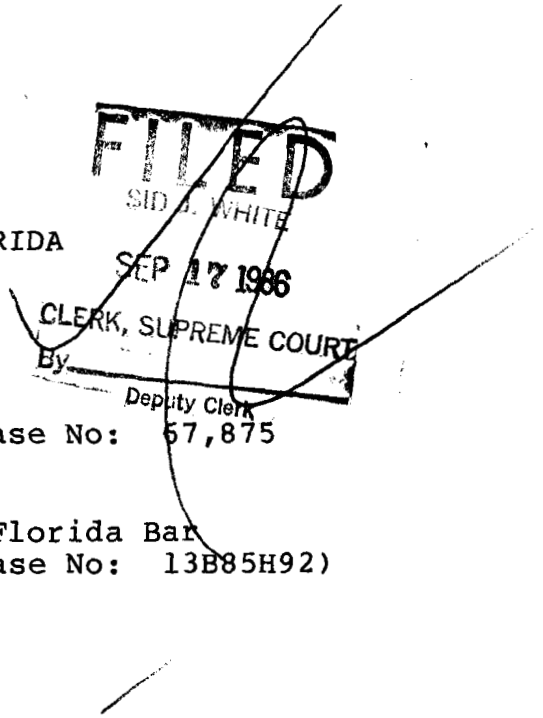

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

J. B. HOOPER,

Respondent.
_____/

Case No: 67,875

(Florida Bar
Case No: 13B85H92)

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE AND FACTS

The Respondent represented two other individuals and himself in the acquisition of a small parcel of investment real estate. Thereafter, a contract was entered into between Suncoast Service Center, Inc., a Florida corporation, hereafter "Suncoast," and the Respondent and his clients for the installation of a central air conditioning system in the above referenced property. Following the installation, a dispute arose between the parties after which Suncoast filed an action against the Respondent and his clients. (Suncoast Service Center, Inc. v. Arthur T. Jones and J. B. Hooper, Case Number 83-14083, Circuit Court, Hillsborough County, Florida). The fact that the Respondent was at all times relevant thereto acting on behalf of his clients has been consistently ignored by the Bar, although such fact is clearly reflected throughout defendant's pleadings in the circuit court case and the Respondent's pleadings in this proceeding along with his testimony therein. R-256, R-300-301.

Several other facts are important. Suncoast, (through its principal, a Bonnie Rodriguez, the Bar's complaining witness), was found by the circuit court to be in violation of "various state statutes and local ordinances," as reflected in the granting of a Motion for Partial Summary Judgment which set out over a dozen violations of the law by Suncoast in the circuit court action. A-1, A-2. Several other instances of dishonesty including perjured testimony on the part of Ms. Rodriguez at both the grievance committee hearing and the Refereee hearing will be set out herein.

Upon losing the circuit court case by the granting of the Defendant's Motion for Summary Judgment, and then facing the possibility

of substantial liability for attorney's fees and costs, R-279-280, Ms. Rodriguez filed a second complaint with The Florida Bar. A prior complaint alleging substantially the same facts was closed by The Bar after its investigation. Res Ex-15. A copy of the second complaint was sent to the Respondent with a cover letter granting him fifteen days within which to respond. Res Ex-1a. Prior to the expiration of the alloted time, the complaint was forwarded to a grievance committee for further action. Res Ex 1b.

The Respondent was noticed on a grievance committee hearing. After the hearing was rescheduled by the Bar on several occasions and the Respondent appeared to testify on May 28, 1985. R-284, R-305. At that time, the hearing was cancelled and the Respondent was informed that it would be rescheduled for a later date. The Respondent requested through Ms. Carolyn Fields, the investigating member of the committee and the only member of the committee with whom he had had any contact, that the matter be continued beyond the next scheduled meeting in July meeting during which time the Respondent would be out of the country. R-284. The Respondent's request was noticed to the committee chairman. Bar Ex-1a. In spite of the Respondent's request, the hearing was held on July 12, 1985, at which time the only witness to testify was Rodriguez. Transcript of Proceedings, Grievance Committee 13-B, July 12, 1986. Ms. Diane Kuenzel, staff Bar counsel, who had in the meantime taken over from Carolyn Fields as the committee investigator, presented the case against the Respondent to the committee and participated in the committee deliberations during which probable cause was found.

Without further investigation, including even a cursory examination of the underlying circuit court case, and without allowing

the Respondent an opportunity to be heard, the Bar found probable cause based entirely upon the testimony of Ms. Rodriguez, notwithstanding the finding of misdeeds against her by the circuit court, and thereafter charged Respondent with all of those allegations made by Ms. Rodriguez.

At no time has the Bar seen fit to review or otherwise consider the basis of the Summary Judgment granted in the circuit court action or interview any witnesses except Ms. Rodriguez and her attorney. The numerous violations of state statutes and local ordinances by Suncoast as set out in the Defendant's Memorandum of Law filed in the circuit court case were never considered by the Committee. Neither did the Committee consider any evidence, except a subtle reference by Ms. Rodriguez, as to the fact that Suncoast's original attorney, Andrew Miroblole, had withdrawn from representation after loosing the circuit court case on behalf of his client and then sued Suncoast for $25,000.00 in attorney's fees. A-3, Res Ex-1. Although essential to the Respondent's defense, The Bar has consistently refused to allow any evidence to be presented regarding the interrelated complaint against Mr. Mirobole and the disposition thereof. R-317, 318.

Respondent filed a Motion to Dismiss the Bar's complaint and therein set out his defenses and attempted to enlighten the Referee as to the untenable position he and his clients had been placed by agreeing to forego their claim for thousands of dollars in attorney's fees and costs in one of several attempts to resolve this matter. A telephonic hearing, scheduled on an ex parte basis by the Bar, was held after which the motion was denied following the submission to the Referee of a proposed order by the bar on an ex parte basis. An extensive answer was

filed by the Respondent, and a hearing was scheduled by the Bar and the matter was heard on March 11th and 21st, 1986, in Tampa.

At the Referee hearing, the Bar offered two witnesses. Ms. Rodriguez testified on several matters including the quality of workmanship in the installation, although it is undisputed that neither she nor her qualifying (licensed) agent ever visted the job site. R-58, R-109, R-113. A Grover Freeman testified about matters related to his representation of Ms. Rodriguez following the withdrawal of her former attorney.

There was a complete absence of any witness on behalf of the Bar, except Ms. Rodriguez, to refute the Respondent's testimony and that of his witnesses regarding the substandard quality of workmanship on the part of Suncoast, the numerous violations of state statutes and local ordinances by Suncoast related to the installation, the propriety of the rebate obtained from Tampa Electric Company or the acquiescence by the Bar to the inclusion of a withdrawal of a Bar complaint as part of a settlement agreement.

SUMMARY OF CIRCUIT COURT CASE

As will be shown, although the Bar has objected strongly to allowing any insight into the underlying circuit court case, it has had no reservation about taking the word of Ms. Rodriguez on several matters directly involved with and arising out of the circuit court action.

Therefore, it is imperative that several undisputed facts regarding the circuit court action be pointed out.

As previously stated, the Bar's complaint relates to and arises out of a dispute between a mechanical contractor and the Respondent and his clients. (Note: It is difficult to find a reference in any of the Bar's pleadings or the findings by the Referee which acknowledges this fact of representation.) It is undisputed that the contractor, Suncoast Service Center, Inc., filed a claim of lien, Res Ex-16, and initiated litigation shortly after the work was completed (within approximately 30-days) and while the work was still well under the protective umbrella of the mechanics lien law. The Respondent attempted to settle the $3,000.00 case on several occasions including the service of an Offer of Judgment for $2,700.00, A-4. All offers of settlement were refused by Suncoast and no counteroffers were ever made.

The following points extracted from the court file and related discovery are noteworthy:

a) In the ensuing litigation, it became apparent that Suncoast was in violation of numerous state statutes and local ordinances, A-1, pp. 7-12, including but not limited to (i) its failure to require its qualifying agent to supervise the work on the job, (ii) allowing an unlicensed person to supervise the work, (iii) failure to obtain permits, (iv) failure to have the work inspected, (v) allowing a

certificate holder's permit to be improperly utilized by an unlicensed entity, and (vi) failure to place the property owner on notice as to possible mechanic's lien law provisions and sanctions.

b) Testimony was taken on several occasions. The Court heard argument of counsel and ruled on several motions. Discovery was had and was available to the Court for its review. There is a complete absence of any evidence to suggest that the Court was not well informed. No improper conduct was ever suggested by the Court and certainly no sanctions were ever imposed for any such conduct. As stated above, the Defendants moved for and were granted summary judgment on all matters within the circuit court's jurisdiction.

c) The Bar's allegation in its complaint that "Respondent requested two changes in the installation, which were completed shortly thereafter," is preposterous. In fact, all credible evidence supports a contrary conclusion. The testimony of Ms. Rodriguez has been accepted as fact at at all levels of these proceedings when in truth, neither she nor her "qualifying agent" ever visited the job site. R-58, R-109. The Bar should have been well aware that the court record did not support the testimony of Ms. Rodriguez and a statement so clearly contrary to the evidence by those who are responsible for prosecuting lawyers is clearly improper.

d) As the moving party, Suncoast refused to allow discovery to proceed in an orderly fashion, even about matters critical to its licensing qualifications. A-1 at 3. It also refused to answer questions regarding other litigation, similar complaints and other jobs started and completed without permits.

e) <u>All</u> settlement efforts during the pending circuit court

action were initiated by the Respondent, Res Ex-22, A-4, -- all were rebuffed by Suncoast. The Respondent will not attempt to address in detail several related issues including the attitude of opposing counsel except to say that in all matters before the Court and at depositions, Suncoast was represented by two attorneys, R-181, R-279, in a case that should have been settled even before it was filed. While this was questioned at first, it soon became clear that the intent was to engage in protracted litigation, prevail in circuit court and then go for the attorneys fees, R-262-265 as evidenced by the fact that opposing counsel had incurred approximately $1,600.00, in attorney's fees and costs during the first ten-days of representation in a case where the amount in dispute was only $3,000.00. Res Ex-1,

The Bar has conveniently overlooked the foregoing facts and circumstances in its efforts to weed out skullduggery among its ranks and in the process has added new meaning to the term harassment. There is a complete absence of any rational reason why an unscrupulous contractor should be given gratuitous support for its illegal actions by the Bar after denial of relief by a Court of proper jurisdiction.

SUMMARY OF ARGUMENT

The Respondent seeks review of the discipline recommended by the Referee, i.e., a ninety-day suspension or one-year probation, in that both are erroneous and unjustified under the facts and circumstances of this case. The charges against the Respondent are not based upon any misdeeds involving any client matters, trust fund violations, criminal conduct, allegations of misconduct by any trial court or complaint by any citizen of wrongdoing except the Suncoast principal who had already been found guilty of violations of state statutes and local ordinances at the time she filed her complaint with the Bar and will be shown to have committed perjury before the grievance committee and at the referee hearing.

These charges arose from the successful representation by the Respondent of his clients, (a fact still unacknowleged by the Bar), and were based in large part on the perjured testimony of the Bar's complaining witness. Therefore, to punish the Respondent under the circumstances of this case would serve no useful end if the purpose of discipline is to protect the public and administer justice as well as protect the legal profession. Rule 11.02, Integration Rule of the Florida Bar.

The Bar has acted improperly throughout the prosecution of this case. The same Bar which seeks to punish the Respondent for communicating with a low-level corporate employee by extending his status to that of opposing party when in fact he was not even a corporate officer, sees nothing wrong with communicating on an ex parte basis with the Referee on the merits of this case. A-5.

The same Bar which seeks to punish the Respondent for failing

to appear at a deposition to which he was noticed (although this matter had already been addressed by the trial court) sees nothing wrong with violating the spirit and the letter of the Integration Rule by the the release of confidential matters to the press during a political campaign, thereby seeking to influence its outcome. A-6.

Even as the Bar comes before this Court, it sees nothing wrong with continuing to misrepresent the facts. For example, the Bar sets out in its brief that "Respondent's violations include personally contacting an opposing party known to be represented by counsel. . . ." Complainant's brief at 6. As Bar counsel is very well aware, there has never been the first piece of evidence to support such an allegation. Rather, the question before this Court is whether an attorney is to be disciplined, contrary to existing law, for contacting a low-level employee of an adverse party.

On the one hand, the Bar has stated that the Respondent is charged with notice of the Integration Rule and is held to know its provisions and standards by Article XI, Rule 11.01(1). Yet, on the other hand, the Bar perceives itself as being above the law by its failure to observe even the rudiments of equal protection and due process, examples of which will be described more specifically below.

As this Court has previously stated,

> "The Bar has consistently demanded that attorneys turn 'square corners' in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so." The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).

However, the Bar's handling of this case does not meet this standard nor satisfy current notions of equity, justice and fair play.

POINT I

WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED DR 1-102(A)(6) AND DR 7-104(A)(1), CODE OF PROFESSIONAL RESPONSIBILITY.

ARGUMENT / COUNT I

The Respondent, on behalf of himself and others, and Suncoast entered into a contract. A dispute arose out of which the Respondent and his clients were the prevailing party. Thereafter the Respondent refused to insist that his clients pay Suncoast the contract sum after spending several thousand dollars in the defense of a lawsuit which was filed by Suncoast within approximately 30-days after the work was completed.

In light of the above circumstances, and in spite of the fact that a circuit court had made a finding that Suncoast "violated various state statutes and local ordinances," A-2, the Referee found that the Respondent had violated DR 7-104(A)(1) by communicating with a party he knows to be represented by a lawyer and DR 1-102(A)(6) for conduct reflecting adversely on his fitness to pactice law.

To support its findings, the Referee states that there is conflicting evidence as to whether or not the installation was satisfactory and contained "technical wiring defects." Such a statement is completely erroneous. The only testimony from any witnesses as to the quality of the installation was from the Respondent who testified that the installation was substandard, R-256-259, R Ex-22; from the city electrical inspector who testified that the installation had been "red-tagged," by him, R-195, R-198, for a violation so serious that a fire could have resulted, R-209; and by the electrical contractor who

testified that additional wiring had been done by Suncoast which did not meet code, R-228, was illegal, R-233, and could cause a fire, resulting in death or serious injury. R-229,230. As the electrical inspector stated, "You can't be too careful with electrical work." Serious infractions involving death or serious injury could hardly be classified as "technical wiring defects." The electrical contractor further testified that Suncaost had done the additional wiring themselves in order to save twenty dollars. Id.

Furthermore, it is undisputed that neither Ms. Rodriguez nor her qualifying agent ever visited the job site during the installation, Memo-p.8, R-58, R-109 and R-113. The Bar failed to put on one witness or offer one piece of evidence to effectively rebut the above referenced testimony by the Respondent, the electrical contractor and the city inspector as to the quality of the installation.

The Referee goes on to state that Respondent evaded or refused requests from Suncoast for payment. Based upon the unrebuted testimony as to the quality of workmanship, such would have hardly been the case. In the first place, the Respondent was at all times acting on behalf of his clients -- a fact which has been generally ignored in all of these proceedings. Secondly, it is undisputed that there was a complete absence of any effort on the part of Suncoast to settle the dispute although the Respondent attempted to settle the matter on several occasions, R-273, R-276, even serving an Offer of Judgment for almost the full amount of the claim, A-4, which was rejected by Suncoast.

The Referee then states that Respondent telephoned Suncoast directly. In fact, the Respondent telephoned Jim Alexander, a corporate employee at Suncoast. In this regard, several points are undisputed.

One, Mr. Alexander to whom the call was made was not even a corporate officer, much less its principal. R-170, Res Ex-8 & 9. **Two,** although the Bar has suggested otherwise, there has never been any evidence that an attempt was made to communicate directly with the opposing party, i.e., Suncoast (a corporate entity) or its principal agent, Ms. Rodriguez. **Three,** DR 7-104(A)(1) is clear and unequivocal. A lawyer shall not communicate "with a party he knows to be represented by a lawyer...." (Emphasis added.) To suggest otherwise would be to make all corporate employees immune from informal discovery. Even a novice civil litigation lawyer would be aware of how impractical such a rule would be. Mr. Alexander was a corporate employee, a sales representative, R-170, nothing more, nothing less. For the Referee to have found otherwise is erroneous.

Finally, except as specifically provided for in DR 7-104(A)(1), a lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party. In fact, the attorney not only has the right but the duty to interview and examine any persons who are supposed to know the facts so as to ascertain the truth. Devlin v. Rosman, 205 So.2nd 346 (Fla. 3rd DCA 1967), as cited in 24 Fla.Jur.2nd, Evidence and Witnesses §391. See also, Mathews v. State, 44 So.2nd 664, (Fla. 1950). The Bar fails to offer any controvertible case.

What the Bar did offer to the Referee through its trial brief was:

Florida Bar v. Kirtz, 445 So.2nd 576 (Fla. 1984), where the "referee found that Kirtz knowingly communicated directly with an adverse party . . . " (Emphasis added).

Florida Bar v. LeFave, 409 So.2nd 1025 (Fla. 1982), where the "referee found that LeFave had improperly communicated with a judge . . . and with a party . . . " (Emphasis added).

Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), where the complaint alleged "that Shapiro communicated an offer of settlement directly to an adverse party . . . " (Emphasis added).

Note: The Bar also cited Hanley v. Hanley, 426 So.2nd 1230 (Fla. 2nd DCA 1983). This is a divorce case, not a discipline case. The Bar improperly misled the Referee by suggesting that the appellate court found the attorney had acted improperly in violation of Rule 7-104(A)(1) by contacting a party directly. Such was not the case.

The Bar with all of its resources fails to cite even one case where an attorney has ever been prosecuted for communicating with an employee of an opposing adverse corporate party. There is a very strict procedure which the Bar must follow should it wish to rewrite or expand upon the Code of Professional Responsibility as presently endorsed by this Court. To attempt such activity in the process of prosecuting attorneys is not authorized by statutory law, the Integration Rule of the Florida Bar or our Constitution. Such action is both arbitrary and discriminatory and contravenes the due process and equal protection clauses of the Fourteenth Amendment. See Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232.

In this same regard, a word must be said as to the propriety of allowing the introduction of the deposition of Mr. Jim Alexander, over the objection of Respondent, R-169, absent a showing that he was unavailable to testify. The rules of evidence on this point are well established. The simple statement by Bar counsel that "Mr. Alexander is unavailable to the best of our knowledge," R-168, is simply insufficient. More noteworthy is the fact that the Bar did not even have a copy of the deposition to offer into evidence, R-169, but rather claimed to have obtained what was purported to be a copy at some later date.

Several problems arise therefrom. First, it is a well established rule of procedure and evidence that opposing counsel has a right to examine evidence prior to its introduction. Furthermore, procedural due process requires that the Respondent be given the opportunity to examine evidence produced against him and to cross examine witnesses. Barsky v. Board of Regents of University of New York, 347 U.S. 442 (1954).

Secondly, even though the Bar had allegedly furnished the Referee with a copy of the deposition, he based his findings upon the testimony of Ms. Rodriguez who testified about what Mr. Alexander told her that the Respondent said to him.

Such flagrant hearsay within hearsay has no place in a proceeding which by its nature has the potential of depriving the Respondent of a valuable property right. Such proceedings must be essentially fair, See Shaughnessy v. United States, 345 U.S. 206 (1953). Such can hardly be the case where the Bar informs the Referee, following an objection by the Respondent to certain hersay testimony, that Florida Bar hearings are informal, hearsay is allowed and the rules of evidence are relaxed. R-57, R-63.

The Referee errs in paragraph eight of his findings wherein he states that "he", i.e., the Respondent, never paid Suncoast. Again, it is worth reminding this Court that the Respondent was defending clients in a matter before a circuit court. Surely, the Referee is not suggesting that the Respondent should have requested of his clients that they pay Suncoast for the substandard installation after expending a great deal of money in the defense of a frivilous lawsuit which Suncoast consistently refused to settle? (Note: While there is no testimony as to the amount of legal expenses incurred by the defendants, the Referee

properly notes that counsel for Suncoast withdrew from representation and sued his client for $25,000.00. It is reasonable to infer that the defendants incurred substantial fees and costs in the defense of the circuit court action.) Again, surely, the Referee is not suggesting that the Respondent should have acquiesced early on in the lawsuit thereby leaving himself and his clients liable for thousands of dollars in attorney's fees and costs.

It is difficult to see how the Respondent could have done any more than was done in an effort to protect the rights of his clients. The Respondent defended his clients in a professional manner and followed the Rules of Civil Procedure as promulgated by this Court. The circuit court never suggested otherwise. The Respondent questions the right of the Bar to interfere with those matters which have been properly litigated in a court of competent jurisdiction. In spite of its findings, the Referee framed the real question very succinctly when it asked:

> "[H]ow does the Bar disassociate the actions of Mr. Hooper in litigation where he is, in effect, defending . . . I don't think that Mr. Hooper should be deprived of the opportunities to seek redress in court the same as any lay person would. The fact that he was an attorney representing himself doesn't deprive him of the right or opportunities that any other litigant would have in such litigation." T-316.

Such an observation surely takes on even greater meaning when an attorney is representing not only himself but others.

As to Count I of Referee's findings, the Respondent would pray this Court find that the requisite standard of clear and convincing evidence falls far short and would respectfully urge the Court to find for the Respondent and dismiss all allegations therein.

POINT II

WHETHER THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED DR 1-102(A)(4) and DR 1-102(A)(6), CODE OF PROFESSIONAL RESPONSIBILITY AND RULE 11.02(3)(A) OF THE INTERGRATION RULE OF THE FLORIDA BAR?

ARGUMENT / COUNT II

The Respondent, on behalf of himself and others, and Suncoast entered into a contract. A dispute arose out of which the Respondent and his clients were the prevailing party. Thereafter the Respondent refused to insist that his clients pay Suncoast the contract sum after spending several thousand dollars in the defense of a lawsuit which was filed by Suncoast within approximately 30-days after the work was completed.

In light of the above circumstances, and in spite of the fact that a circuit court had made a finding that Suncoast "violated various state statutes and local ordinances," A-2, the Referee found that the Respondent had violated Article XI, Rule 11.02(3)(a), Integration Rule, for conduct contrary to honesty, justice and good morals, DR 102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and 1-102(A)(6) for conduct reflecting adversely on his fitness to pactice law.

The Referee finds in paragraph twelve of his Findings of Fact that Respondent attempted to avoid his own deposition. The evidence simply does not bear this out. The original allegation was made by Ms. Rodriguez at the grievance committee, Transcript of Proceedings at 19, and adopted in paragraph twelve of the Bar's complaint without any examination of the circuit court file. R-299. Moreover, several things are noteworthy. First, contrary to statements by the Bar that the Respondent was subpoened, R-293, the unrebutted testimony reflects that

the Respondent was not subpoened but was served a routine Notice of Taking Deposition one day prior to the scheduled deposition. R-266-269, R-296, R-312. Secondly, the matter had already been acted upon by the circuit court which granted Respondents's Motion for a Protective Order. R-266. Finally, and most importantly, the Respondent was rebuffed in his efforts to tie in certain key portions of the underlying circuit court action in his defense of this and other allegations. The Referee stated at R-152, "I'm not going to reopen that circuit court case. . . your're trying to reopen it regardless of the fact that I'm not going to do it." In a further effort to counter the perjured testimony of Ms. Rodriguez regarding the installation, the Court stated: "Counsel, I'm not interested in all of this. You're just wasting our time." R-159. Such restrictions resulted in unfair prejudice to the Respondent in the defense of this matter.

In spite of his own rulings against reopening the circuit court action, and in spite of the fact that the matter had already been heard and ruled upon by the circuit court, the Referee elected to go behind the circuit court action and single out the alleged failure to appear at a deposition as a violation, notwithstanding the unrebutted testimony as set out above, basing his findings upon the clerk's date stamp. The unfairness in such a procedure is obvious.

The Bar cannot point to one case remotely similar where an attorney was prosecuted for failing to appear at a deposition to which he was noticed as a litigant. Even if the allegation were true, (which it is not as reflected by the court file), the prosecution for such behavior is petty and well outside the boundaries of any case law supporting the punishment of lawyers anywhere in the United States.

The Referee found in paragraph fourteen and fifteen that the Respondent attempted to misrepresent himself to Tampa Electric Company in the completion of a routine energy rebate form. Such findings are completely erroneous based upon the unrebutted testimony of the Respondent and only witness to testify on behalf of TECO Energy. The question was whether the Respondent attempted to obtain a $75.00 rebate due Suncoast as the dealer. There has never been any question that the Respondent and his clients were due the $426.50 (sic) referenced in paragraph fourteen of the Referee's Findings and that the dealer (Suncoast) was due only $75.00. Even Ms. Rodriguez concurs with this position at R-76 where she admits that the Respondent would be entitled to $462.50 as the homeowner. This fact is further confirmed by at R-250-254.

The testimony was clear and unequivocal. Respondent contacted and received instructions and a rebate form from an employee, Mr. Vince Palori, assigned to the Energy Conservation Services of Tampa Electric Company. The Respondent completed the form according to the instructions which he had received and returned it. The only credible testimony was from this TECO employee and the Respondent himself and each testified as to the absence of any misrepresentation. Does not the Bar then have the burden of proving misrepresentation? The Bar's only effort in this regard, except the bare allegaton of misrepresentation, was a weak attempt to impeach Palori's testimony by the suggestion that Respondent's acquaintance with Palori was somehow an attempt to justify actions which have yet to be shown as improper.

Mr. Vince Palori, testified as follows:

To a routine inquiry regarding the availability of the rebate given that there was a "problem with the work, Mr. Palori responded:

"The manager [at Tampa Electric] that's directly involved in the rebate said to have Mr. Hooper directly apply for the rebates. "R-236.

Q: "Did you voluntarily furnish the form to Mr. Hooper on which he submitted the request for the rebate?"

A: "Yes." R-237.

Q: "Did you feel at that time that Mr. Hooper was responding to your instructions as to obtaining the rebate?"

A: "Yes." R-237.

Q: "Was there ever any idea in your mind that Mr. Hooper was acting improper or illegally?"

A: "Not at all." R-237.

Q: "Was Mr. Hooper always acting upon your instruction and above-board.

A: "At all times." R-238.

Mr. Palori went on to testify that he was never under any false impressions about the Respondent's posture in relationship to the rebates and that the Respondent never represented himself as a dealer or as a salesman. R-242. And upon inquiry from the Referee, Mr. Palori further stated that such problems are common, that unlicensed people's names are on the forms on a regular basis and that the error in completing this form would not have caused even a "15-second" delay. R-249.

While the Respondent admitted that someone in his office for whom he was responsible completed the rebate form, R-313, there is a complete absence of any credible testimony or evidence to suggest that anyone attempted to defraud Tampa Electric of seventy-five dollars. Given the testimony by Mr. Palori of Tampa Electric and that of the

Respondent, and in the absence of any effective rebuttal, such conclusions by the Referee involving the sum of only seventy-five dollars, without the first piece of rebuttal testimony, is clearly erroneous. The Bar has just simply failed to establish by clear and convincing evidence any wrongdoing in this regard.

The next finding by the Referee in paragraph sixteen is most fascinating. How a sarcastic note to former opposing counsel could be construed as reflecting upon an attorney's fitness to practice law is beyond comprehension. Although, the Bar refused to allow the Referee to have the benefit of certain evidence of wrongdoing against Mr. Mirobole in order to evaluate his personal character, R-317, 318, several things should nevertheless be noted: (a) As previously outlined, Mr. Mirobole filed the claim of lien and the lawsuit within approximately 30-days after the demand for full payment was made notwithstanding the defects in workmanship. (b) At every turn throughout the litigation, Mr. Mirobole and his assistant were both present, neither of which would consider settlement. R-181, R-279. (c) Within the first 10-days of representation, Mr. Mirobole had incurred over $1,600.00 dollars in attornys fees and costs. Res Ex-1. (d) Upon the entry of the summary judgment, Mr. Mirobole withdrew from representation and sued his client for an additional $24,000.00 in attorneys fees. A-3.

The crucial question before this Court appears to be: "Is it the intent of the Supreme Court of the State of Florida and the Supreme Court of the United States of America that an attorney should be subject to prosecution based upon private free-speech communications with another attorney?" If so, what about commuications between business partners or associates who are attorneys? What about communication

between husband and wife or between neighbors, one or both of whom are attorneys? Such a finding by the Referee for the Bar is without any legal, moral or ethical basis and fails to comport with the standard set out by this Court which states that the primary purpose of discipline of attorneys is the protection of the public and the administration of justice as well as the protection of the legal profession. Rule 11.01, Integration Rule of the Florida Bar.

Finally, the Referee finds that the Respondent acted improperly by attempting to settle, as he had done on several other occasions, the dispute between himself and his clients and Ms. Rodriguez by including in a settlement letter to Ms. Rodriguez's attorney, Bar Ex-1, the following conditions:

> 1. We [Respondent and his clients] would forego our claim for attorney's fees and costs. (Note: As previously stated, these amounted to several thousand dollars.)
>
> 2. We would waive our malicious prosecution and slander of title claims. (Note: Given the disposition of the mechanic's lien action in favor of the Defendants based upon the illegal acts of Suncoast, there was clearly a basis for such a claim.)
>
> 3. You would take a voluntary dismissal with prejudice of your county court claim. (Note: As the evidence now shows, this was rather insignificant given the attorneys fees and costs incurred since the filing of the action by Suncoast.)
>
> 4. Mrs. Rodriguez would withdraw her pending complaint filed with the Florida Bar.

Several things, however, are significant. First of all, and very important, is that nowhere in the Intergration Rule or the Code of Professional Responsibility is there even a hint that an attempt to include a withdrawal of a Bar complaint as part of a total settlement is somehow improper. The Bar fails to cite any case remotely on point which would support such a proposition. In fact, Article XI, Rule

11.04(4) is clearly stated in that settlement will not excuse the completion of an investigation. It does not, however, state that the inclusion of a complaint withdrawal as part of a settlement is improper or that such an act may be used as a basis for disciplinary action. For direction as to what acts may be utilized as a basis, one must turn to the Code of Professional Responsibility which "points the way to the aspiring and provides standards by which to judge the transgressor." Code of Professional Responsibility, Preamble.

Secondly, a most sensitive issue arises from the ashes. The question of including the withdrawal of the Bar complaint was discussed and approved by Carolyn Fields, the investigator for the grievance committee, prior to its inclusion as a condition of settlement. R-280, R-282, R-287, R-288 and R-314. Such testimony is unrebutted. Even the grievance committee and bar counsel were informed of the proposed settlement condition. Bar Ex 1-a. These facts are undisputed and the Bar has produced absolutely no evidence to the contrary. If such conduct is a breach of the Code, the question must be asked as to the propriety of the investigating member of the grievance committee, bar counsel and the committee chariman acquiescing to such behavior after being duly informed that the settlement was pending with the alleged "improper" provision. According to the finding by the Referee, even Ms. Rogriguez's new attorney, Grover Freeman, believed that including such a proviso in the proposed settlment was improper. That certainly didn't keep him from taking advantage of it in order to remove his client from the potential liability of the pending claim for substantial attorneys fees and costs. Res Ex-14.

Is it the position of the Bar that fellow attorneys, and especially

grievance committee members and bar counsel, should sit like vultures on a fence waiting for the attorney to commit an improper act of which they have prior knowledge and then sweep down to feed on the carrion. Such thoughts are disgusting and rail against the bond which attorneys should have with each other and stand against the precepts long established by the Bar and endorsed by this Court.

Finally, since the Bar has consistently objected to any inquiry related to the the facts and circumstances arising out of the underlying circuit court case, it would hardly seem to be in a position to judge whether the Respondent's so called "threats" as alleged in the Bar complaint, and found by the Refereee to be improper, were justified. The undisputed facts reveal that the Respondent had prevailed in the circuit court action with the exception of the remaining contract claim which had been transferred to county court and later dismissed administratively. (Suncoast v. Jones, 85-483CC.) The Respondent was left with only a hearing in order to claim thousands of dollars in attorneys fees and costs. Given the circumstances of the original claim by Suncaost, (e.g., no permits, unlicensed contractors, no inspections and all of the other dozen or so violations found existing by the circuit judge), A-1, A-2, there was clearly a basis for the possibility of a slander of title or malicious prosecution action. The Bar has failed to show otherwise.

The Referee also finds that pleadings filed by the Respondent are construed to be a threat against Suncoast and the Florida Bar when the Respondent argues that after having entered into a settlement agreement with Suncoast, she intentionally breached the agreement thereby leaving him with no alternative but to bring an action for

breach of contract or be placed in the unconscionable position of having bargained away significant legal rights in good faith (in the form of his client's claim for attorney's fees and costs), without a remedy to reinstate those rights. How this alternative style argument could be construed as a threat boggles the imagination. This finding is also deficient in two other areas.

It should be noted that this finding by the Referee was adopted by the Referee from the Bar's trial brief. Complainant's trial brief at 11. Contrary to those cases cited earlier, and numerous cases handed down by this Court, such a unilateral finding by the Referee without the benefit of any explanation or argument from the Respondent violates even the most basic precepts of procedural due process. See Barsky v. Board of Regents of University of New York, 347 U.S. 442 (1954).

This finding is also contrary to a whole body of case law holding that statements and allegations in pleadings are absolutely privileged. The Respondent has found no case on record in any state or federal court where an attorney has been disciplined for the inclusion of routine argument of this nature in his pleadings.

As to Count II of Referee's findings, the Respondent would pray this Court find that the requisite standard of clear and convincing evidence falls far short and would respectfully urge the Court to find for the Respondent and dismiss all allegations therein.

POINT III

WHAT IS THE STANDARD BY WHICH ATTORNEY CONDUCT SHOULD ME MEASURED AND DISCIPLINARY ACTION IMPOSED AS PROVIDED FOR IN RULE 11.02(3)(a), INTEGRATION RULE OF THE FLORIDA BAR.

ARGUMENT

The Bar attempts to use Rule 11.02(3)(a), Integration Rule of the Florida Bar, as a catch-all when the alleged wrongdoing will not fit elsewhere. For example, The Bar argues and the Referee finds that failing to appear at a deposition, communicating with a low-level corporate empolyee, attempting to resolve what had become a very expensive lawsuit by the inclusion of the withdrawal of a Bar complaint as part of a settlement, writing a settlement letter to opposing counsel and obtaining a rebate due him are somehow "contrary to honesty, justice or good morals."

In this regard, the Respondent would submit that, Rule 11.02 (3)(a) should not be used promiscuously as a convenient tool for lawyer discipline where the facts do not fit within the rubric of other specific ethical and disciplinary rules. Simply alleging bare facts is not enough. The facts must be proven as in any other legal proceeding. The quantum of proof necessary is more than the mere "preponderance of the evidence." It must be clear and convincing, The Florida Bar v. Quick, 279 So2d 4 (Fla. 1973), and free from doubt. Charlton v. F.T.C., 543 F.2d 903. Such is the touchstone of judicial decisions from across the nation. Id at 907. "Charges of unprofessional conduct are not intricate or difficult to fathom." The Florida Bar v. Murrell, 122 So2d 169 (Fla. 1960) Once a proceeding is instituted the lawyer's professional reputation is shadowed and is in danger of becoming permanently impaired. Therefore, if the charges are found to be without merit, the lawyer should be exonerated. Id. at 174.

The Bar offers several cases in its trial brief in support of its contention that the Respondent should be prosecuted for "conduct contrary to honesty, justice or good morals . . . whether or not the act is a felony or a misdemeanor. . . .", Integration Rule 11.02(3)(a).

Perhaps a beginning point in evaluating the standard by which attorney conduct should be measured is to review those cases submitted to the Referee by the The Bar from the plethora of cases which have been handed down from this Court. It may be presumed that since the Bar has a large staff of lawyers who specialize in the business of prosecuting other lawyers, the cases below represent the core of those which are most nearly on point in the present case. Taken in the same order as they are offered in the Bar's trial brief, we find:

> The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1973)
> The victim of his [Hefty's] evil desires was his step-daughter, member of his own household. In his orgy he was not satisfied just to violate her body but was at pains to have photographs taken of him and her in sexual embrace, normal and abnormal. . . .[H]e was still persuing his disgusting campaign with her when she reached the age of 17 years. . . .[S]he was first placed in a foster home and then in a home for unwed mothers, she having meanwhile become pregnant.

While the Respondent finds the action on the part of Hefty repugnant, as did the Court, the Respondent strongly resents the Bar's introduction of this case in support for its argument that the Respondent should be disciplined for conduct contrary to honesty, justice or good morals. Even in this case the Court appeared to moderate its position by stating that "This decision is not to be stretched so that any peccadillos of a member of the Bar may result in disciplining the member, but is reached because of the depravity of the man with whom we are dealing." Id. at 424.

The Bar offers next:

> The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973) [A] suit by four [co-investors] against the attorney for 'fraudulent misrepresentation and breach of fiduciary duties' resulted in May 1970 in a final judgment in the Dade County Circuit Court against the attorney for $71,333. . . (Emphasis added.)

The Referee found (and this Court agreed) that Bennett had failed to diligently and promptly discharge his fiduciary duties toward his principals and that he was guilty of misrepresentation to his principals. Id. at 483. While the facts in Bennett are in no way similar to the present case against Respondent, it should nevertheless be noted that the Court stated that the results of a civil action are not conclusive of disciplinary action; "there must be proof of a breach of the Code of Professional Responsibility for Attorneys before discipline will result." Id. at 482. (Emphasis added.)

The Bar then cites:

> The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984) The referee found that [Adams] engaged in unethical conduct by failing to notify a business partner of the sale of some property by respondent as trustee . . . and failing to make a timely accounting of funds received from the sale. Adams at 818. (Emphasis added.)

There is a complete absence of any factual relationship between Adams and the present case. The purpose of the Bar including this per curiam decision is unknown.

Finally, the Bar throws in:

The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986)

This is another per curiam decision involving an attorney who borrowed $30,000 from each set of in-laws. The relationship of Jennings

to this case is unclear since the majority opinion simply affirms the findings of the referee.

We now know that sexually abusing one's minor daughter may cause some difficulty with the Bar. Also, fradulent misrepresentaion and breach of fiduciary duty toward one's principal may offer a basis for disciplinary action. Even failing to properly account as a trustee or borrowing money from in-laws might cause problems. But as stated earlier, in all of the thousands of cases to choose from, the Bar has failed to offer even one remotely on point, i.e., where an attorney has been prosecuted for any of the acts alleged in this proceeding.

On another point, the Bar apparently sees nothing wrong with objecting strongly to replaying portions of the underlying circuit court case, (to the extent that one allegation was dismissed voluntarily from the Bar's complaint to support its objection), R-123, and then offering two drug conviction cases to support the propostion that the Referee **may** inquire into the facts and circumstances of the related circuit court case. See The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) and The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). Nor does the Bar find any problem with gratutiously introducing issues for the first time in its brief. Thus, sayeth, the Bar, "[T]here is absolutely no reason that a Referee should be precluded from addressing ethical issues which may have been collaterally addressed by a court." Complainant's Trial Brief at page 7 citing Florida Bar v Shimek, 284 So.2d 686 (Fla. 1973). Search as one may, yet, there is absolutely no reference anywhere in the related circuit court proceeding addressing directly or otherwise an ethical issue. Again, the Respondent is confused as to what possible relevance this case which speaks of a "scurrilous attack upon members of

the state judiciary" has to the matters before this Court.

The strict standard established by this Court of clear and convincing evidence free from doubt has just not been met in this proceeding against the Respondent. The Bar's argument to the Referee, based as it was upon unrelated cases and, as will be shown, the perjured testimony of Ms. Rodriguez, was improper and did a serious disservice to the Respondent. As stated in Murrell, unprofessional conduct is not intricate or difficult to fathom, and the quantum of proof in this proceeding has fallen far short of that required by this Court and the Respondent should be exonerated.

POINT IV

WHETHER THE RESPONDENT'S CONSTITUTIONAL DUE PROCESS RIGHTS WERE VIOLATED BY THE BAR IN THE PROSECUTION OF THIS CASE BY:
(1) THE BAR'S BREACH OF ITS OWN RULES OF PROCEDURE AND VIOLATIONS OF THE INTEGRATION RULE; AND
(2) THE BAR'S USE OF PERJURED TESTIMONY BEFORE THE GRIEVANCE COMMITTEE AND AT THE REFEREE HEARING; AND

ARGUMENT

Among those privileges long recognized at common law as essestial to the orderly pursuit of happiness is "the right to hold specific private employment and to follow a chosen profession," Greene v. McElroy, 360 U.S. 474; including, "the practice of law." Schware v. Board of Bar Examiners, 353 U.S. at 238. "The right to procedural due process . . . is conferred, not by legislative grace, but by constitutional guarantee. . . . As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms." Arnett v. Kennedy, 416 U.S. at 167.

This Court has consistently endorsed the same concepts of due process when it states that a license to practice law "should not be withdrawn by a governmental authority save by proper application of traditional concepts of due process." The Florida Bar v. William T. Fussell, 179 So.2d 852 (Fla. 1965).

As stated earlier in Rubin, the Bar demands attorneys turn "square corners" and an attorney has a right to expect no less of the Bar. The Florida Bar v. Rubin, 362 So.2nd 12 (Fla. 1978).

(1) THE BAR'S BREACH OF ITS OWN RULES OF PROCEDURE AND VIOLATIONS OF THE INTEGRATION RULE.

After the Bar received the second complaint from Ms. Rogriguez alleging essentially the same facts and circumstances as a previous complaint which had been closed by The Bar after a short investigation, the Respondent received a copy of the second complaint and was given fifteen days within which to reply. Prior to the expiration of the designated period, the complaint was forwarded to a grievance commmittee (the Bar's "grand jury") and referred to Ms. Carolyn Fields, a committee member, for investigation. Res Ex-1a & 1b. The matter was noticed for a hearing but in violation of Rule 11.03, Intergration Rule of the Florida Bar, the notice failed to list the grievance committee members. The matter was rescheduled several times by the Bar, R-284, 285, and the Respondent appeared for a scheduled hearing on May 28, 1985, which was cancelled by the Bar. R-305. The Respondent made a timely request to the committee investigator, Carolyn Fields, that the matter not be scheduled during the month of July during which time the Respondent would be unavailable. R-284.

The essence of due process is that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 313. It is not only necessary that notice reach the Respondent but that it convey the required information, Id. at 314. One must surely question what was so pressing about this matter that even though the Respondent had voluntarily adjusted his schedule on several occasions to accomodate the Bar, that he was nevertheless preempted from being heard even after noticing the Committee investigator and liaison that he would be unavailable?

(2) THE BAR'S USE OF PERJURED TESTIMONY BEFORE THE GRIEVANCE COMMITTEE AND AT THE REFEREE HEARING.

Why, one must ask, is there a need for a grievance committee? Might not the same result have been forthcoming in this case had Bar counsel interviewed Ms. Rodriguez and prepared the complaint therefrom. As evidenced by the Transcript of Proceedings, the Grievance Committee, elected to adopt every statement Ms. Rodriguez made, (including those which the Bar counsel knew or should have known were perjury) and incorporated them into its complaint.

When the "grand jury" meets in secret, one should have a reasonable expectation that the evidence which it considers will be supported by the truthful testimony of the witnesses and the exhibits introduced into evidence. However, it would seem that the grievance committtee, in at least this matter, either allowed itself to be misled or intentionally considered evidence which was false.

Question by Bar counsel:

> "At some time in April of 1984, you went before a judge in this matter who said that you and Mr. Hooper should settle this, and you offered him to settle for a certain amount of money. Is that correct?" Hearing of July 12, 1985 at page 23.

Ms. Rodriguez's lengthy response comes at no surprise. She not only confirms what Bar counsel has told her but goes on to state that "[the case] had been set up for trial many times and continued at Mr. Hooper's request." Id. A total fabrication as reflected by the court file. The obvious injustice which results from this casual quasi-judicial approach could easily be avoided and should not be tolerated by this Court.

> Whoever makes a false statment, which he does not believe to be true, under oath in an official proceeding in regard to any material matter shall be guilty of a felony of the third degree. . . . Chapter 837.02, Florida Statutes (1983).
>
> [A] lawyer shall not. . .Knowingly use perjured testimony or false evidence. DR 7-102(A)(4).
>
> A court has the inherent power to protect the integrity of its judicial processes against misrepresentations of fact and the "duty to protect the litigants before it from abuse harassment or exploitation." Diamond v. State, 270 So.2d 459 (4th DCA 1972), Green v. Wyrick, 462 F.Supp. 357.

Contrary to what she would have had the Committee and this Court believe, Ms. Rodriguez did not always "believe in doing things legally." Hearing of July 12, 1985 at page 12. The Bar was made aware of numerous violations of state statutes and local ordinances by Ms. Rogriguez in a hearing against Mr. Mirobole on April 5, 1985, wherein the Committee was furnished a copy of the same memorandum utilized by the Circuit Court in its granting of the Motion for Summary Judgment and attached hereto as Appendex 1. While numerous examples of known perjury could be offered here, it will suffice to list examples of those which the Bar knew or should have known were false statements by Ms.Rodriguez:

Example #1: "The money [paid into the Court Registry to have the lien removed] did not go into the escrow account until January." Hearing of July 12, 1985 at page 19. (The Bar should have been aware of this false statment from the Circuit Court file.)

Example #2: "I had a permit on this job." Id. at page 21. (The Bar was aware since the date of the Mirobole hearing that a building permit was not obtained until after the job was completed.) See Res Ex-5 and Ex-6.

Example #3: To the question, "Were you ever red tagged or noticed of a violation as a result of the installation of that air conditioner?, Ms. Rodriguez responds: "No. I had a final from the electrical bureau. I had a final from the mechanical bureau." Id. (The Bar had previously been furnished evidence of the electrical violation -- otherwise, how would Bar counsel have known to ask the question?]

Example #4: To the question, "And did you remedy those problems [with the installation], to which Ms. Rodriguez responded: "I sure did." Id. at 14. (The Bar had been previously informed of the undisputed fact that neither Ms. Rodriguez nor her qualifying agent had ever visited the job site.)

Example #5: At the Referee hearing, Ms. Rodriguez stated four times, with the concurrence of Bar counsel, that the installation was never "red tagged." R-149, R-151, R-155 & R-157. (As set out on page three herein, testimony by licensed electrician Dan Mast and city electrical inspector Percy Plyn was that an employee of Suncoast had modified the electrical installation improperly by the use of a "wild splice" thereby causing a potentially hazardous situation -- that which the Bar would call "technical wiring defects.")

It is wrong indeed to have lay witnesses to perjure themselves but far more serious, indeed, is to have those lawyers who are charged with prosecuting other lawyers to endorse such wrongful activity in violation of the Code of Professional Responsibility and the laws of Florida.

Additional misdeeds by Bar counsel are set out in some detail in A-5, Application for Extraordinary Writ, filed earlier with this Court but denied. At A-6, a copy of Respondent's Motion for Order to Show is also attached, although denied, as one final example of the intensity with which the Bar has prosecuted this matter in derogation of the Respondent's Constitutional equal protection and due process rights.

CONCLUSION

The Bar has failed far short of proving by "clear and convincing" evidence even one allegation against the Respondent. Why then, one must ask, given the circumstances under which these matters appeared before the Bar's "grand jury," was probable cause founded upon such weak evidence?

The committee didn't need to review the circuit court file during its "investigation" but had only to hear the evidence of wrongdoing from Ms. Rodriguez, whose testimony the Bar knew to be perjured and who had already been found to have violated numerous state statutes and local ordinances when she stated to the committee: "I believe in doing things legally." This was the same Ms. Rodriguez who had never inspected her own installation during all those months of litigation but told the committee all of the problems had been corrected. These undisputed facts mattered not to the committee.

The suggestion that the Respondent's actions in defending the circuit court action against a dishonest contractor adversely reflect upon his fitness to practice law exceeds any bounds of common sense. Given the circumstances of the circuit court case, which the Bar has consistently refused to review, such allegations border on the bazaar.

Since almost no investigation was done by the Bar prior to or subsequent to the grievance committee hearing, the perjured testimony of Ms. Rogriguez had to be accepted as the "gospel." The phrase "it is clear" and variations thereof are cast about in the Bar's brief as if the simple allegations were sufficient to convict. Yet, the allegations themselves bear no rational or reasonable relationship to a legitimate Bar interest; that of protecting the public from dishonest lawyers.

I HEREBY CERTIFY, that the original of the foregoing Respondent's Brief has been furnished together with seven copies to Sid J. White, Clerk, Supreme Court of Florida, with copies to Jan K. Wichrowski, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801, and to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, this 17th day of September, 1986.

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