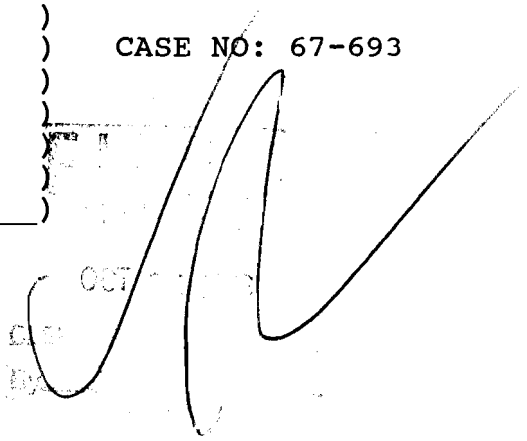
IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,	)	**CONFIDENTIAL**
Complainant,	)	
vs.	)	CASE NO: 67-693
ANDREW J. MIRABOLE,	)	
Respondent.	)	



RESPONDENT'S REPLY BRIEF

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In this Reply Brief, The Florida Bar will be referred to as the "Bar", the Respondent, ANDREW J. MIRABOLE, will be referred to as "Respondent", the complaining witness, Bonnie C. Rodriquez, will be referred to as the "Complainant", and the Answer Brief of the Bar will be referred to as "BB".

TABLE OF CITATIONS

CASE AUTHORITIES	PAGE
Tickett v. Bowen, Case #85-7718 . . . . . 11th Cir. Slip Opinion, Page 5113, 9/ 9/86	4
Howard v. Gonzalez, 658 Fed. 2d 352 . . . . . (5th Cir. 1981)	4
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STATEMENT OF THE CASE AND OF THE FACTS

Respondent adopts the Statement of the Facts and of the Case in his initial Brief.

SUMMARY OF ARGUMENT

The Bar's reliance on hearsay testimony of an attorney was highly prejudicial. That attorney was not proffered nor accepted by the Referee as an expert but was, nonetheless, permitted to testify, as one on the crucial issue of the reasonableness of the fees charged by Respondent.

ARGUMENT

WHETHER THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING DR 2-106, RECOMMENDING THAT HE FINALLY BE FOUND GUILTY AND RECOMMENDING A PUBLIC REPRIMAND UPON THE EVIDENCE AND THE GUIDE LINES SET OUT IN DR 2-106(B)

The Bar's reliance on the concept that Mr. Napolitano spent some of the billed out time to "educate himself" is truly a mystery (BB-3). It is submitted that every case is different, every lawyer with a somewhat different education and background and every proceeding a furtherance of the lawyer's education. The Trial Judge in the Respondent's suit for his fee could have discounted any hours he felt were not contracted for nor performed pursuant to the contract.

The Bar also makes much of the fact that the Respondent sued this client for the fee. The term "sue" has in recent times earned an ugly reputation, hence the recently promulgated penalties for the bringing of frivolous claims. In this case, it is more fairly put that the attorney submitted the matter to the Courts for a just determination.

The Respondent did not seek to extort the fee by illegal threats or coercion; when the client refused to pay, he went where he should have gone - to Court where a judge could deal with the justice of the matter.

The Bar, in its conclusion, argues that "All

evidence in these proceedings was properly considered by the Referee for its reliability and probative value". (BB 15) Yet, the Brief of the Bar recites that:

> Mr. Freeman, who took over representation of Mrs. Rodriguez in this matter, testified that he had reviewed the file and spoken with other counsel in the area of commercial law in reference to the fee Respondent charged Mrs. Rodriguez. TT. 92 (BB 11)
> (Emphasis supplied)

This gross hearsay was objected to (TT 91) and should not have been admitted or considered. It is little difference from the situation in Tickett v. Bowen, Case Number 85-7718, 11th Cir. Slip Opinion, Page 5113, September 9, 1986, where a conviction in Alabama State Court was set aside by the United States District Court and affirmed by the Court of Appeals because a medical report by a doctor not presented as a witness was admitted into evidence to prove sexual contact in a sexual molestation case. See to like effect Howard v. Gonzales, 658 Fed. 2d 352 (5th Cir. 1981).

Here the Bar expresses reliance on the testimony of Attorney Grover Freeman to the effect that the fees charged by the Respondent were excessive and in its Brief alludes to the fact that his opinion was based upon his review of the file and discussions with other lawyers in the area of commercial law to reach his conclusion that the fees charged were excessive for the work done. (BB 11)

This opinion was obviously crucial within the meaning of Dutton v. Evans, 400 U.S. 74, 91 Sup. Ct. 210, 27 Law Ed. 2d 213, because it could be inferred that the witness, in seeking other opinions, was in doubt as to his own. The foundation of those "other opinions", of course, is unknown and could only be reliably ascertained upon cross-examination of those rendering the opinion.

In the face of this testimony, Respondent moved for an opportunity to present rebuttal but was denied that opportunity.

Under the Rule in Dutton, supra, the reliability factor certainly is not present since Attorney Freeman, inferentially unsure of his own opinion, sought the opinion of others. The "crucial" factor is further reinforced by the Bar's reliance on the hearsay bolstered opinion of Attorney Freeman. This error justifies reversal because of the obvious prejudice.

CONCLUSION

It is sincerely urged that the common sense and practical approach to the Resolution of this matter is to reverse the finding of guilt by the Referee and remand the cause to him for dismissal.

The proceedings themselves are adequate warnings to the Respondent to take greater care in dealing with his clients.

Respectfully submitted,

Michael L. Kinney

Michael L. Kinney, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been served by United States mail upon DIANE VICTOR KUENZEL, ESQUIRE, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida, 33607, this the **13th** day of **October**, A. D., 1986.

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