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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Petitioner, v. JOHN H. LOWE, JR., Respondent.	)	Case No. 68,450

RESPONDENT'S INITIAL BRIEF

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I.

PRELIMINARY STATEMENT

This brief is filed on behalf of the respondent, John H. Lowe, Jr., in support of his Petition for Review of the Amended Report of the Referee filed with the Court on February 19, 1987. The complainant, the Florida Bar, is referred to as "the Bar" throughout this brief. References to matters contained in the transcripts of the proceedings before the Referee are designated as follows: references to the transcript of the proceedings on June 26, 1986, are designated "Tr.I,p.___," followed by the page number at which the referenced data appears; references to the transcript of proceedings held on July 28, 1986, are designated "Tr.II,p.___"; references to the transcript of the proceedings held on August 21, 1986, are designated "Tr.III,p.___"; references to the transcript of the proceedings held on September 26, 1986, are designated "Tr.IV,p.___"; and references to the transcript of the proceedings held on January 13, 1987, are designated "Tr.V,p.___." References to exhibits offerred in evidence by the Bar are designated "B.Ex.____," followed by the exhibit number assigned by the Referee, and references to the respondent's exhibits are designated "R.Ex.___."

II.

STATEMENT OF THE FACTS AND OF THE CASE

A. Course of the Proceedings

This matter has its genesis in a complaint filed by the Bar against Lowe on March 13, 1986. The complaint alleges that Lowe

violated Disciplinary Rules DR1-102(A)(4), 2-106(A), 2-106(E) and 9-102(A), during his representation of Robert and Pattye Ingram. The Bar alleged, and Lowe does not dispute, that he was initially retained by the Ingrams in September, 1981, to pursue a tort claim against the United States Government and the Hillsborough County School Board. The Bar maintained that Lowe charged an excessive fee for his representation of the Ingrams in that matter. The Bar further alleged that Lowe solicited the payment by the Ingrams of a $7,500.00 cost advance to defray the expenses of the trial in that case and then converted those funds to his own use.

Lowe is also alleged to have charged an excessive fee to represent the Ingrams in an action against Sears, Roebuck and Company. The complaint charges that Lowe had no fee agreement with the Ingrams, either oral or written, and that he nevertheless took a $1,400.00 fee from the $2,500.00 settlement reached in that case.

Finally, the Bar maintains that if $5,000.00 of the $7,500.00 paid to Lowe by the Ingrams was for attorney's fees in an administrative proceeding before the Veterans Administration, it is a clearly excessive fee in that it exceeds the statutory cap of $10.00 set forth in 38 U.S.C. §3404(c).

Lowe answered the Bar's complaint on May 8, 1986. He admitted that he represented the Ingrams in the tort action against the United States and Hillsborough County but denied that

the fee arrangement in that case was excessive. Similarly, Lowe acknowledged that he represented the Ingrams in the action against Sears, Roebuck and Company but stated that the $1,400.00 that he took from the $2,500.00 settlement included attorney's fees and costs and that the fee that he did charge was not excessive. Finally, Lowe denied that the $5,000.00 fee he charged Ingram for representation in the Veterans Administration proceeding was illegal or excessive.

A hearing was convened before Referee Maynard Swanson on June 26, July 28, August 21 and September 26, 1986. The referee issued his report and recommendation shortly thereafter wherein he determined that Lowe violated DR1-102(A)(4) for inducing the Ingrams to pay him $7,500.00 for the ostensible purpose of applying such funds to offset the expense of taking their case against the United States to trial when, in fact, Lowe applied such funds against attorney's fees he claimed were owed him by the Ingrams. The referee also determined that Lowe had violated DR2-106(A) by charging the Ingrams excessive fees in the Sears case and in the Veterans Administrative proceeding. The referee determined that Lowe did not violate DR2-106(E) or DR9-102(A) as was alleged by the Bar. The referee recommended that Lowe be suspended from the practice of law for a period of 36 months and that he be required to make restitution to the Ingrams in the amount of $7,500.00 and pay the costs of this proceeding.

Prior to filing a petition for review of the referee's report, Lowe moved the referee to reopen the record to consider the testimony of newly-discovered witnesses regarding the charges flowing from the receipt and disbursement of the $7,500.00 paid to Lowe by the Ingrams in January, 1983. Prior to the referee's ruling upon the motion to reopen the record, Lowe was required to file a petition for review of the referree's report with the Court. Such petition was filed on November 26, 1986. Lowe also moved the Court to stay the proceedings with regard to the motion for review until the referee ruled upon the motion to reopen the record. On December 3, 1986, the Court entered an order granting Lowe's motion to stay proceedings and directed the referee to reopen the case to consider the newly-discovered evidence and to issue an amended report.

In accordance with the the Court's order, the referee reconvened the hearing on January 13, 1987. The referee filed an amended report on February 19, 1987, wherein he rejected the additional testimony offered by Lowe and reached the same findings and conclusions and recommended the same penalty as in the original report.

B. The Underlying Facts

On September 17, 1980, Robert Ingram entered into an agreement with Lowe pursuant to which Lowe agreed to represent Ingram in an action against the United States Government and the Hillsborough County School Board. Ingram agreed to pay Lowe "an

initial retainer of five thousand dollars ($5,000.00)," as well as 33 1/3% of any settlement proceeds received prior to trial or 40% of any award achieved at trial. B.Ex.6. In addition to the foregoing, Ingram agreed "to assume and pay all costs of investigation, preparation, and court costs" relating to the action. Id. Lowe eventually filed suit in the United States District Court for the Middle District of Florida, Tampa Division, on behalf of Mr. and Mrs. Ingram against the United States and Hillsborough County School Board on June 10, 1981. B.Ex.4. On March 10, 1982, the federal district court issued an order scheduling the case for trial during the weeks of February 7, 14 and 21, 1983. Id.

Subsequent to undertaking to represent the Ingrams in their action against the United States and the Hillsborough County School Board (hereinafter the federal case), Lowe agreed to pursue a claim on their behalf against Sears, Roebuck and Company. Tr.I,p.51. Ingram maintains that no fee agreement was discussed or entered into with Lowe prior to the time when the matter was settled for $2,500.00. Tr.I,p.52. Lowe insists that Ingram agreed to pay a standard contingent fee of 33 1/3% of settlement proceeds before suit was filed or 40% of the settlement proceeds after suit was filed. Tr.II,pp.11-12. In any event, both Ingram and Lowe concur that the action against Sears was settled, with Ingram's consent, for $2,500.00. Tr.I,pp.51,52; Tr.II,p.13. Of the $2,500.00 settlement proceeds, Ingram received $1,100.00 and

Lowe received $1,400.00. Lowe claims that the $1,400.00 he received was for attorney's fees and reimbursement of costs he had paid out-of-pocket in prosecuting the case. Tr.II,p.14. Ingram acknowledged that Lowe had incurred expenses for depositions and related matters in pursuit of the claim against Sears and that such costs were recovered by Lowe out of the $2,500.00 settlement proceeds. Tr.I,p.83.

During the latter part of 1980, Lowe also undertook to represent Ingram's daughter, Carol Peng, in a dissolution of marriage action. B.Ex.5. Lowe maintains that Ingram promised to pay whatever fees and costs were incurred in the divorce action. Tr.II,pp.15-18. Lowe further asserts that he told Ingram when he agreed to represent his daughter that Ingram would be charged a fee of $1,500.00. Id. Ingram denies that he agreed to pay Lowe for representing his daughter. Tr.I,p.55. Both Ingram and his daughter recall that Lowe estimated that his fee would be between $700 and $800. Id.; Tr.I,p.94. When the final judgment of dissolution was entered on April 1, 1981, Ms. Peng asked Lowe how much she owed him. Lowe responded that he would work out the fee with Mr. Ingram. Tr.I,pp.55-56;95.

Lowe also performed legal services for Ingram in connection with a disability claim Ingram was pursuing through the United States Veterans Administration. Tr.I,pp.27-28; Tr.II,pp.17-18. Ingram claims that Lowe agreed to represent him in that matter for the statutorily mandated $10.00 maximum fee. Tr.I,p.28.

Lowe maintains that when Ingram approached him about the Veterans Administration matter, he offered to help Ingram prepare for the hearing by reviewing applicable federal regulations and by researching federal court decisions relating to the issues involved in Ingram's case. Tr.II,pp.17-18. Lowe insists that he advised Ingram that he would charge him $5,000.00 for his services in that matter. Id. Lowe also claims that he was unaware of the statutory $10.00 attorney's fee cap when he agreed to represent Ingram. Tr.II,pp.20-21. Lowe eventually spent 65 hours researching Ingram's claim and preparing for the Veterans Administration hearing. Tr.II,p.21. He also spent a full day representing Ingram at the hearing. Id.

On January 3, 1983, according to Ingram, he met with Lowe and Lowe asked him for money to pay expenses necessary to proceed with the federal case to trial. Tr.I,pp.33-34. Although Lowe didn't specify the amount of money he would need, Ingram claims that Lowe asked him to borrow money to pay for the costs. Tr.I,p.36. Ingram maintains that he and Lowe met again on January 6, 1983, and, at that meeting, Lowe told him that he needed $7,500.00 to defray the costs of the upcoming trial in the federal case. Tr.I,pp.36-37. Ingram alleges that Lowe told him that the $7,500.00 would be used to pay transportation costs and expert witness fees. Id. Lowe admits that he did, in fact, ask Ingram for $7,500.00 during this period but insists that he made it plain to Ingram that the $7,500.00 was for legal services rendered in the divorce case and the Veterans Administration case

and also to reimburse Lowe for a $1,000.00 payment Lowe had made to expert witness Dr. Blau. Tr.II,pp.22-24. In any event, the parties agree that on January 11, 1983, Ingram gave Lowe a check for $300.00 and that Ingram wrote the notation "attorneys fees" on the check. B.Ex.13; Tr.I,p.38. The parties further agree that on January 19, 1983, Ingram paid Lowe another $7,200.00. B.Ex.14; Tr.I,p.40. Ingram claims to have asked Lowe on several occasions between January 19, 1983, and April 28, 1983, for an "accounting" or "itemized statement" setting forth what the $7,500.00 was used for. Tr.I,pp.45-47. Ingram maintains that he was concerned about the money he had paid because he learned that the trial in the federal case had been continued. Id. On April 28, 1983, Ingram appeared in Lowe's office and again requested a statement setting forth the use or uses to which the $7,500.00 was put. Tr.I,p.47. Lowe instructed his secretary, Carol McKee, to prepare a receipt reflecting the fact that Ingram had paid Lowe $7,500.00 in January, 1983. Id.; B.Ex.15. Ingram alleges that Lowe wrote the word "trial" in the comments portion of the receipt to acknowledge that the $7,500.00 was paid to him to defray costs in the federal case. TR.I,p.48. Lowe denies writing the word trial on the receipt. Tr.II,p.29.

Ingram eventually dismissed Lowe in October, 1983. Tr.I, pp.49-50. Ingram has also filed a civil action against Lowe claiming that Lowe was negligent in his representation of Ingram in the federal case. Tr.I,p.90.

III.

SUMMARY OF THE ARGUMENT

The referee's finding that Lowe violated DR1-102(A)(4) is clearly erroneous. The physical evidence and the overwhelming weight of the testimony presented concerning the $7,500.00 paid by Ingram to Lowe in January, 1983, make plain that Ingram knew that the money was to be used by Lowe to offset accrued attorney's fees he had earned by representing Ingram in various matters during the previous two years. The referee's conclusion that Lowe had told Ingram that the $7,500.00 was needed to offset the costs and expenses associated with an impending trial is simply not supported by the record.

In finding Lowe guilty of charging excessive fees in violation of DR2-106(A), the referee misapplied the burden of proof. Thus, the referee erroneously held that Lowe failed to prove, by individual testimony, that his fees were reasonable when, in fact, it was the Bar's burden to prove by clear and convincing evidence that Lowe's fees were excessive.

Finally, even if the Bar proved one or more of the violations found by the referee, the penalty the referee recommended is, nevertheless, excessive. The referee erroneously relied upon conduct which he found not to be unethical to support the imposition of an admittedly harsh penalty. The referee also incorrectly determined that Lowe's two prior private reprimands somehow justified the imposition of a weighty penalty in this matter when the prior matters were in no way related to the misconduct found here.

ARGUMENT

A. THE REFEREE'S FINDING WITH REGARD TO LOWE'S ALLEGED VIOLATION OF DR1-102(A)(4) IS CLEARLY ERRONEOUS AND SHOULD NOT, THEREFORE, BE ADOPTED BY THE COURT.

The evidence of record in this matter falls woefully short of the "clear and convincing" quantum necessary to support a finding of guilt upon the charge that Lowe misrepresented to Ingram that the $7,500.00 paid to him in January, 1983, was to be used to offset the cost of bringing the federal case to trial. The Floria Bar v. Rayman, 238 So.2d 594 (Fla. 1970). Even the most cursory review of the record makes plain that the Bar failed to carry its burden of proof with regard to this charge and that the referee erred in entering a finding of guilt.

The Bar's charge against Lowe was supported, for the most part, by the uncorroborated testimony of Robert Ingram.[1] Thus, Ingram testified that in January, 1983, Lowe demanded that Ingram pay him an additional $7,500.00 to underwrite the cost of bringing the federal case to trial.[2] Tr.I,pp.36-37. Ingram admits that no one else was present when Lowe made these representations, and the Bar did not submit any documentation or other

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[1] Ingram's wife testifed that she witnessed Lowe writing the word "trial" on the receipt for the $7,500.00. Tr.I,p.107. No other witness was presented to support Ingram's version of the events.

[2] Ingram had already paid Lowe a $5,000.00 "retainer" at the outset of the federal case and had paid numerous expenses related to that case as they were incurred. Tr.I,p.62.

physical evidence to support Ingram's contention. Indeed, the evidence that was presented on this issue, both by the Bar and by Lowe, overwhelmingly supports Lowe's claim that he made it clear to Ingram that the $7,500.00 he asked Ingram to pay him in January, 1983, was for attorney's fees Lowe had earned while representing Ingram and his family during the previous two years. In that regard, the evidence showed as follows:

1. Even though the Bar recognized in its complaint, and the referee found, that the $5,000.00 Ingram paid Lowe at the outset of the federal case was an attorney's fee, Ingram nevertheless testified that he believed the $5,000.00 was to be used for costs. Tr.I,pp.22-23. Yet, Ingram acknowledged that he paid court reporter fees and other costs out of his pocket as they were incurred in that case and never inquired of Lowe regarding the disposition of the $5,000.00 he had given Lowe as "costs." R.I,p.62. Indeed, Ingram didn't ask Lowe what the $5,000.00 was used for or why he couldn't continue to pay costs as they were incurred when Lowe asked for payment of $7,500.00 in January, 1983. Tr.I,pp.74-76.

2. Although Ingram maintains that the $300.00 payment he made to Lowe on January 11, 1983, was an initial payment toward the $7,500.00 "cost advance" Lowe requested, he nevertheless

wrote the explanation "attorney's fees" on the memorandum section of the check. Tr.I,p.76.[3]

3. Ingram stated that he was "apprehensive" about giving Lowe the $7,200.00 balance on January 19 and that Lowe offered to keep the money in his trust account for awhile if it would make Ingram feel more at ease. Tr.I,pp.40-41. It is difficult to understand Ingram's uneasiness or Lowe's offer if the $7,500.00 was, as Ingram stated, to be used for costs and expenses associated with an impending trial. Why would Lowe offer to hold the money "for a couple of months" if the trial were scheduled to commence within a matter of weeks? Tr.I,p.41. And why would Ingram be "apprehensive" if he really believed the money was to be used for expert witness fees and related costs?

4. Ingram claims that as early as February 22, 1983, he began asking Lowe for an "itemized statement" regarding the $7,500.00 paid the month before. Tr.I,pp.44-46. If Ingram believed that the $7,500.00 was to be used to pay various expert witnesses to testify at a trial that had not yet occurred, why

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[3] Ingram used the word "retainer" at one point to describe the $7,500.00 he paid Lowe. Tr.I,p.38. Ingram apparently has great difficulty distinguishing between costs, attorney's fees and retainer. Yet, Ingram's understanding of the differences between these concepts is critical to the Bar's case. Ingram stated during his testimony that he "didn't know the difference between attorney's fees, attorney's costs, or anything else." Tr.I, p.91. His confusion regarding these important distinctions is further underscored by his characterization of the initial $5,000.00 payment as a "fee," after he insisted that the $5,000.00 was to be used to pay costs. Compare Tr.I,p.23,line 2 with Tr.I,p.28,lines 12-13.

would he want an itemized statement? It is more likely that the itemized statement Ingram requested related to the various legal services Lowe performed for which Ingram paid him $7,500.00. Tr.I,p.135.

5. Ingram claims that Lowe wrote the word "trial" on the receipt he gave Ingram to acknowledge that the $7,500.00 Ingram paid was to be applied to costs and expenses of the trial of the federal case. Tr.I,p.48. Ingram's testimony is contradicted by no fewer than four independent witnesses. First, Carol McKee, Lowe's former secretary, testified that she did not write the word "trial," nor did the word appear to have been written by Lowe. Tr.I,p.137. What's more, Lowe's former client, Paul Taylor, his wife, Barbara Taylor, and a casual acquaintance of Lowe's, Ann Dyer, all testified under oath that Ingram tried to persuade Barbara Taylor to write the word "trial" on the receipt. All three witnesses testified that one afternoon in the spring of 1983 Ingram confronted Mr. and Mrs. Taylor on the corner of Franklin Street and Jackson Street in Tampa, Florida, and, while in a very agitated and emotional state, asked Mrs. Taylor to write the word "trial" on the receipt. Tr.V,pp.5;17-18;27. Although neither Mrs. Taylor nor Ms. Dyer saw what Ingram did with the receipt after Mrs. Taylor refused to write on it, Mr. Taylor testified that he witnessed Ingram write the word "trial" on the receipt. Tr.V,pp.13-14. What's more, Mr. and Mrs. Taylor testified that Ingram told them that he had second

thoughts about paying Lowe $7,500.00 for attorney's fees and that he wanted Lowe to give him his money back. Ingram told the Taylors that if Lowe declined, he would go to the Bar and claim that the money was "trust money" that Lowe was required to return to him. Tr.V,pp.6;18-19.

Lowe also presented the testimony of William Duncan, a Hillsborough County deputy court clerk, concerning a similar threat Ingram had made against Lowe. Duncan testified that sometime after he started working for the Clerk in July, 1985, he was speaking with Lowe in the courthouse hallway when Ingram interrupted the conversation. Duncan recalled that the conversation that ensued between Ingram and Lowe concerned money that Ingram had paid Lowe which Ingram was attempting to recover from Lowe. Duncan's impressions of the conversation are as follow:

> Q: I just want you to tell us what you remember.
>
> A: I remember the gentleman--what I can recall of the converation was that he was upset with him and he wasn't satisfied. He had paid him--he paid him like attorney's fees and he wanted to claim it as either trust money or something--money that he was supposed to hold for him when he was, in fact, going to almost change around what he had initially set out to do. I mean, that's the impression I had. As far as the words out of his mouth, I really couldn't say. Tr.V,p.35.

Even though the Bar failed to suggest a single reason why the Taylors, or Ann Dyer, or Carol McKee or William Duncan would perjure themselves to assist Lowe in this matter, the referee nevertheless chose to credit Ingram's version of the events,

despite Ingram's obvious stake in the outcome of this proceeding. Thus, the referee stated that he "doubts strongly" the accuracy of the testimony given by the Taylors and Ms. Dyer. Amended Report of Referee, p.3. The referee suggests, contrary to all of the evidence presented on this point, that the word "trial" was written by the same person who wrote the balance of the receipt. Id. No one disputes that Carol McKee filled out the receipt. Tr.I,pp.47;106-107;136-137. She denies writing the word "trial" on the receipt. Tr.I,p.137. Indeed, even the Ingrams claim that it was Lowe, and not Carol McKee, who wrote "trial" on the receipt.[4] The referee has clearly misconstrued the evidence on this point.

The referee found further support for his rejection of the testimony of Dyer and the Taylors because "If Ingram wanted a woman to write in 'trial,' duplicating the handwriting of respondent's secretary," he would not have immediately written the word in himself. Amended Report of Referee,p.3. It was the referee's theory, however, and not that of any of the witnesses, that Ingram may have wanted Mrs. Taylor to write "trial" on the

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[4] The referee, without the aid of any expert testimony regarding the alleged similarity of the handwriting of the word "trial" to that of Ms. McKee, nevertheless concluded that she made the notation. We suggest that, to the untrained eye, the printed word "trial" on the receipt is remarkably similar to Mr. Ingram's printed notations on the bottom of his copy of the receipt, which is attached to his affidavit of January 9, 1987. A copy of that document has been attached to this brief for the Court's convenience.

receipt for that reason. Mr. Taylor's testimony on that point is as follows:

> Q: (By the Referee) Now, at that particular point Mr. Lowe had a female secretary, is that correct?
>
> A: Yes, sir.
>
> Q: Did Mr. Ingram suggest that your wife signing this would, therefore, be a woman signing it similar to his secretary signing it? He needed a woman's signature? Did he indicate anything of that nature?
>
> A: Yes. He wanted a woman's signature. He didn't ask me. He asked her. I assume that would be the reason. Tr.V,p.14 (emphasis added).

The referee neglected even to address Duncan's testimony, which established that Ingram was still threatening to lie to the Bar about the nature of the $7,500.00 payment more than a year after it was made. Such testimony buttresses that given by the Taylors regarding Ingram's announced intention to do whatever was necessary, including fabricating a story about the purpose for which he gave Lowe the $7,500.00, in order to get his money back. There is absolutely no basis in the record for the referee to have rejected the testimony of Dyer, Duncan and the Taylors. To do so, the referee must have decided that the Taylors and Dyer conspired to commit purjury on Lowe's bahalf[5] and that Duncan was either mistaken or that he, too, lied under oath.

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[5] Their testimony of the events which occurred on the Tampa street corner in the spring of 1983 is virtually identical. The Taylors swore that they had never met Dyer before the hearing, and Dyer made the same representation with regard to her knowledge of the Taylors. In order to fabricate such a story, these three witnesses would have to have been in collusion with one another.

6. Ingram claims that at no time prior to paying Lowe the $7,500.00 in January, 1983, did Lowe or anyone else from Lowe's office advise him that he owed Lowe money for legal services Lowe performed on his behalf. Tr.I,p.73; Tr.III,pp.3-4. Yet, Lowe's former secretary, Carol McKee, and his former bookkeeper, Pat Holloman, testified that they had called Ingram on numerous occasions to remind him that he owed Lowe $7,500.00 for attorney's fees. In that regard, Ms. McKee testified as follows:

Q: Did there come a time when you were called upon to attempt to collect an attorney's fee from Mr. Ingram?

A: Yes.

Q: Who gave you the instructions to do that?

A: Mr. Lowe.

Q: What did Mr. Lowe tell you?

A: He told me that Mr. Ingram owed him money for cases that he had handled for him.

Q: What did he ask you to do about that?

A: He asked me to call Mr. Ingram to remind him of the money that he owed him. On numerous occasions I asked Mr. Ingram for the money, when he was bringing the money in.

Q: You spoke specifically with Mr. Ingram on this?

A: Yes, I did.

Q: On how many occasions do you recall having those conversations with Mr. Ingram?

A: At least a dozen times.

Q: And specifically, what did you ask Mr. Ingram to do?

A: I asked Mr. Ingram to bring the check in.

Q: Did you tell him what the check was for?

A: Yes, I did. Mr. Ingram and I discussed many times what it was for, and Mr. Ingram asked me on many occasions to just type out an accounting for him.

Q: When he asked you what the money was for, did you respond?

A: Yes, I did.

Q: What did you tell Mr. Ingram?

A: I told him it was for cases that John had represented him for.

Q: Did you tell him it was for attorney's fees?

A: I told him it was for attorney's fees. Tr.I,p.132-133.

Ingram was unable to explain why Lowe's former secretary would fabricate such a story. Tr.III,pp.3-4. The referee, apparently, was likewise unable to suggest a reason why yet another person would lie under oath to assist Lowe; so he chose simply to ignore this critical testimony.

It is obvious from the foregoing that the referee's findings regarding Lowe's alleged violation of DR1-102(A)(4) are based upon sympathy for Ingram and not upon any clear and convincing evidence of Lowe's misconduct, for no such evidence exists. It is not difficult to feel sorry for Ingram. He obviously invested a great deal of his time, money and emotion into the federal case and received nothing in return. Lowe may have unjustifiably raised Ingram's expectations regarding the prospects for success in that case. Yet, none of these factors, or all of them,

support the referee's finding that Lowe mislead Ingram into paying him $7,500.00 for costs and then used the money to offset accrued attorney's fees he claims Ingram owed him.

B. THE RECORD IS DEVOID OF EVIDENCE THAT LOWE CHARGED AND COLLECTED AN EXCESSIVE FEE FROM INGRAM.

The referee recognized that $5,000.00 of the $7,500.00 Ingram paid to Lowe in January, 1983, was intended by Lowe to compensate him for work he performed on Ingram's behalf in the Veterans Administration proceeding. Amended Report of Referee, p.3. Lowe maintains that he devoted approximately 65 hours to researching federal regulations and court decisions to assist Ingram in preparing for his administrative hearing before the Veterans Administration. Tr.II,pp.21-22. Lowe also testified that when he undertook to represent Ingram in that matter, he was unaware of the existence of a federal statute limiting the amount of fees he could charge in that matter to $10.00. Tr.II,pp.20-21. Ingram maintains that Lowe was aware of the $10.00 fee cap when he agreed to assist Ingram in the Veterans Administration matter. Tr.I,p.28.

The referee never resolved this conflict in the testimony. His findings on this point are as follows:

> Respondent testified that of the $7,500.00 paid to him by Robert C. Ingram in January 1983, $5,000.00 was for his "research and appearance at Hearing" on a claim that Robert C. Ingram had with the Veteran's Administration. Respondent submitted a written

> statement on 27 June 1985 to the grievance committee to that effect. He testified that he did not know that federal law prohibits a fee for V. A. hearings in excess of ten dollars. Respondent testified that the fee was mostly for research and so not illegal.
>
> If Respondent is correct, then $4,990.00 was his fee for research. No independent testimony was presented supporting this kind of fee for the research involved. Respondent testified that he had no standard hourly rate, but if the usual standard hourly rate for sole practioners in 1983 in Tampa Bay of $100.00 per hour is applied, then Respondent would have had to spend 49 hours on research, far in excess of what he testified he did spend on this matter. For research his fee is clearly excessive and if more than $10.00 is applied to his appearance then it is illegal. Amended Report, pp.3-4.

The referee's findings are fatally flawed. He notes that Lowe failed to present independent testimony to support collecting a fee of $4,990.00 for research. Lowe testified that he did the work. Tr.II,pp.21-22. His testimony on this point is unrebutted. We are not aware of any requirement that a respondent in this type of proceeding must present "independent testimony" to establish that his fees are reasonable. The burden was on the Bar to prove by clear and convincing evidence that Lowe's fee was excessive, not on Lowe to prove the reasonableness of his fee. See, e.g., The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). The Bar failed even to attempt to refute Lowe's testimony on this point.

The referee's error is further compounded by his assertion that Lowe testified that he spent far less than 49 hours

conducting research regarding Ingram's Veterans Administration proceeding. Lowe's testimony on that point is as follows:

> Q: Mr. Lowe, how much time did you spend researching these service-related injury questions for Mr. Ingram?
>
> A: Originally I estimated it would take me approximately five hours considering $125 an hour, but I spent more like 65 hours altogether in research and time.
>
> Q: Does that include the time for the hearing and the representation for the hearing?
>
> A: No, it doesn't. In fact, due to the fact that I was away, Mr. Ingram was going to pursue the matter. It was something totally unrelated at the time. I estimate that including my time and appearing for Mr. Ingram, my time, the days that I spent, I estimate approximately 30 hours. Tr.II,pp.21-22.

It is plain from the foregoing that the referee's findings with regard to the fee charged by Lowe for representing Ingram in the Veterans Administration proceeding is clearly erroneous and should not, therefore, be adopted by the Court.

The referee determined that a separate violation of DR 2-106(A) occurred when Lowe collected a $1,400 fee from Ingram for representing him in a case against Sears. Amended Report, p.4. The referee's findings on this point are as follows:

> Respondent testified that of the $7,500.00 paid to him by Robert C. Ingram in January 1983, $1,400.00 was for representing Robert C. Ingram in a suit against Sears which was settled for $2,500.00. To the grievance committee he submitted a written receipt to this effect. There was no previous agreement

> between the parties for a contingency fee and Respondent did not clearly show how many hours he spent on the case. Absent an agreement to the contrary, a fee in excess of one-half of the recovery is clearly excessive. Id.

The referee's findings are flawed in several respects. Initially, we note that the fee charged for work performed by Lowe in the Sears matter was not part of the $7,500.00 paid him by Ingram in January, 1983. The Sears case was settled long before then. The Bar's auditor, Mr. Pizarro, stated that Lowe's trust account records revealed that the disbursement of the $2,500.00 occurred in June and July of 1980. Tr.I,p.18. Of the $2,500.00, Lowe took $1,000.00, apparently for fees, and $500.00 for costs. Another disbursement of $1,000.00 was made, apparently to Ingram. Id. Pizarro's testimony is consistent with Lowe's testimony and Ingram's testimony and establishes that Lowe did not take a $1,400.00 fee, as the referee found. Rather, Lowe was reimbursed for costs he had advanced in that matter out of the $2,500.00 settlement proceeds. Ingram does not dispute that Lowe had incurred these costs and that he recovered the cost advance out of the settlement proceeds. Tr.I,p.83. The question the referee should have answered then is whether a $1,000.00 fee in the Sears case is excessive. As in the matter of the $5,000.00 fee for representing Ingram before the Veterans Administration, the Bar failed to carry its burden of proving that charging a $1,000.00 fee in a matter which settles for $2,500.00 before trial is excessive. In any event, it is difficult to

imagine that a $1,000.00 fee would be excessive in a case where a complaint was filed, depositions taken and settlement discussions held. If, as Lowe claims, Ingram had agreed to a standard contingent fee arrangement, the $1,000.00 fee, representing 40% of the settlement proceeds, would be within reasonable limits. If no contract existed, it is not unreasonable to imagine that Lowe devoted at least ten hours to this matter when one considers that he spent time discussing the matter with Ingram before filing the complaint, he drafted the complaint, he took the depositions of contractors who performed the work for Sears, and he engaged in and concluded the settlement negotiations with Sears to Ingram's satisfaction. Since the referee recognized that the standard hourly rate for sole practitioners in the Tampa Bay area is $100.00 per hour, Lowe's efforts in the Sears matter were surely worth $1,000.00.

C. THE PENALTY RECOMMENDED BY THE REFEREE IS EXCESSIVE.

After finding that Lowe had violated DR1-102(A)(4) by misleading Ingram with regard to the use to which he intended to put the $7,500.00 Ingram paid him in 1983, and that Lowe violated DR1-106(A) by twice charging Ingram an excessive fee, the referee recommended that Lowe be suspended for 36 months. Amended Report, p.6. The referee justified this harsh recommendation of punishment as follows:

> Respondent deserves this harsh treatment because he has had two private reprimands

> from the Supreme Court and because he debases the highest noble aims of the legal profession, to wit: he poses as a friend to the oppressed and poor yet charges his trusting gullible friend an original fee of $5,000.00 outrageous in the circumstances, and the subject fee of $7,500.00. Id.

The referee's recommended punishment is unduly harsh for two reasons: First, to the extent that he relied upon Lowe's prior disciplinary problems, his reliance was misplaced. Neither of the prior reprimands related to misconduct of the nature dealt with here. One prior reprimand concerned technical errors Lowe committed in maintaining his trust account. There was no indication that Lowe's conduct had resulted in injury to a client. The same is true with regard to the other reprimand, which dealth with Lowe's alleged misconduct toward his brother's probation officer. Surely these prior reprimands, even when coupled with the referee's findings here, do not establish the existence of any pattern of unethical behavior warranting Lowe's suspension from the Bar for three years. This case marks the first instance where Lowe has been charged with misconduct vis-a-vis a client. In light of this fact, the referee's recommendation appears excessive.

Finally, although the referee failed to find an ethical violation with regard to the original fee arrangement in the federal case, he nevertheless characterizes the fee as "outrageous" and translates his outrage into a weighty penalty. To the extent that the referee was influenced to recommend a

harsh penalty by his self-contradictory view of the bona-fides of the original fee arrangement, he has abused his discretion.

CONCLUSION

Based upon the foregoing, the Court is urged to reject the referee's findings of misconduct and his recommended penalty.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by First Class United States Mail to Diane V. Kuenzel, Esquire, Assistnt Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, FL 33607, on this 9th day of March, 1987.

Robert F McKee
Attorney