola Bottling Company v. Clark, 299 So.2d 78 (Fla. 1st DCA 1974); Hillsborough County Board of County Commissioners v. Public Employee Relations Commission, 424 So.2d 132 (Fla. 1st DCA 1982); Altchiler v. State of Florida Department of Professional Regulation, 442 So.2d 349 (Fla. 1st DCA 1983).

As expressed by the Court in Hillsborough County Board of County Commissioners, supra,

> An appeal ... is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it. Hillsborough County Board of County Commissioners, supra, at 134.

In addition, Respondent has attached items that were not presented to the Referee. An Appellate Court addressed this very issue in the case of Mann v. State Road Department, 223 So.2d 383 (Fla. 1st DCA 1969). The Court found this tactic to be "contrary to all rules of procedure.....". Id at 385. The Mann court struck such items from the record.

Respondent did not raise any allegations of bias of grievance committee members at the grievance committee level or at the Referee level. In fact, the first time said allegations surfaced was in Respondent's Petitions for Review. Respondent failed to present this claim to the grievance committee or the Referee appointed in this cause and failed to present any support for this spurious allegation of bias. Respondent appears to be attempting to cast aspersions on everyone else to try to camouflage his own wrongdoing. Respondent's scurrilous and unprincipled attack on Mrs. Calloway does serve to demonstrate his lack of fitness to practice law.

Furthermore, the Referee appointed in this cause independently heard all the evidence presented by The Florida Bar and found the Respondent guilty and stated that "the cumulative guilt of the three different transgressions indicated a gross callousness and indifference to the entire Code of Professional Responsibility (RR, p. 4). Therefore, even if Respondent's irrelevant and frivolous allegations were true, the Respondent suffered no prejudice.

For the above stated reasons, this tactic of the Respondent should be disregarded by this Court.

IV. THE DEPOSITION OF THE HONORABLE NORMAN C. ROETTGER, JR., UNITED STATES DISTRICT JUDGE, WAS PROPERLY ADMITTED INTO EVIDENCE PURSUANT TO FLORIDA RULE OF CIVIL PROCEDURE 1.330(a)(3).

Fla. Bar Integr. Rule, art. XI, Rule 11.06(3)(a) provides in pertinent part that the Rules of Civil Procedure apply in disciplinary proceedings.

Florida Rule of Civil Procedure 1.330(a)(3) provides as follows:

> Rule 1.330. Use of Depositions in Court proceedings.
>
> (a) Use of Depositions. At the trial or upon the hearing of a motion of an interlocutory proceeding any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice of it so far as admissible under the rules of evidence applied and testifying in accordance with any of the following provisions:
>
> (3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the Court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity or imprisonment; or (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; or (F) the witness is an expert or skilled witness.

Respondent was duly noticed of the taking of the Honorable Norman C. Roettger, Jr.'s deposition (See copy of Notice of Taking Deposition and Return Receipt, attached hereto as Appendix A). In fact, the notice specifically stated that the deposition was to be used in lieu of Judge Roettger's personal appearance at the final hearing in this cause. Respondent failed to appear at said deposition. Said notice was sent to Respondent via certified and regular mail. The green receipt card evidencing receipt by the Respondent is attached to Appendix A.

The Respondent's objections to the introduction of the deposition were stated at the final hearing (T. 95-98) and in his Motion to Strike Judge Norman Roettger, Jr.'s deposition, dated November 8, 1985. The only objection claimed by Respondent concerned the fact that The Florida Bar had not made an independent showing outside of the deposition that Judge Roettger was more than 100 miles away from the place of trial.

Judge Roettger stated in his October 18, 1985 deposition that it would be impossible for him to appear at the final hearing scheduled for November 8th in West Palm Beach, Florida. Judge Roettger further stated that he may be out of town, or certainly more than a hundred miles away. (TFB, Ex. 9, pp. 8-9). The Honorable John G. Ferris, Referee, stated, "I will take the sworn testimony of a Federal Judge that he is going to be more than a hundred miles away." (T. 98, lines 4-6).

The Florida Bar is without knowledge as to the allegations made by Respondent pertaining to the whereabouts of Judge Roettger on the date

of the final hearing in this cause. However, The Florida Bar was entitled to rely upon Judge Roettger's statement as to his future whereabouts when the subject deposition was taken and had no reason to believe that this statement was not true when given. If Respondent's allegations about Judge Roettger's whereabouts are true, The Florida Bar must assume that there was an unforeseen change in his schedule which was not communicated to The Florida Bar.

Respondent has failed to establish through competent evidence that the subject deposition does not fall within any of the exceptions enumerated in Florida Rules of Civil Procedure 1.330(a)(3). In addition to The Florida Bar's reliance upon Judge Roettger being at a greater distance than 100 miles from the place of trial or hearing under exception (3)(b), it is submitted that Judge Roettger might well fall within exception (3)(e) of the aforesaid rule which provides in pertinent part that a deposition of a witness may be used if the Court finds that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

Exception (3)(e) would apply in that Judge Roettger's position as a sitting federal judge is an exceptional circumstance and due deference should be given to the difficulties inherent in scheduling testimony of a sitting federal judge. Exception (3)(e) also applies in that it is extremely important to know whether Judge Roettger would have entered the Temporary Restraining Order had he known that the defendants opposed Respondent's motion.

State of Florida, Department of Health and Rehabilitative Services v. Bennett, 416 So.2d 1223 (Fla. 3d DCA 1982) illustrates the application of Florida Rules of Civil Procedure 1.330(a)(3)(e) where a deposition was admitted into evidence wherein exceptional circumstances were deemed to exist. The Florida Bar relies upon the precedent established by the case law in this jurisdiction in addressing the issue of whether a showing outside the deposition is a condition precedent to admissibility of a deposition. Colonnades, Inc. v. Vance Baldwin, Inc., 318 So.2d 515 (Fla. 4th DCA 1975) establishes that in this jurisdiction the trial court has broad judicial discretion and is not precluded from relying solely upon deposition testimony for establishing the predicate for use of the deposition.

Accordingly, it was certainly properly within the Referee's discretion to allow Judge Roettger's deposition into evidence wherein the Respondent had been duly noticed of the taking of said deposition.

Additionally, Judge Roettger's testimony concerned the fact that Respondent's misrepresentations misled Judge Roettger (See deposition of Judge Roettger, TFB's Ex. 9). However, the Respondent's actual misrepresentations were proved through the testimony of other witnesses and documentary evidence (See testimony of Ana Barnett, T. 71-92; testimony of Gregory Gay, T. 99-124 and TFB Ex. 8, PP.48-73; testimony of Colonel Sims, PP. 11-32 of TFB's Ex. 8; testimony of Major Baxley, PP. 33-48 of TFB's Ex. 8; and TFB's Composite Ex. 7).

In conclusion, it was certainly appropriate for the Referee to accept into evidence the duly noticed deposition of the Honorable Norman C. Roettger, Jr., a Federal District Court Judge, in lieu of his personal appearance before the Referee at the final hearing.

V. IN LIGHT OF THE SERIOUS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT, THE REFEREE'S RECOMMENDATION OF DISBARMENT IS CLEARLY APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee found that The Florida Bar established the allegations contained in its complaint by clear and convincing evidence. The three separate acts engaged in by Respondent, of representing a client adverse to the interests of a former client in an action substantially related to the initial representation and absent informed consent of the former client, coercing an agreement to pay damages from a former client on a claim which had no legal basis, and misrepresenting material facts in a sworn pleading in order to obtain the relief sought, constitute cumulative misconduct which is dealt with more severely by the Supreme Court of Florida in attorney discipline cases. The Florida Bar v. Baron, 392 so.2d 1318 (Fla. 1981) and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979).

The Florida Bar submits that the course of conduct engaged in by Respondent calls for the severest sanction available in the disciplinary arsenal, that being disbarment. The unethical nature of Respondent's representation of Mrs. Freeman's former husband as set forth in Count I of the complaint has been established in the statement of facts, findings of fact of the Referee and Issue I of this Brief. it is quite noteworthy, however, that Respondent does not discern the fundamental precepts of the attorney/client relationship and the unethical nature of his conduct.

Further, Respondents have been disbarred for engaging in extortionate activity as evidenced in Count II of The Florida Bar's complaint. The Florida Bar v. Kastenbaum, 263 So.2d 793 (Fla. 1972). Additionally, this course of conduct on Respondent's part is not a first time transgression. On September 21, 1984, Respondent received a Private Reprimand from The Florida Bar for his conduct in sending a letter that could be interpreted as threatening criminal prosecution solely to obtain an advantage in a civil matter in violation of Disciplinary Rules 1-102(A)(1), 1-102(A)(6), 7-105(A) and Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a). (Said Private Reprimand is included herein in Appendix B). Rule 11.02(3)(a) concerns commission of any act contrary to honesty, justice or good morals.

Respondent's misconduct in Count II should be viewed seriously as it is similar to the misconduct for which Respondent received his Private Reprimand (Appendix B), the issuing of threats. This Court stated in The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983),

> [T]he Court deals more harshly with cumulative misconduct that it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct. Id., at 528.

Finally, there are certain areas of lawyer misconduct that involve such a betrayal of the public trust and breach of fiduciary duty to the courts, the profession and the public that they should be deemed "capital" disciplinary offenses for which only disbarment is appropriate. These areas should include the creation of or participation in the creation of perjured testimony, knowing false

representations to a court and the misappropriation of clients' funds.

The Supreme Court of Florida indicated it adopted such a standard relative to perjured testimony in The Florida Bar v. Dodd, 118 So.2d 17 (Fla. 1960) wherein it stated:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by attorney of false testimony in the judicial process. When it is done, it deserves the harshest penalty.

In Dodd, the respondent was charged with having urged and advised several persons, including his clients, to give false testimony in two (2) personal injury actions in which he represented the plaintiffs. Dodd was a 70% disabled American veteran with no prior disciplinary history and yet he was disbarred because of the nature of the offense.

Similarly, in The Florida Bar v. Apgar, 394 So.2d 405 (Fla. 1981) the Court disbarred the respondent for knowingly presenting false testimony in Court. The Court articulated therein its general rule of strict discipline against deliberate, knowing elicitation of false testimony.

Respondent's actions as stated in Count III of The Florida Bar's complaint were even more outrageous than those of lawyers who deliberately put on false testimony of witnesses as those lawyers needed an accomplice. Respondent was singly engaged in an ex-parte proceeding and was only able to obtain the relief sought by personally presenting material misrepresentations to the Court in his own sworn pleading. (See TFB's Composite Ex. 7). It is incomprehensible that a lawyer would

so debase his profession as Respondent has done by inducing a Court to act based upon sworn information personally known by him to be false. Respondent's actions undermined the very basis of our system of justice and cannot be tolerated. An attorney is an officer of the Court and must be severely punished when he loses sight of his obligations to the Court in pursuing a client's cause. In our system the ends do not justify the means employed and Respondent's use of unethical expedient means to secure his ends have no place in the legal profession.

The misconduct committed by Respondent regarding Count III of The Florida Bar's complaint, committing perjury to mislead a federal judge, in and of itself warrants disbarment. However, combined with the additional and cumulative misconduct of Counts I and II, and Respondent's prior discipline, disbarment is the only appropriate discipline in this cause.

In making his recommendation that the Respondent be disbarred, the Referee stated:

> 1. The cumulative guilt of the three (3) different transgressions indicated a gross callousness and indifference to the entire Code of Professional Responsibility.
>
> 2. In Count I, he must be presumed to have divulged secrets to his client's adversary.
>
> 3. In Count II, he outrageously and successfully pressured his client to wrongfully agree to pay him money when his client had no legal obligation to do so. Certainly moral extortion if nothing else.
>
> 4. He deliberately lied under oath to a federal judge who relied upon such falsehood in issuing the order. Certainly a lawyer can do little more culpable and des-

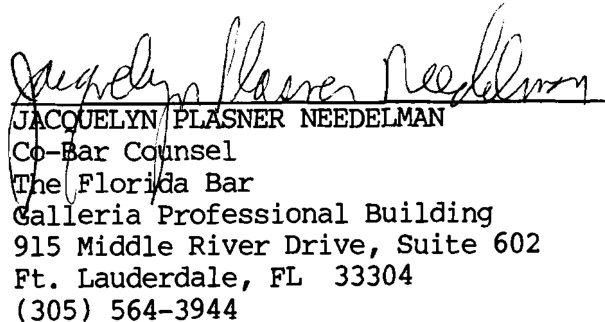
> tructive to the court system. The example set by Respondent must be dealt with harshly to prevent those considering such conduct in the future. (See RR, pp. 4-5).

Accordingly, The Florida Bar requests that this Court uphold the recommendation of the Referee and disbar the Respondent from the practice of law.

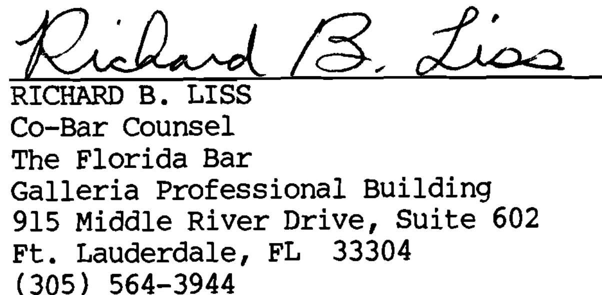
CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact and approve the discipline of disbarment that was recommended by the Referee and have execution issue against the Respondent in the amount of $4,086.45 for the costs incurred in this proceeding.

Respectfully submitted,



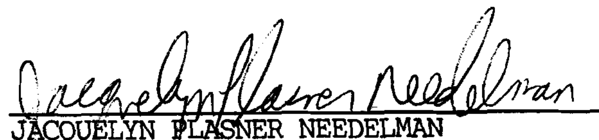
JACQUELYN PLASNER NEEDELMAN
Co-Bar Counsel
The Florida Bar
Galleria Professional Building
915 Middle River Drive, Suite 602
Ft. Lauderdale, FL 33304
(305) 564-3944



RICHARD B. LISS
Co-Bar Counsel
The Florida Bar
Galleria Professional Building
915 Middle River Drive, Suite 602
Ft. Lauderdale, FL 33304
(305) 564-3944

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of The Florida bar was furnished to Scott William Katz, Respondent, at his official record Bar address of 3923 Lake Worth Road, Suite 205, Lake Worth, FL 33461 by Certified Mail #P 578 598 212, return receipt requested, on this 5th day of March, 1986.



JACQUELYN PLASNER NEEDELMAN