IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

MILTON E. GRUSMARK,

Respondent.
_____/

Supreme Court Case No. 72,506

The Florida Bar Case No. 87-25,230(11K)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5 of the Rules Regulating The Florida Bar (article XI, Rule 11.06 of the Integration Rule of The Florida Bar), a Final Hearing was held in the offices of The Florida Bar, on August 19, 1988. All of the pleadings, transcripts, notices, motions, orders and exhibits are forwarded with this report and the foregoing constitutes the record of the case.

The following attorneys acted as counsel for the parties:

For The Florida Bar: Randi Klayman Lazarus
Suite 211, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131

For the Respondent: Milton E. Grusmark, pro se
The Senator Building
13899 Biscayne Boulevard
Suite 147
Miami, Florida 33181

II. FINDINGS OF FACT: I find Respondent guilty of all allegations contained in the Bar's complaint which I hereby accept and adopt as the findings in the cause, to wit:

> 1. In or about February 1986 the Respondent was retained by Don Silverstein (hereinafter referred to as "Silverstein")
> 2. Silverstein paid Respondent five thousand dollars ($5,000.00) to handle Silverstein's case and Silverstein paid an additional five thousand dollars on O'Connor's case as O'Connor could not afford legal counsel.
> 3. The Respondent only worked four or five hours on behalf of Silverstein and O'Connor and in fact the Respondent's only work on Silverstein's and O'Connor's behalf involved

a bond hearing to get Silverstein and O'Connor out of jail.

4. The Respondent did nothing else on Silverstein's behalf, as Silverstein was unhappy with the Respondent's work and Silverstein, therefore, retained new counsel after the bond hearing.

5. As a direct result of the Respondent's failure to perform any tasks other than the bond hearing, Silverstein felt that he was entitled to a refund of the fee that Silverstein paid to the Respondent.

6. The Respondent and Silverstein agreed to binding arbitration of this fee dispute before a sub-committee of the Dade County Bar Association Fee Arbitration Committee (hereinafter "Arbitration Committee").

7. Said arbitration only involved the five thousand dollar ($5,000.00) payment that Silverstein made on his own behalf as the Respondent refused to arbitrate O'Connor's fee with Silverstein even though Respondent was aware that Silverstein's funds were used on O'Connor's behalf.

8. The Arbitration Committee after hearing the evidence presented to it on this matter found that Respondent had charged an excessive fee for the work that he had performed on behalf of Silverstein. A copy of the Arbitration Committee's award is attached hereto as Exhibit "A".

9. The Respondent charged a clearly excessive fee for the amount of legal work that he performed for Silverstein and O'Connor, as ten thousand dollars ($10,000.00) is a clearly excessive fee for four (4) or five (5) hours of legal work.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE IMPOSED:

I recommend that Respondent receive a ten day suspension and be permitted readmission only upon proof of payment of $3,000.00 to Donald Silverstein for having collected an excessive fee. I base my conclusion on the following reasons.

The Florida Bar's charge that Respondent "collected" an excessive fee, as opposed to having "charged" an excessive fee is amply supported by the testimony. Mr. Grusmark spent a limited amount of time conferring with Mr. Silverstein, and attended a simple bond hearing without the attendance of any witnesses.

Subsequently, Respondent agreed to submit this matter to binding arbitration before the Dade County Bar Association. The

Arbitration Committee found that the sum of $3,000.00 should be returned to Mr. Silverstein, therefore ruling that the collected fee was excessive. The Committee did not rule on the $5,000.00 paid to Respondent regarding his representation of Jack O'Connor. That is a matter for another day. The Committee issued its finding on July 7, 1987. Payment should have been made long ago. Further, John Hickey, Chairman of the Arbitration Committee testified that Respondent had stated at the Arbitration hearing that Mr. Silverstein was owed monies and it was just a matter of how much.

In The Florida Bar v. Hipsh, 441 So.2d 617 (Fla. 1983) the Court issued a public reprimand and ordered restitution where the attorney refused to refund unearned fees. Public reprimands were also issued for similar conduct in The Florida Bar v. Mirabole, 498 So.2d 428 (Fla. 1986) and The Florida Bar v. Fussell, 390 So.2d 68 (Fla. 1980).

Moreover, Respondent's failure to honor his obligation to repay these monies after agreeing to be bound by fee arbitration constitutes an aggravating factor. Had Respondent been sincere in his intentions to return monies he would have returned some small amount despite his cry of financial difficulty. Therefore, Mr. Silverstein's testimony that Respondent had laughed and stated, "You're not going to get a dime back. Try and get it." is quite believable. (Tr. 25)

Last, I have considered the fact that Mr. Grusmark received two private reprimands in 1975 and a public reprimand in 1978. Both private reprimands involved failure to return funds. The Florida Supreme Court has consistently held that it deals more severely with cumulative misconduct than with isolated misconduct. The Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987). The Florida Bar v. Vernell, 374/473 (Fla. 1979). It is therefore proper for me to consider these matters when determining what discipline is appropriate. The Florida Bar v. Greene, 515 So.2d 1280 (Fla. 1987).

I recognize that a case involving an excessive fee would ordinarily require a public reprimand and payment of restitution. In light, however, of the foregoing aggravating factors, a short term suspension is appropriate.

IV. RECOMMENDATION AS TO GUILT: I recommend that the Respondent be found guilty and specifically that he be found guilty of violating Disciplinary Rule 2-106 [a lawyer shall not charge or collect an illegal or clearly excessive fee] of the Code of Professional Responsibility.

V. RECOMMENDATION AS TO COSTS: I find the following costs to have been reasonably incurred by The Florida Bar:

Grievance Level

Administrative Charge [Rule 3-7.5(k) (1)]	$ 150.00
Grievance Committee Hearings Transcripts and Court Reporter's Attendance Hearing 2/23/88	192.25

Referee Level

Administrative Charge [Rule 3-7.5(k) (1)]	$ 150.00
Status Conference at Collier County July 18, 1988	164.73
Final Hearing, August 19, 1988	
Transcript	261.30
Court Reporter's Attendance	45.00
Mailing, including original to Judge	4.80
TOTAL COSTS:	**$ 968.08**

5. It is further recommended that execution issue with interest at a rate of twelve percent (12%) to accrue on all costs not paid within thirty (30) days of entry of the Supreme Court's final order, unless time for payment is extended by the Board of Governors of The Florida Bar.

Dated this 5TH day of October, 1988.

CHARLES T. CARLTON, Referee

Copies furnished to:

Randi Klayman Lazarus, Bar Counsel
Milton E. Grusmark, pro se