IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BENNY A. SETIEN,

Respondent.
_____/

Supreme Court
Case No. 70,460

On Petition for Review of
the Referee's Report in a
Disciplinary Proceeding

ANSWER BRIEF OF COMPLAINANT

PATRICIA S. ETKIN
Bar Counsel
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

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

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

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "THE FLORIDA BAR", "THE BAR", or "COMPLAINANT"; Benny Setien will be referred to as the "Respondent" or "SETIEN". Other parties and/or witnesses will be referred to by their respective surnames for clarity.

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings

"FS" refers to the Factual Stipulation

"RR" refers to the Report of Referee

"EX" refers to Complainant's Exhibit introduced into evidence in the proceedings before the Referee

"RB" refers to Brief of Respondent

STATEMENT OF THE CASE

These disciplinary proceedings commenced on May 1, 1987 with the filing of a nine-count complaint by The Florida Bar against Respondent. On May 5, 1988, The Florida Bar filed with the Supreme Court a copy of the Request for Admissions which had been served on Respondent by mail at his official record Bar address and a second address, a private post office.

On May 5, 1987, the Supreme Court assigned a referee to hear this matter. A copy of the Complaint and Request for Admissions was forwarded to the Referee by the Supreme Court on May 6, 1988.

The Florida Bar did not receive Respondent's answer to the Complaint or the Request for Admissions. In addition, The Florida Bar did not receive the return receipt cards for the Complaint and Request for Admissions which had been sent to Respondent at his official record Bar address. However, the copy of the Complaint sent to Respondent at the second address was acknowledged as having been received; but the return receipt card for the Request for Admissions sent to Respondent at the second address was not returned to The Florida Bar. Accordingly, on June 29, 1987, The Florida Bar forwarded by certified mail, another copy of the Request for Admissions to Respondent at both addresses. By letter to the Referee dated

June 29, 1987, the Bar advised the Referee that should Respondent fail to respond to the Request for Admissions, the Bar would file a motion to deem the matters admitted.

Respondent's first appearance in these proceedings occurred July 17, 1987, with the filing by counsel of a Notice of Appearance, together with an Answer to both the Complaint and Request for Admissions.

The final hearing was held February 3, 1988. Prior to the commencement of the hearing, Respondent filed a Motion in Limine to exclude all evidence of misconduct not charged in the Bar's Complaint. Respondent's motion was denied by the referee (TR 10).

At the final hearing a factual stipulation was filed by the Bar and Respondent (TR 5-6). Based upon the factual stipulation, the referee found Respondent guilty of the disciplinary rule violations alleged in the Bar's Complaint (TR 30-31).

After having found Respondent guilty of misconduct, the Referee considered testimony and evidence relevant to discipline.

The Referee filed a Report of Referee dated February 12, 1988 recommending Respondent's disbarment.

The Report of Referee was considered and approved by the Board of Governors of The Florida Bar at its meeting held March 16 through 19, 1988.

Respondent seeks review of the Report of Referee recommending disbarment and contests the Referee's

recommendation of discipline.

The Florida Bar recommends approval of the Report of Referee pursuant to which The Florida Bar seeks entry of an order disbarring Respondent.

STATEMENT OF THE FACTS

The nine-count Complaint filed by The Florida Bar against Respondent alleges misconduct involving neglect of a legal matter (five counts), issuing a worthless check (three counts) and abandoning the practice of law.

A factual stipulation was tendered to the Referee at final hearing pursuant to which Respondent admitted both the facts alleged and the disciplinary rule violations set forth in Count I, as well as facts which support the remaining counts of the Complaint.

Counts I through V of the Bar's Complaint charge Respondent with neglect of a legal matter in violation of Disciplinary Rule 6-101(A)(3) of the Code of Professional Responsibility. As set forth in Counts I through IV, Respondent's actions which constitute neglect involve failure to pursue his clients' legal matters, failure to return his clients' telephone calls and failure to keep his clients advised as to the status of their legal matters. With respect to Count V, Respondent's neglect involves his failure to pursue his client's legal matter, failure to return telephone calls from or on behalf of his client, failure to keep his client or the client's family advised as to the status of the legal matter and failure to comply with the request to return the client's file.

Neither the Bar nor Respondent presented witnesses at final hearing to establish the factual basis for the Complaint. The

Florida Bar argued that the facts, as stipulated, support a finding of guilt as to the disciplinary rule violations charged in the Bar's complaint (TR 13, 21-22, 27, 29). After considering both the factual stipulation and the Bar's complaint, the referee found Respondent guilty on all counts. (TR 29-30).

Count I of the Complaint pertains to Respondent's representation of ANTELO in connection with a civil action brought against him by a hospital for ANTELO's failure to pay his wife's hospital bills. The Bar's Complaint alleges that after Respondent filed an Answer, Affirmative Defense and Third Party Complaint against ANTELO's insurance company, Respondent took little or no action to pursue his client's legal matters. Specifically, Respondent failed to respond to discovery requests and to appear at hearings in connection with motions to compel discovery filed by the opposing parties. As a result, the Third Party Defendant's Motion for Sanctions was granted which resulted in the dismissal of the Third Party Complaint. Thereafter, the Plaintiff's Motion for Default and Final Judgment was granted which resulted in the entry of a judgment against ANTELO in the amount of $36,986.68, plus costs. In addition to neglecting his client's legal matter, Respondent failed to both advise his client of the status of the case as well as to return numerous telephone calls from his client.

Count II of the Complaint pertains to Respondent's representation of CARRASCO in connection with a personal injury

and property damage claim. Pursuant to the factual stipulation, Respondent was retained in early 1985.

Although Respondent claims that in August or September 1985, he requested a copy of his client's medical evaluation from the treating physician, Respondent did not receive the medical report and failed to initiate further contact with the physician to ensure its receipt. On three occasions between early 1985 and 1986, CARRASCO contacted Respondent requesting information about the status of his case. Respondent always reassured CARRASCO that there was "plenty of time". Thereafter, on numerous occasions during 1986 CARRASCO attempted to contact Respondent concerning the status of his case, but Respondent failed to return CARRASCO's telephone calls. In June 1986 CARRASCO retained new counsel.

Count III of the Complaint involves Respondent's representation of GAROFOLO in a claim involving an assault. Pursuant to the factual stipulation, Respondent was retained in July 1984. Between July and November 1984 Respondent's office staff sent correspondence to various persons requesting medical reports and bills as well as advising parties of GAROFOLO's claim. Thereafter, between April and August 1985, Respondent's staff communicated with the insurance company and prepared a draft complaint to be filed on GAROFOLO's behalf. However, Respondent failed to file the complaint and, after August 1985, took no action to pursue GAROFOLO's legal matter.

In January 1985, GAROFOLO began to have difficulty obtaining information from Respondent concerning the status of

his claim. Although GAROFOLO telephoned Respondent on numerous occasions, Respondent failed to return GAROFOLO's telephone calls. In May 1986, GAROFOLO retained new counsel.

Count IV of the Complaint pertains to Respondent's representation of FIGAROLA in connection with the collection of payment on a note. Pursuant to the factual stipulation, FIGAROLA entrusted Respondent with the original promissory note. In June 1985, Respondent wrote a demand letter on FIGAROLA's behalf. In October 1985, Respondent advised FIGAROLA that he had written to the debtor and was waiting for a response. Respondent did not receive a response and took no further action on his client's behalf. FIGAROLA telephoned Respondent on numerous occasions after October 1985 to ascertain the status of the collection effort, but Respondent failed to return FIGAROLA's telephone calls.

In addition, FIGAROLA was unable to locate Respondent to recover the original promissory note. Respondent retained possession of the original promissory note from the Spring of 1985, when he was retained, until August 1987, when the note was returned to FIGAROLA by Respondent's counsel, subsequent to the filing of the Bar's Complaint.

Count V of the Bar's Complaint pertains to Respondent's representation of the minor son of MOREJON. Pursuant to the factual stipulation, Respondent was retained in August 1983. In November and December 1983, Respondent's staff corresponded with the insurance company concerning a claim for P.I.P benefits. In February 1984 Respondent was discharged and the file sent to the

client's new attorney, as requested by the MOREJONS. In March 1984, the MOREJONS discharged their new attorney and returned the case to Respondent for handling. In August 1984, Mr. MOREJON went to Respondent's office to discharge him for failing to return their telephone calls or to communicate with them concerning their son's case. Respondent reassured the MOREJONS that he would proceed with the representation and based upon his assurances, the MOREJONS permitted Respondent to continue as their son's attorney.

Between October and December 1984 Respondent or his staff sent correspondence to the health care providers and the insurance company relative to the MOREJON claim. In December 1984 Respondent received notice that the insurance company had gone into court-ordered liquidation. After receiving this notice Respondent took no further action to pursue his clients legal matter. He failed to advise the MOREJONS of the status of their son's case.

In January 1986, the MOREJONS discharged Respondent and retained new counsel. Respondent failed to respond to numerous written requests and telephone calls from the MOREJONS and/or their counsel for information concerning both the status of the case and the return of the client's file.

Counts VI, VII and VIII of the Complaint charge Respondent with issuing worthless checks which constitutes a violation of Disciplinary Rules 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 1-102(A)(6) (conduct

that adversely reflects on fitness to practice law) of the Code of Professional Responsibility and Integration Rule 11.02(3)(a).

Count VI of the Complaint involves Respondent's actions of issuing a check in August 1985, made payable to the Clerk of the Circuit Court, which was dishonored by the bank due to insufficient funds. The dishonored check was redeemed by Respondent in November 1985.

Count VII of the Complaint involves Respondent's actions of issuing a check in September 1986, made payable to an auto shop for repair of his car, which was dishonored by his bank due to insufficient funds. As of January 27, 1987, the date of the grievance committee hearing, Respondent had not redeemed the check and did not do so until December 1987, seven months after the instant Complaint was filed.

Count VIII of the Complaint involves Respondent's actions of issuing two checks in February 1986, made payable to his landlord for rent of his law office, which were dishonored by the bank as having been written on a closed account. Respondent has not redeemed the checks and maintains that because he had paid first and last month's rent, he owes no obligation to the payee/landlord for the worthless checks.

Count IX of the Bar's Complaint alleges abandonment of the practice of law in violation of Disciplinary Rule 2-110(A)(2) (withdrawal from employment) and 1-102(A)(6) (conduct that adversely reflects on fitness to practice law) of the Code of Professional Responsibility. Pursuant to the factual stipulation, on March 10, 1986, Respondent's landlord changed

the locks on Respondent's law office because of the worthless check he had tendered for rent. Thereafter, Respondent sent a person to his law office to recover personal effects and client files. The files were brought to Respondent's home. Respondent failed to advise at least those clients referenced in the Bar's complaints of an address where he could be located or their files obtained.

Respondent failed to advise his clients that he would not continue to represent them and failed to return to his clients their files or documents which might have been of assistance in pursuing their legal matters. As alleged in the Complaint, Respondent's actions constitute withdrawal from employment without taking reasonable action to avoid foreseeable prejudice to his clients' rights and the abandonment of the practice of law.

After the referee entered a finding of guilt, he considered testimony and evidence relevant to discipline. Respondent's position before the referee was that Respondent's substance abuse problem (cocaine) should mitigate discipline (TR 245). In support of this position, Respondent testified concerning his involvement with cocaine (TR 41-43, 72, 73, 75-76), and presented the testimony of witnesses involved in substance abuse rehabilitation programs, KILBY (TR 141-147), HAGAN (TR 153-162) and Respondent's A.A. sponsor, RICE (TR 135-141).

The Bar maintained that Respondent's drug abuse should not be considered a mitigating factor in this case because of a lack of causation. In rebutting Respondent's mitigation argument,

The Florida Bar asserted that Respondent abandoned his law practice and "disappeared" because of his involvement in illegal activities and/or in an attempt to avoid creditors. In support of its position, the Bar presented the testimony of SITHER, a Bar Staff Investigator, (TR 169-183) who established the extensive efforts made by the Bar between October 1985 and November 1986 to locate Respondent. In addition, TRUESDALE, a former drug dealer and automobile broker, testified concerning Respondent's involvement in negotiations for the sale of arms to Nicaragua (TR 191-201), Respondent's actions of smuggling cocaine to his client in jail (TR 202-203), Respondent's failure to pay TRUESDALE for the purchase of a Mercedes (TR 202-212), Respondent's debts to others (TR 209), and Respondent's acknowledgment to TRUESDALE that he had been hiding out (TR 211).

After considering both the testimony and argument presented by Respondent in support of mitigation, and the rebuttal testimony and argument presented by Complainant, the referee recommended disbarment.

SUMMARY OF THE ARGUMENT

After neglecting clients' cases and following a mysterious and sudden disappearance, Respondent resurfaced and sought to explain his misconduct as the result of drug abuse. Respondent did not seek to rectify his misconduct even after he ceased using drugs. Further, Respondent's disappearance may be the result of factors other than drug use; to wit, involvement in dangerous, illegal activities or an attempt to avoid creditors. Evidence of such activities is clearly relevant to Respondent's character and rebuts Respondent's argument of mitigation.

Although The Florida Bar does not accept Respondent's argument that his drug addiction caused the misconduct, even if causation is found, the referee has the discretion to recommend disbarment based upon the seriousness of the misconduct or the evidence presented to him which adversely reflects on the respondent's character and fitness as an attorney. A respondent's disagreement with the Referee's findings or recommendations as to discipline is an insufficient basis to allege that the referee's conclusions are clearly erroneous or without evidentiary support.

As in this case, where an attorney is found guilty of five counts of neglect, three counts of issuing a worthless check and the abandonment of the practice of law, disbarment is fully warranted.

ARGUMENT

I. THE FACTUAL STIPULATION IS SUFFICIENT TO SUPPORT THE REFEREE'S FINDING OF GUILT OF THE MISCONDUCT CHARGED IN THE BAR'S COMPLAINT.

In his brief Respondent argues that the Bar's reliance on the factual stipulation at final hearing is insufficient evidence to support the referee's findings. Respondent's counsel, however, conceded at the final hearing that the factual stipulation was "like a set of undisputed facts" (TR 26) and that by stipulating "what we have done is eliminated the need of any outside witnesses" (TR 22).

Although at final hearing Respondent's counsel initially attempted to go behind the stipulation to present testimony as it related to factual findings (TR 26-28), after argument was presented to the referee, Respondent's counsel finally agreed to the stipulation which was accepted by the referee in lieu of live testimony (TR 29-30).

A referee's findings in disciplinary proceedings will be upheld unless clearly erroneous or without evidentiary support. The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987). In the instant case, the facts are undisputed and set forth in a factual stipulation. There is no more clear and convincing evidence than the presentation of undisputed facts. The referee considered the factual stipulation in conjunction with the Complaint and entered a finding of guilt as to each of the nine Counts of the Complaint (TR 29-30).

Respondent asserts that the Referee erred in finding Respondent guilty of abandoning the practice of law (Count IX), issuing worthless checks (Counts VI, VII, and VIII), and neglect (Counts II through V). Respondent, however, has failed to demonstrate that the Referee's findings which are based upon the factual stipulation, are clearly erroneous or lacking in evidentiary support.

With respect to the allegation of abandonment, the Referee considered the factual stipulation and in finding that Respondent's actions constituted abandonment, the referee commented, "What else could it be?" (TR 20). Further, in his brief, Respondent admits that the clients referred to in Counts I through V were active clients who were not advised of Respondent's "move" (RB 6). Moreover, Respondent testified that as of March 1986, he had no office and clients could not reach him (TR 85) and that he did not advise his clients where he could be reached (TR 85). Respondent further testified that although his office was locked, his friend had no difficulty in obtaining his client files from his landlord and that he could have done so himself (TR 87).

Further, SITHER, Bar Staff Investigator and former special agent for the FBI (TR 169), testified that he was unable to locate Respondent, notwithstanding the expenditure of at least 100 investigative hours between October 1985 through December 1986. (TR 170-171, 183).

In his brief, Respondent alleges that it was not shown that Respondent had no other clients than those referred to in the

factual stipulation (RB 6-7). This statement is clearly inaccurate; at the final hearing Respondent testified that at the time his client files were "picked up" "the only ones that remained open were the four or five -- the basis of the complaint" (TR 50).

Moreover, Respondent's argument is irrelevant in that the number of abandoned clients is not a factor in determining whether an attorney's actions constitute abandonment. There is no case law that establishes a numerical criteria for determining abandonment, (i.e., fewer than five abandoned cases constitutes neglect or greater than 10 constitutes abandonment). It is the nature of the actions of an attorney which establishes the abandonment, such as a locked office, unattended files and the absence of a working telephone and address where an attorney may be reached.

What makes this case even more egregious is that when Respondent recovered his client files, he had the ability to initiate action to protect his clients' interests. Yet he continued his pattern of neglect by failing to notify his clients that he would not continue with their representation and failing to return to them their files or documents necessary to pursue their legal matters. Why? According to Respondent, when he recovered his files,

> Being out of money I figured that I would work on those four or five and get some money out of them
>
> * * * *
>
> Before I got around to calling is when I started getting all the Bar letters. So at that point, I kept away from those clients [SIC]. I felt that was the appropriate thing to do.

They had been to the Bar and they had other attorneys. (TR 50)

With respect to the allegations involving Respondent's issuance of worthless checks (Counts VI, VII and VIII), Respondent argues that the factual stipulation and testimony reveal that he did not intend to issue worthless checks. The factual stipulation, however, sets forth two instances (Counts VI and VII), in which Respondent's bank records, including bank statements and checkbook stubs, reflect that at the time he issued the checks he did not have sufficient funds in his account to cover the obligations (FS at 8). Further, in another instance (Count VIII), Respondent's bank records reflect not only insufficient funds but that the account had actually been closed (FS at 9).

To rebut any suggestion that Respondent's actions were either an isolated instance or unintentional, The Florida Bar introduced evidence which establishes a pattern involving mishandling of his bank account. Between August 1984 and February 1986 Respondent's account at the Bank of Miami was overdrawn 53 times and 32 checks were returned for insufficient funds (TR 125-126; EX 2).

Between August 1985 and January 1986 Respondent's account at Ocean Bank was overdrawn 18 times and 7 checks were returned for insufficient funds (TR 126, EX 2). As of January 31, 1986, Respondent's account at Ocean Bank had a negative balance of $173.00. Further, Respondent admitted that he did not make any deposits into his account at Ocean Bank after January 1986 to

fund the worthless check he issued to his landlord (TR 127).

Between December 1984 and October 1984 Respondent had 6 checks returned for insufficient funds from Southeast Bank (TR 128, EX 2).

In addition, 15 checks from Respondent's bank account at Republic National Bank were returned for insufficient funds (TR 128, EX 2). This was the account from which Respondent issued his worthless check for auto repair (Count VII). Respondent admitted at the final hearing that he knew he did not have funds in the account to cover the check issued for the repair (TR 129, 131) and that he did not make any subsequent deposits into the account to fund the check (TR 131). Notwithstanding the status of his account, Respondent continued to issue checks from his account (TR 131-132).

The evidence fully supports the Referee's finding that Respondent issued worthless checks as alleged in Counts VI, VII and VIII of the Bar's Complaint. Respondent has failed to demonstrate any error with respect to this finding.

Concerning the Bar's allegation of neglect, the factual stipulation clearly supports the referee's finding that with respect to each client, Respondent neglected the client's legal matters, failed to return telephone calls and failed to keep the client advised as to the status of the case.

Even in his brief, Respondent admits to delay and a pattern of failing to communicate with his clients (RB 8,9). Respondent points out that the statute of limitations did not expire on his clients' cases and that Respondent never sought

fees. (Respondent overlooks the fact that the representations were undertaken on a contingency fee basis.) Such statements, however, do not exonerate Respondent for his misconduct or is a sufficient basis to argue that the Referee erred in finding that Respondent's actions constitute neglect in violation of the Code of Professional Responsibility.

II. THE REFEREE PROPERLY CONSIDERED EVIDENCE PRESENTED BY THE BAR RELATING TO RESPONDENT'S FITNESS TO PRACTICE LAW AND TO REBUT RESPONDENT'S ARGUMENT CONCERNING MITIGATION.

In The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981), the Supreme Court approved a referee's consideration of information not charged in the Bar's complaint as being relevant to discipline. The disciplinary proceedings in Stillman were based upon a respondent's conviction for grand larceny for appropriating client's money to his own use as well as the facts underlying the conviction to which the respondent had pled nolo contendere. The referee, however, considered other matters reflecting upon the respondent's integrity. Specifically, the referee considered respondent's earlier plea of nolo contendere to charges of forgery and grand larceny in an unrelated matter as well as respondent's testimony before the referee affirming his client's signature on a receipt for funds. In Stillman, the respondent's testimony before the referee appeared to be false in view of the results of a handwriting examination which the referee had ordered.

In reviewing Stillman, the Supreme Court approved the referee's consideration of these other matters and held

> Evidence of unethical conduct, not squarely within the scope of the Bar's accusations, is admissible, and such unethical conduct, if established by clear and convincing evidence, should be reported because it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed.

Stillman, at 1307. See also the more recent cases which cite Stillman, The Florida Bar v. Kent 484 So.2d 1230, 1231 (Fla.1986); The Florida Bar v. Lipman 497 So.2d 1165, 1167 (Fla. 1986).

Respondent suggests that the Court's decision in The Florida Bar v. Hosner, 513 So.2d 1057 (Fla. 1987), the Supreme Court has the effect of overruling Stillman. However, Hosner can be distinguished from Stillman in that in Hosner the Court disapproved the Bar's argument on appeal that the respondent may have been guilty of other misconduct which had not been charged in the Bar's Complaint or included in the referee's report. Presumably the Bar raised these other matters for the first time in the review proceedings before the Supreme Court. Hosner therefore, does not apply to the instant case. The referee considered both Hosner and Stillman and in denying Respondent's Motion in Lemine ruled that Stillman was controlling (TR 10).

According to Respondent, the actions which led to the instant disciplinary proceeding were the "results of involuntary and nonmalicious results of distorted thinking caused by his disease, drug addiction" (RB at 13).

The Florida Bar does not dispute that substance abuse may be taken into consideration in determining discipline where it is the underlying cause of the misconduct. The Florida Bar v. Larkin 420 So.2d 1080, 1081 (Fla. 1982). This does not mean, however, that in all cases a referee must accept a respondent's

assertion of substance abuse as a basis for mitigation. Moreover, even where substance abuse has been accepted as the underlying cause of misconduct, the Supreme Court has refused to reverse a referee's recommendation to disbar where the offense is serious. The Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986).

In the case sub judice, the Bar maintains that Respondent's substance abuse should not be accepted as the underlying cause of the misconduct based upon a lack of evidence establishing causation. Further, even if substance abuse is recognized as the cause, the offenses are so serious that the substance abuse should be rejected as being insufficient to reverse the referee's recommendation of disbarment. See The Florida Bar v. Johnson, ---So.2d--- 13 F.L.W. 367 (June 10, 1988) where the Supreme Court stated that in questions involving the degree of seriousness of the misconduct, the Supreme Court will defer to the conclusions of the referee which will be upheld unless clearly erroneous or without evidentiary support.

With respect to causation, the record of these proceedings reflects substantial evidence to rebut Respondent's defense of substance abuse as the cause of the misconduct. HAGAN, Respondent's witness and an expert in substance abuse, confirmed that other factors unrelated to Respondent's addiction could cause an attorney to manifest the kind of conduct involved in the instant proceeding (TR 165-166). The Bar sought to establish these other factors in an effort to explain Respondent's misconduct, particularly his actions involving the

abandonment of his law practice. The Bar's theory is that Respondent "disappeared" because of his involvement in illegal transactions involving the sale of arms to Nicaragua. According to TRUESDALE, a former drug trafficker, in October 1985, Respondent was representing NAVARRO on drug charges (TR 190). NAVARRO is the grandson of the Vice-President of Nicaragua and went to school with Daniel Ortega (TR 197). In 1985 TRUESDALE was present at a meeting between NAVARRO and Respondent at the Sheraton Hotel in Hialeah (TR 191-192). The purpose of this meeting was to discuss a buyer for a shipment of arms (TR 191) which Respondent had intercepted and which were being stored in the Bahamas (TR 192-193).

A subsequent meeting occurred in December 1985 between TRUESDALE, NAVARRO, a Salvadoran named GATTO, Respondent and an unknown person (TR 197). GATTO was to find a purchaser for the weapons (TR 197). Respondent was to receive 6.5 million dollars and in return he would pay 1.5 million to NAVARRO as a commission for finding the buyer (TR 199). GATTO, however, had played both sides against the "middle" and shortly thereafter was killed (TR 200-201). This occurred during or about 1986 (TR 201), at about the time of Respondent's sudden disappearance.

In addition, in the course of his business involving the sale of automobiles, TRUESDALE came into possession of a 1985 190E Mercedes imported from Guatemala (TR 207, 208). TRUESDALE agreed to sell the car to Respondent for $13,000, payable in three installments (TR 207). Respondent advised TRUESDALE that he had connections in Miami to have the DOT and EPA work done,

after which he would have the title transferred if the title was clear (TR 208-209). TRUESDALE gave Respondent the open title (TR 208). Respondent did not pay TRUESDALE for the car (TR 212). TRUESDALE tried to locate Respondent at his office address and was told by the secretary that Respondent owed everybody money, including her and that he could not be found (TR 209).

TRUESDALE left messages for Respondent at various locations and eventually met with Respondent on one occasion at a prearranged meeting place (TR 209-210). Respondent told TRUESDALE that he had been "hiding out" (TR 211) and that he did not "intend to steal" the car (TR 211).

According to TRUESDALE, Respondent pointed his finger at him and stated:

> I am going to do the best I can, but don't fuck with me about this car (TR 211).

TRUESDALE never heard from Respondent after that date (TR 212).

At the final hearing Respondent claimed that he was given the Mercedes as a legal fee for representing NAVARRO (TR 108). However, Respondent acknowledged that during his deposition he stated that he had told TRUESDALE that he would pay him for the car (TR 109). According to Respondent he sold TRUESDALE's car to a friend and client for $15,000 but did not furnish TRUESDALE with any proceeds of the sale (TR 109-110).

Moreover, Respondent identified a letter he sent to The Florida Bar in January 1987, which was put in an air mail envelope and then in another envelope (EX 1). This letter

includes a cryptic reference to "present and past commitments out of the State of Florida" which have "impeded communication" (TR 118; EX 1). Although at final hearing Respondent disavowed the representations in his letter concerning commitments out of the State of Florida, he later acknowledged that during his deposition he stated he may have been in New York (TR 119-121). The contents of the letter, the lack of any return address and the form in which it was delivered to The Florida Bar clearly reflect that Respondent wanted to keep his whereabouts unknown. Respondent's actions are consistent with the actions of a person in "hiding".

The circumstances surrounding Respondent's disappearance suggest an element of willfulness in Respondent's abandonment of his law practice. It occurred during a time in which Respondent had been involved in dangerous dealings involving arms shipments and had outstanding financial liabilities for cars and for the worthless checks he had written. Thus while Respondent may have been a drug abuser, the abandonment of Respondent's law practice and his disappearance may more easily be attributed to factors other than drug abuse.

In this regard it is significant to consider Respondent's admission that his income did not significantly diminish as a result of his cocaine addiction (TR 88) and, according to Respondent did not diminish until 1987, when he was suspended from the practice of law (TR 88-89). In addition, by the time Respondent had a craving for cocaine, he was not financially able to purchase it in any quantity (TR 122-123) and presumably didn't.

The evidence reflects that curiously, regardless of his financial position, Respondent craves cars, and not drugs. In 1984 Respondent owned a Toyota and a Volvo and leased a 1984 Corvette (TR 106) which he retained until 1986 or 1987 when it was repossessed (TR 107). During this period of time, Respondent purchased a Mercedes (February 1985) (TR 107). In early 1986, Respondent obtained a Mercedes from TRUESDALE (TR 108). Then in July or August 1986, Respondent purchased a Porsche for $25,000 (TR 98-98).

> [Bar Counsel]: Subsequent to March of 1986, you were in a difficult financial condition, is that correct?
>
> [Respondent]: Yes.
>
> [Bar Counsel]: Did you use the money to buy cocaine?
>
> [Respondent]: No. I purchased a car.
>
> [Bar Counsel]: As soon as you got some money in July of 1986, you used it to purchase a Porsche?
>
> [Respondent]: Yes.

(TR 93-93)

At final hearing, Respondent was unable to credibly account for the source of the $25,000 he used to pay for the Porsche. During his interview with HAGAN in October 1987, Respondent admitted that he had not practiced law since March 1986 (TR 162-163). However, Respondent testified at final hearing that he had represented a client named YANAD RODRIGUEZ in July 1986 in connection with a vessel seizure and had received a $22,000 - $23,000 fee in cash which he used to purchase the Porsche (TR 89, 91-92). [See also the factual stipulation wherein Respondent identifies the client that he represented in the

vessel forfeiture as ROLANDO MARTINEZ (FS 9)]. Even assuming this is true, Respondent was unable to account for source of funds for the balance of the purchase price since he admitted before the Referee that at the time of the purchase he had no funds available in any of his bank accounts (TR 102-103).

Respondent raised the issue of cocaine abuse as a mitigating factor. The Florida Bar disputed Respondent's claim of cocaine abuse as the underlying cause of misconduct and presented evidence in support of its position. Moreover, the evidence presented by The Florida Bar in rebuttal relates to Respondent's character and fitness and is relevant to the discipline to be imposed.

III. A REFEREE HAS THE DISCRETION TO REJECT EVIDENCE PRESENTED BY A RESPONDENT IN MITIGATION.

Respondent's argument that the Referee erred in not finding mitigation is without merit. The contents of a referee's report are set forth in Rule 3-7.5(k)(l), Rules of Discipline. There is no requirement that in recommending discipline a referee must accept the arguments in mitigation offered by a respondent. Accordingly, it is not error for the referee to omit mitigating factors offered by the respondent from his report.

IV. THE REFEREE'S RECOMMENDATION OF DISBARMENT IS FULLY WARRANTED.

Respondent began neglecting his clients' cases in 1983 where in representing ANTELO, he took no action other than the filing of one pleading (Answer, Affirmative Defense and Third Party Complaint) (Count I; RR 2). In January 1985, a default in

the amount of $36,986.68 was entered against ANTELO as a result of Respondent's neglect.

This pattern of neglect continued in 1984 where in representing his client MOREJON, Respondent took no further action to pursue his client's legal matter (FS at 8, 9).

In early 1985, Respondent was retained by CARRASCO. Other than verbally requesting a medical report from a physician which was never received, Respondent took no action to pursue the claim (Count II).

In the Spring of 1985, Respondent was given a promissory note by FIGAROLA to collect. Other than sending one demand letter in June 1985, Respondent took no action to pursue his client's legal matters (Count IV).

Again in August 1985, Respondent failed to file a complaint on behalf of GARAFOLO and took no action to pursue GARAFOLO's legal matters (Count III).

In not one instance did Respondent contact his client to advise that he was withdrawing from the representation; in not one instance did Respondent keep his client advised of the status of the case; in not one instance did Respondent return his client's telephone calls.

Beginning in October 1985 and continuing through November 1986, The Florida Bar conducted an extensive investigation in an attempt to locate Respondent (SITHER, TR 171).

Respondent's last known Bar address was the Ocean Bank Building located at 780 NW LeJeune Road, Miami (TR 36, 80). Respondent later moved his office to 815 NW 57th Avenue, Miami

(TR 42). Respondent did not advise his clients of his move (TR 44-45) or The Florida Bar (TR 77) and his phones were disconnected for lack of payment (TR 45).

The Florida Bar Staff Investigator eventually discovered Respondent's new office address (TR 172), but Respondent was simply nowhere to be found.

As of March 1986, Respondent's office was closed and locked as a result of his actions of issuing checks to his landlord on a closed account (FS 9). Letters sent by The Florida Bar to Respondent at his official record and the second office address were returned to The Florida Bar, marked "moved. Left no address" (TR 81). Toward the end of 1986, Respondent arranged to have his mail forwarded to Total Trust Mail Center (TR 82-83), a private mail facility.

By order dated January 16, 1987, the Court suspended Respondent from the practice of law.[1]

The only contact Respondent had with the Bar since it initiated its investigation occurred in January 1987. This contact involved one telephone call from Respondent expressing an interest in submitting a consent judgment (TR 74-75) and one letter enclosed in an air mail envelope without any return address which was enclosed in another envelope. In this letter Respondent advised The Florida Bar that he would not attend the grievance committee hearing, and referred to mysterious

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[1]The temporary suspension proceedings have been assigned Supreme Court Case No. 69,868.

"commitments out of the State of Florida" (EX 1; TR 116, 121). Thereafter, The Florida Bar heard nothing further from Respondent until July 1987 when Respondent's counsel filed a Notice of Appearance and a response to the Complaint and Request for Admissions.

Respondent was, therefore, unreachable to his clients and The Florida Bar from 1985 through July 1987. During this time, Respondent did not return client files and, in fact, in one instance retained possession of his client's original promissory note which was not returned to the client until August 1987, subsequent to the filing of this Complaint (FS 6).

> [Bar Counsel]: The Supreme Court suspended you, is that correct?
>
> [Respondent]: Yes, ma'am.
>
> [Bar Counsel]: At that point in time, you still did not take any further action to close your practice, is that correct?
>
> [Respondent]: I had no practice when I got suspended.
>
> [Bar Counsel]: Let's take an example. You did have Mr. Figarola's original promissory note at that time, didn't you?
>
> [Respondent]: At the time of the suspension, yes, ma'am.
>
> [Bar Counsel]: Did you have the note back in 1985?
>
> [Respondent]: I got it when I initially spoke to Mr. Figarola. I told him that I would do him a favor -- that was in 1985.
>
> [Bar Counsel]: You had possession of the note at that point, is that correct?
>
> [Respondent]: That's correct.
>
> [Bar Counsel]: And you retained possession of that note through and after the period of time when you were suspended, is that correct?

[Respondent]: Yes, ma'am, until such time as counsel returned it to Mr. Figerola.

[Bar Counsel]: When was that?

[Respondent]: Sometime the beginning of 1987. I don't know the exact date. I wasn't a party to it.

[Bar Counsel]: When did you retain counsel?

[Respondent]: I believe it was July.

[Bar Counsel]: Between the period of 1985 until sometime after July of 1987, you had an original promissory note of Mr. Figarola, is that correct?

[Respondent]: Yes, ma'am.

[Bar Counsel]: You knew that he needed the original promissory note to pursue further action, is that correct?

* * * *

[Respondent]: Yes, he did need it.

(TR 78-79)

Is the period of time in which Respondent abandoned his clients and neglected their cases significant? The Florida Bar believes it is. It manifests an attitude of complete disregard for professional obligations to clients and The Florida Bar. Even assuming, arguendo, that Respondent's neglect and indifference prior to 1987 was caused by Respondent's drug abuse, there is simply no explanation for the continuation of the pattern after January 1987, when Respondent, by his own admission, ceased using drugs (Respondent, TR 75; RB 2; HAGAN, TR 155).

It is The Florida Bar's position that Respondent's disbarment is fully warranted based solely upon his abandonment of his law practice without giving notice to clients. The Florida Bar v. Montgomery, 412 So.2d 346 (Fla. 1982). The

Florida Bar v. Mackenzie, 485, So.2d 424 (Fla. 1986). See also The Florida Bar v. Tato, 435 So.2d 807 (Fla. 1983) which involves neglect.

The instant case involves five instances of neglect, one of which resulted in the entry of a default judgment against the client (Count I), three instances of issuing worthless checks, and abandonment of the practice of law without notice to clients.

Pursuant to Standard 4.41, Florida's Standard for Imposing Lawyer Sanctions, disbarment is appropriate when:

a. a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

b. a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

c. a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Where the "composite conduct" of a respondent is "gross", this Court has not hesitated to order disbarment. The Florida Bar v. Penrose, 413 So.2d 15 (Fla. 1982). The evidence presented to the referee demonstrates that this is such a case. Respondent is clearly unfit to practice law and in accordance with the Standards for Imposing Lawyer Santions should be disbarred.

CONCLUSION

The factual stipulation fully supports the finding of the referee as to Respondent's guilt of the violations alleged in each of the nine counts of the Bar's Complaint.

Based upon the seriousness of the misconduct, disbarment is fully warranted. The Florida Bar urges the Supreme Court to approve the Report of Referee and enter an order of disbarment.

Respectfully submitted,

Patricia S. Etkin

PATRICIA S. ETKIN
Bar Counsel
The Florida Bar
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, FL 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Complainant was mailed to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahasee, Florida, 32301, and that a true and correct copy was mailed to Henry Hunnefeld, Attorney for Respondent, 1650 So. Bayshore Drive, Coconut Grove, Florida 33133 this 17th day of June, 1988.

Patricia S. Etkin

PATRICIA S. ETKIN
Bar Counsel