IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant.

v.

JAMES C. MCKENZIE,

Respondent.

Case No. 72,575
TFB NO. 87-23,020(06E)
and 87-23,023(06E)

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, James C. McKenzie, will be referred to as "the Respondent". The appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "C" will refer to the Complaint filed in this cause. "TR1" will refer to volume I of the transcript of the Final Hearing held on April 6, 1989. "TR2" will refer to volume II of the transcript of the Final Hearing of April 6, 1989. "TR3" will refer to the hearing on Assessment of Costs held on June 2, 1989. "TR4" will refer to the transcript of the hearing on Respondent's Motion for Rehearing held on July 6, 1989. "TR5" will refer to the transcript of the Disciplinary Hearing held on May 1, 1989. "RR" will refer to the Report of Referee. "R" will refer to the record in this case.

STATEMENT OF THE FACTS AND OF THE CASE

The Respondent's rendition of the facts in his initial brief is distorted and contains matters that are irrelevant and outside of the record in this cause. Therefore, in the interest of clarity, The Bar sets forth the following facts:

The Florida Bar's complaint in this cause contains two (2) counts. Count I of The Bar's complaint relates to the Respondent's representation of Charles E. Lanham in a Dissolution of Marriage action in 1985 and 1986. (C.,p.1). During the course of the Respondent's representation of Mr. Lanham, the Respondent sent several letters to Judge O'Brien, the presiding Judge in the divorce action.

On December 13, 1985, the Respondent sent a letter to Judge O'Brien, with a copy to Richard C. Davis, opposing counsel, which stated in part, as follows:

> "I certainly don't know what Mr. Davis is attempting to do by his recent paper sent to you regarding an "arrest" of Mr. Lanham.. ..
>
> ...if he causes Mr. Lanham's arrest by these papers sent to you, (totally improperly) Mr. Lanham would have, I believe a very good cause of false arrest and false imprisonment against him as well as certain ethical considerations". (R. Bar Exhibit #16).

Mr. Davis did not do anything in response to the Respondent's letter to Judge O'Brien dated December 13, 1985. (TR2,p.132,L.4-7).

On February 7, 1986, the Respondent wrote another letter to Judge O'Brien which contained arguments relating to certain Motions and Orders filed in the divorce action by both sides. (R. Bar Exhibit #17). Mr. Davis received a copy of the aforementioned letter but did not take any action in regard to the same. Thereafter, on April 11, 1986, the Respondent sent a third letter to Judge O'Brien with a copy to Mr. Davis. The Respondent's letter of April 11, 1986 stated in part, as follows:

> "I have today just been delivered to me, April 11, 1986 a Motion for Alimony delivered by Richard Davis, set for April 18, 1986. I have a call into your secretary as to when Mr. Davis applied for this court date, because I find it strange he is able to get a court date so early, when it has been in my experience that it takes about a month or more on your schedule to obtain a date.
>
> I feel Mr. Davis got this court date some time ago, never notifying me until today in order to prevent me from obtaining witnesses, conducting discoveries, etc.....". (R. Bar Exhibit #19).

When Mr. Davis received a copy of the aforementioned letter, he decided to take action in regard to the same. On April 14, 1986, Mr. Davis wrote a letter to The Florida Bar, regarding the Respondent's letter writing to Judge O'Brien, which stated as follows:

> "Gentlemen:
>
> The subject lawyer apparently has absolutely no idea that he is ethically forbidden from making ex-parte communications to the court as he seems to make a constant practice of this. The latest of such incidence

> that the undersigned has had experience with is contained within the enclosed communication to the court.
>
> I am growing sick of this and I believe this attorney should be disciplined under the appropriate rule." (R. Bar Exhibit #20).

At the final hearing in this cause, Mr. Davis testified that he sent the aforementioned letter to The Florida Bar because he felt there had been a professional infraction by the Respondent, since the Respondent was communicating directly with the Court by letters regarding the merits of a case pending before the Court. (TR2,p.139,L.10-17). Although Mr. Davis' letter alleges that the Respondent made ex-parte communication to the Court, the same is incorrect since the Respondent sent copies of his letters to Mr. Davis. Mr. Davis sent a copy of his letter dated April 14, 1986 to the Respondent and to Judge O'Brien. Mr. Davis testified that he sent a copy of his grievance letter to Judge O'Brien because he wanted the Respondent's letter writing to the Court to stop and he felt the Court should know that he had taken the matter to The Florida Bar. (TR2,p.139,L.22-25 and p.140,L.1-2).

When the Respondent received a copy of the letter to The Florida Bar dated April 14, 1986, he filed a grievance against Mr. Davis and sent a copy to Judge O'Brien and allegedly to Mr. Davis, who did not receive a copy of the same. (TR2,p.141,L.23-24). The Respondent's letter to The Florida Bar, dated April 18, 1986 regarding his grievance against Mr. Davis, stated in part as follows:

"Gentlemen:

Regarding RICHARD C. DAVIS' letter dated April 14, 1986 yet not received until April 17, 1986, please note he also sent a copy to the Judge on the case, obviously for prejudicial purposes, which I believe is unethical.

Not that Mr. Davis has not done other things on this case wholly for prejudicial purposes. Obviously, my letter to the court was for continuance purposes because of lack of adequate notice given by him.

In addition, Mr. Davis certainly knows what "ex-parte" means - he certainly cannot be ignorant of the term because I understand he had to take the ethics exam in order to be reinstated to The Florida Bar. My letter clearly was received by Mr. Davis, it is therefore not "ex-parte.." (R. Bar Exhibit #21).

The Respondent testified at the final hearing that he sent a copy of his letter dated April 18, 1986 to Judge O'Brien in order to make Mr. Davis look bad in the eyes of the Judge. (TR2,p.208,L. 1-9).

Thereafter, on April 24, 1986, Steve Rushing, Branch Staff Counsel of the Tampa Office of The Florida Bar, sent a letter to the Respondent which stated as follows:

"RE: Grievance against Attorney Richard C. Davis

Dear Mr. McKenzie:

We are in receipt of your recent correspondence regarding the above-referenced matter.

> However, we do not find a copy of the letter from Mr. Davis which you refer to. Please provide a copy of same for our records.
>
> Additionally, our membership roster lists two Richard C. Davis; one located in Largo and one in Newport Richey. Please advise which of these attorneys you are complaining against.
>
> Upon receipt of this information, your complaint will be investigated." (R. Bar Exhibit #22, p.2).

After the Respondent received the aforementioned letter from Mr. Rushing, he wrote a letter to Judge O'Brien dated April 25, 1986 enclosing a copy of Mr. Rushing's letter. The Respondent's letter of April 25, 1986 to Judge O'Brien stated, in part:

> "...Apparently Mr. Davis never even sent a letter to The Florida Bar about me, because he just wanted you to think he did - I don't need to draw a picture, it is self evident.
>
> To me, but I am not the one to make such charge, I feel that he has violated DR 1-102(A)(4), (5), and (6) relating to conduct which is "dishonest, deceitful, prejudicial to the administration of justice or adversely reflects on his fitness to practice law..." (R. Bar Exhibit #22).

Steve Rushing's letter dated April 25, 1986 to the Respondent did not state that The Florida Bar did not receive a grievance from Mr. Davis against the Respondent. The letter only indicated that the Respondent failed to enclose a copy of Mr. Davis' letter of April 14, 1986, and requested that a copy of the same be forwarded to The Florida Bar office. (R. Bar Exhibit #22,p.2).

Mr. Davis filed his grievance against the Respondent with The Florida Bar. (TR2,p.140,L.12-14).

On June 6, 1986 the Respondent sent yet another letter to Judge O'Brien wherein he warned the Court that his client was experiencing health problems which could interfere with the tentative final hearing date on the Lanham matter. (R. Bar Exhibit #23). Mr. Davis received a copy of the aforementioned letter and responded to the same by forwarding a letter dated June 9, 1986 to Judge O'Brien. Mr. Davis' letter to Judge O'Brien stated in part:

> "...Mr. McKenzie's client has for almost two (2) years now successfully avoided every attempt to bring this matter to a final conclusion by every artifice, connivance, pretext, sham and excuse imaginable. I am sick to death of these lies, evasions, pretensions, unfounded and malicious charges of unethical behavior and persistent misrepresentation of this record to the Court by opposing counsel; I feel wholly justified in demanding that this Court use all of the inherent power it has to put a firm and final end to it once and for all." (R. Bar Exhibit #24).

Mr. Davis sent a copy of the aforementioned letter to the Respondent. When the Respondent received Mr. Davis' letter, he wrote yet another letter dated June 12, 1986, to Judge O'Brien. Respondent's letter to Judge O'Brien, dated June 12, 1986, stated:

> "I am incredibly offended by the totally odious remarks of Mr. Davis in his letter of June 9, 1986 addressed to you. I think Mr. Davis has transgressed way beyond the bounds of normal behavior to have made these terrible remarks about me. It is however

> quite obvious that he seeks to gain some special consideration from the court by this conduct.
>
> In my view he has violated DR 1-102 and the specific language found under EC7-36 to 39 by his tirade, I enclose copies.
>
> I don't know why Mr. Davis had his license to practice law revoked but apparently he hasn't learned anything from it. Copy of this is being sent to The Florida Bar for such action as they feel fit to undertake." (R. Bar Exhibit #25).

At the final hearing, Mr. Davis testified that it is not a local custom or practice of the Sixth Judicial Circuit to write letters to a Judge. Mr. Davis also testified that the proper procedure for bringing matters to the Court's attention is through the filing of Motions and by setting a hearing on the same. (TR2,p.151,L.3-11).

In regard to Count I of The Bar's complaint, the Referee ruled that the letters written by the Respondent to Judge O'Brien dated April 11, April 18, April 25 and June 12, 1986 (R. Bar Exhibit #19, 21, 22 and 25) constitute evidence that the Respondent violated DR 1-102(A)*(5)* (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law); and DR 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or would not be supported by admissible evidence). (RR.p.2, 3).

Count II of The Bar's complaint relates to the Respondent's representation of Meriam Shrock, f/k/a Meriam Bishop, in a post dissolution of marriage action on a Petition For Modification and a Partition action regarding the formal marital home of Ms. Shrock and her ex-husband. (C, p.3).

On or about September 10, 1984, the Respondent, on behalf of Meriam Shrock, filed a Petition to Modify in the case styled In Re The Marriage Of: Meriam L. Bishop, wife, petitioner and George M. Bishop, husband, respondent, Case No. 82-14371-07. (R. Bar Exhibit #10). In the Modification action, Ms. Shrock asked the Court to award her the marital home as lump sum alimony, or in the alternative she asked the Court to award her the exclusive use of the marital home, requiring the husband to pay the monthly mortgage payments on the same. (R. Bar Exhibit #10). Ms. Shrock's Petition For Modification was eventually denied. (TR1,p.104,L.12-17).

Thereafter Ms. Shrock's ex-husband filed a Complaint For Partition of Real Property. (TR1,p.60,L.23-25 and p.61,L.1-8). In addition, the Respondent, on behalf of Ms. Shrock, filed a Supplemental Petition For Modification seeking permanent alimony.

On February 26, 1985, a Final Judgment In Complaint for Partition of Real Property was entered by Judge David Seth Walker, the Presiding Judge in the Partition action. The Final Judgment set forth that the parties stipulated that the marital home would be placed for sale on the open market and that the

parties would each cooperate in listing and selling the property. (R. Bar Exhibit #1 and TR1,p.9,L.6-13).

Ms. Shrock did not appeal the Final Judgment in Complaint for Partition of Real Property. (TR1,p. 9,L.14-17 and p.92,L.20-25). Although no appeal was taken on the Final Judgment, Ms. Shrock refused to cooperate in the listing and selling of the property even after several Orders were entered requiring her to cooperate. (TR1,p.9,L.21-25,p.10,L.1-2 and R. Bar Exhibit #2,p.3,4). As a result, Mr. Bishop's attorney filed a Motion for Order of Contempt. (TR1,p.7,L.21-25,p.8,L.1).

On August 9, 1985, a hearing was held before Judge Walker on the Motion for Order of Contempt. At the conclusion of the hearing, Judge Walker ruled that Ms. Shrock was in contempt of Court and sentenced her to ten (10) days in the Pinellas County Detention Center with the imposition of the sentence being stayed until August 16, 1985 to give Mrs. Shrock an opportunity to purge herself of the contempt by signing a listing agreement with Century 21, for the sale of the parties' former marital home. (TR1,p.12,L.23-25,p.13,L.1-6; and R. Bar Exhibit #3). On August 26, 1985, Judge Walker entered an Order, nunc pro tunc to August 9, 1985. (R. Bar Exhibit #3).

The Respondent was very upset about Judge Walker's ruling on August 9, 1985. Immediately following the hearing on August 9, the Respondent confronted Thomas Colclough, counsel for Mr. Bishop, and in a loud, hostile tone of voice threatened Mr. Colclough with words to the effect, "You'll get yours", or "I"ll

see you get yours''. (TR1,p.14,L.16-25,p.17,L.16-22; and R. Bar Exhibit #13).

The Respondent did not file a Motion for Rehearing on Judge Walker's nunc pro tunc Order of August 26, 1985. In addition, Judge Walker's Order was not appealed by either party. (TR1,p.13,L.7-14). Respondent did, however, counsel and advised his client not to sign the Listing Agreement despite the Court's Order of August 26. (TR1,p.90,L.22-25 and p.91,L.1-5).

After the August 9, 1985 hearing, Ms. Shrock signed the Listing Agreement in order to avoid going to jail. (TR1,p.63,L.8-20). When the Respondent discovered that Ms. Shrock signed the Listing Agreement, he advised her to file a Complaint against Judge Walker, Mr. Colclough, Mr. Boake, Mr. Bishop, and Century 21. (TR1,p.73,L.12-15,p.100,L.6-11). The Respondent told Ms. Shrock that filing a Complaint against the aforementioned parties was the only thing she could do if she wanted to set aside Judge Walker's Order and the Listing Agreement with Century 21. (TR1,p.100,L.12-18).

On or about September 27, 1985 the Respondent filed a lawsuit styled Meriam L. Shrock, f/k/a Meriam L. Bishop, plaintiff, v. Century 21, #1 in the Sun, Inc., Carl T. Boake, Thomas P. Colclough, David Seth Walker and George M. Bishop, defendants, (hereinafter referred to as Schrock v. Judge Walker, et al.) Case No. 85-14236-14. (R. Bar Exhibit #6). Ms. Shrock signed the Complaint; however, she did not realize or understand the significance of the same. (TR1,p.65,L.24-25,p.66,L.1-10,

p.70,L.25,p.71,L.1; and R. Bar Exhibit #9). Respondent personally paid the cost of filing the lawsuit and in addition did not intend to charge Ms. Shrock for representation regarding the same. (TR1,p.101,L.6-10,p.117,L.11-12).

At the Final Hearing, the Respondent testified that he filed the lawsuit against Judge Walker and the other parties in order to intimidate Mr. Colclough into not moving forward with the Partition action; in order to cause Judge Walker to have to recuse himself from the Partition action; and in order to delay the sale of the home so that he could obtain the home as permanent alimony for his client in a Supplemental Modification Action. (RR,p.2,TR1,p.90,L.10-12,p.93,L.5-11,p.105,L.5-19).

On or about December 10, 1985, a hearing was held before the Honorable John S. Andrews in regard to a Motion to Change Venue filed by Respondent on behalf of Ms. Shrock in the lawsuit against Judge Walker, et al. At the conclusion of the hearing Judge Andrews denied the Motion. Immediately following the hearing, the Respondent approached Glen Woodworth, counsel for several of the defendants, and stated "I don't know what your getting so "sexed up" about in this lawsuit. All I'm trying to do is get some alimony for my client." (TR1,p.35,L.9-25; and R. Bar Exhibit #8).

Subsequent to the December 10, 1985 hearing, Ms. Shrock consulted with Attorney Walden Malouf to seek counseling regarding the Partition action and the Complaint she filed against Judge Walker, et al. During the consultation with Mr.

Malouf, Ms. Shrock became aware of the fact that she had actually filed a lawsuit against Judge Walker and the other parties to her Complaint. (TR1,p.70,L.12-25,p.71,L.1-2).

On or about April 2, 1986, Ms. Shrock executed a Voluntary Dismissal with Prejudice in the lawsuit filed against Judge Walker, et al. (R. Bar Exhibit #7). Shortly thereafter, the Final Judgement of Partition entered on February 26, 1985, was set aside after the parties entered into an oral stipulation before the Court that Ms. Shrock would pay her ex-husband $20,000.00 for the former marital home and waive any pending claim for alimony of any type, and in return, Mr. Bishop would transfer to Ms. Shrock all of his rights, title and interest in the formal marital home. (TR1,p.71,L.17-24 and p.72,L.9-12).

On April 25, 1986, Mr. Glenn Woodworth executed an Affidavit in regard to the Respondent's conduct immediately following the December 10, 1985 hearing. The affidavit also set forth a conversation that Mr. Woodworth had with Walden Malouf and Ms. Shrock. (R. Bar Exhibit #8). Mr. Woodworth prepared and executed the aforementioned affidavit for two (2) reasons: (1) he wanted to bring the matter to the attention of The Florida Bar: and (2) he wanted to memorialize the events that he recalled as having occurred, since his clients were exploring the possibility of a civil action based on the lawsuit filed against them. (TR1,p.42,L.20-25, and p.43,L.l-10). Mr. Woodworth submitted the aformentioned Affidavit to Florida Bar Staff Investigator Ernest Kirstein. (TR1,p.42,L.24-25).

In regard to Count II of The Bar's Complaint the Referee recommended that the Respondent be found guilty of violating DR 1-102(A)(1) (a lawyer shall not violate a disciplinary rule), DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice), DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law), DR 7-102(A)(1) (in his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or it is obvious that such action would merely serve to harass or maliciously injure another), DR 7-102(A)(2) (in his representation of a client, a lawyer shall not knowingly advance a claim or defense that is unwarranted by existing law except that he may advance such a claim or defense if it can be supported by a good-faith argument for an extension, modification or reversal of existing law), DR 7-102(A)(7) (in his representation of a client, a lawyer shall not knowingly counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent). (RR,p.3).

The Florida Bar complaints of Richard C. Davis and Glenn Woodworth were forwarded to the grievance committee on March 29, 1988 and after receiving sworn testimony the Sixth Judicial Grievance Committee "E" found probable cause for further disciplinary proceedings. (C,p.5).

On or about June 14, 1988, The Florida Bar filed with the Supreme Court of Florida a two count Complaint against the Respondent. (C,p.6).

On or about November 23, 1988, the Respondent filed an Answer with an Affirmative Defense in regard to The Florida Bar's Complaint. (R. Respondent's Answer).

On April 6, 1989, a Final Hearing was held on The Florida Bar's two count Complaint against the Respondent. (R. TR1 and TR2).

On April 19, 1989, the Referee submitted a letter to Bar Counsel and to the Respondent setting forth his finding that, as to Count I of The Florida Bar Complaint, the Respondent violated DR 1-102(A)(5), DR 1-102(A)(6), and DR 7-106(C)(1), and as to Count 11, the Respondent violated DR 1-102(A)(1), DR 1-102(A)(5), DR 1-102(A)(6), DR 7-102(A)(1), and DR 7-102(A)(7). In addition, the Referee found there was insufficient evidence to establish that the Respondent violated DR 1-102(A)(4). (RR,p.1,2).

On May 5, 1989, a disciplinary hearing was held before the Referee. At the disciplinary hearing, Bar Counsel recommended that the Respondent be disciplined by a ninety-one (91) day suspension and payment of the Bar's costs. At the conclusion of the disciplinary hearing, the Referee recommended that the Respondent be disciplined by a ninety-one (91) day suspension as recommended by the Bar even though he felt that a one (1) year suspension was more appropriate. (TR4,p.55,L.20-25,p.56,L.1-17).

The Referee also recommended that the Respondent be held responsible for the Bar's costs. (RR,p.4).

On May 8, 1989, the Referee sent a letter to Bar Counsel with a copy to Respondent wherein he revised his findings as to Count II of The Bar's Complaint, to include that the Respondent violated DR 7-102(A)(2). (R. Referee letter dated May 8, 1989).

On June 2, 1989, a hearing was held before the Referee to determine the assessment of costs in this cause, since the Respondent took issue with The Bar's Statement of Costs. At the conclusion of the hearing, the Referee ruled that the Respondent should be required to pay The Bar's costs in the amount of $2,052.80. (RR,p.4,R.TR3, and R. Second Amended Statement of Costs).

On June 2, 1989, the Referee issued his Report of Referee.

On July 5, 1989, a hearing was held before the Referee in regard to the Respondent's Motion For Rehearing. At the conclusion of the hearing, the Respondent's Motion was denied. (R. TR4).

This brief is filed in answer to Respondent's Initial Brief in Support of his Petition for Review filed on August 4, 1989.

SUMMARY OF ARGUMENT

The Respondent's initial brief presents several arguments alleging that the Referee's findings in his report are erroneous.

First, the Respondent challenges the Referee's finding that his letters to Judge O'Brien dated April 11, April 18, April 25, and June 12, 1986 (R. Bar Exhibit #19, 21, 22, and 25) constitute violations of DR 1-102(A)(5), DR 1-102(A)(6), and DR 7-106(C)(1). This same argument was made to the Referee during the hearing on the Respondent's Motion for Rehearing. (R. Motion for Rehearing). The aforementioned letters to Judge O'Brien alluded to matters that the Respondent had no reasonable basis to believe were relevant to the Landham case or supported by admissible evidence. The Respondent's disparaging letters to Judge O'Brien attacked the character of the Respondent's opposing counsel. The letters written by the Respondent clearly reflect on the Respondent's fitness to practice law and further, the letters are prejudicial to the administration of justice.

Second, the Respondent challenges the Referee's denial of a rehearing or mistrial based on Bar Counsel having questioned Respondent about his past disciplinary record prior to a finding of guilt. Respondent made the same argument during the hearing on his Motion for Rehearing. The Respondent found that the

Respondent opened the door to Bar Counsel's inquiry about his past disciplinary offenses when he raised as an affirmative defense in his Answer, an allegation that The Bar had pursued him for a long time on trumped up charges due to the fact that the Respondent advertised. The Referee also found that the Respondent opened the door to his prior disciplinary record when he attached to his Answer a Report of Referee wherein Judge Steinberg found the Respondent not guilty of misconduct alleged by The Bar. (TR4,p.50,L.9-25,p.51,L.1-4; and R. Respondent's answer, p.6). Further the Respondent did not object to Bar Counsel's questions regarding his prior disciplinary record until after he answered the same. (TR1,p.117,L.23-25,p.118,L.1-6).

The Respondent also takes issue with the Referee's refusal to grant a rehearing based on the Respondent's allegations that Ms. Shrock committed perjury while testifying and that Bar Counsel introduced false and misleading evidence to prove The Bar's case against Respondent. The record is void of any evidence to support the Respondent's claims.

Third, the Respondent challenges the Referee's findings relating to the lawsuit styled Shrock v. Judge Walker, et al. The record is replete with facts and testimony to support the Referee's findings that the lawsuit filed by the Respondent was entirely without merit.

Fourth, the Respondent challenges The Bar's costs in the amount of **$2,052.80**. On June **2, 1989**, a hearing was held in

regard to The Bar's costs and at the conclusion of the same, the Referee found The Bar's costs to be in accordance with Rule 3-7.5(k)(1).

"A Referee's findings of fact are presumed to be correct unless clearly erroneous or lacking in evidentiary support". The Florida Bar v. Stalnacker, 485 So.2d 815 (Fla. 1986). The Respondent fails to rebut the presumption of correctness. Therefore, The Bar asks this Court to uphold the Referee's findings of fact and its recommendations, which are abundantly supported by the record.

ARGUMENT

THE DISPARAGING LETTERS THAT THE RESPONDENT SENT TO JUDGE O'BRIEN ON APRIL 11, 18, 25 AND JUNE 12, 1986, CLEARLY VIOLATE THE DISCIPLINARY RULES OF THE FLORIDA BAR IN EFFECT IN 1986.

The Respondent challenges the Referee's finding that the letters he sent to Judge O'Brien on April 11, 18, 25 and June 6, 1986 violated DR 1-102(A)(5), DR 1-102(A)(6) and DR 7-106(C)(1).

Disciplinary Rule 7-106(C)(1), Code of Professional Responsibility, states: "in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence". In the aforementioned letters to Judge O'Brien, the Respondent accused his opposing counsel of unethical conduct without substantial evidence of the same, and in addition, in several letters the Respondent set forth opposing counsel's prior disciplinary problems with The Florida Bar. The aforementioned matters were clearly not relevant to the Lanham's divorce action and, therefore, the Respondent violated DR 7-106(C)(1).

The Referee also found that the Respondent's letter writing to Judge O'Brien was extremely unprofessional. Further the Referee found that the judicial system and legal profession cannot tolerate the type of conduct engaged in by the Respondent.

It was the Respondent's own testimony which caused the Referee to make the aforementioned findings now challenged by the Respondent. At the final hearing, the Respondent testified as follows, in response to questions propounded by Bar Counsel regarding the reasons why he thought Mr. Davis sent a copy of his grievance against Respondent to Judge O'Brien:

> Q. Why do you think he did that?
> A. To make me look bad in his eyes so that he could get his way with my client.
> Q. Do you think this is why he did it?
> A. Well, certainly. There was no other reason to.
> Q. Is that why you sent a copy of your April 18 letter to the Judge?
> A. Sure. Because if he attempts to diminish me in the Judge's eyes, I have to fight that.
> Q. Was there any reason for your mentioning Mr. Davis' past ethical problems with The Florida Bar?
> A. He is complaining about me, I have a right to say whatever is truthful about him.
> Q. Well, did Mr. Davis put anything in his letter about your past ethical problems with The Florida Bar?
> A. Well, maybe he doesn't know anything about them. (TR2,p.208,L.1-17).

Based on the foregoing testimony, the Respondent sent letters to Judge O'Brien in order to prejudice the Judge against Mr. Davis. This conduct is not only prejudicial to the administration of justice, but also reflects on the Respondent's fitness to practice law. Therefore, the Respondent violated DR 1-102(A)(5) and DR 1-102(A)(6).

In addition, the Respondent knew that his conduct in the Lanham case was improper. During the final hearing, the

Respondent testified as follows in response to questions by Bar Counsel regarding the proper procedures for bringing matters before the court:

> Q. I am just asking you isn't that the proper procedure that attorneys follow in cases that they are handling before the court?
> A. Sure, or whatever the motion might be.
> Q. And isn't that the proper procedure?
> A. Well, there is alot that is proper and alot of latitude.
> Q. O.K.
> A. I remember writing a letter to Judge Fogle because Judge Fogle didn't ask for any closing remarks on a case that I had. And Judge Fogel went over the roof when I wrote that letter. And I have a perfect right as a lawyer to make closing remarks following the trial of the case. It is something that lawyers are entitled to do.
> When he closed me off from not making closing remarks I wrote him a letter enclosing my closing remarks.
> Q. Enclosing your closing remarks?
> A. Yes, enclosing your [sic] closing remarks of the case.
> And he didn't like that at all.
> Q. Did he tell you it was improper?
> A. He told me it was ex-parte. And he even wrote to The Florida Bar about it. (TR2,p.209,L.1-24).

The Referee's findings were based on clear and convincing evidence established through the Respondent's own testimony and Bar Exhibit Nos. 19, 21, 22, and 25.

THE REFEREE'S DECISION TO OVERRULE THE RESPONDENT'S OBJECTION TO BAR COUNSEL'S QUESTIONING THE RESPONDENT ABOUT HIS PAST DISCIPLINARY RECORD, PRIOR TO A FINDING OF GUILT, WAS APPROPRIATE IN LIGHT OF THE RESPONDENT'S AFFIRMATIVE DEFENSE.

The Respondent challenges the Referee's decision to overrule his objection to Bar Counsel's questions regarding Respondent's prior disciplinary record, prior to a finding of guilt. The Respondent claims the Referee should have granted a mistrial or rehearing. The Referees ruling was appropriate for two (2) reasons. First, the Respondent's objection to Bar Counsel's questions regarding his disciplinary record was untimely. Respondent did not object to Bar Counsel's questions until after he testified that he had been disciplined by The Bar on two (2) prior occasions. (TR1,p.117,L.23-25 and p.118,L.1-11). Second, the Respondent himself opened the door to Bar Counsel's questions regarding his disciplinary record. (TR4,p.50,L.9-25).

The Respondent's Answer to The Bar's Complaint contained a so-called affirmative defense that The Bar had "long pursued Respondent on various trumped up charges because he advertises and has done *so* since 1977..they use false affidavits to get by probable cause...Further, that the last matter brought by The Bar against Respondent and tried by Judge Ralph Steinburg of Tampa, Florida resulted in a not guilty verdict..." (R. Respondent's Answer, p.6, 7).

The record clearly shows that the Referee did not error in overruling Respondent's objection and denying a rehearing since Bar Counsel had the right to question the Respondent about his disciplinary record with The Bar in order to rebut the Respondent's affirmative defense.

THE REFEREE'S FINDINGS AND RECOMMENDATIONS IN REGARD TO THE LAWSUIT FILED BY THE RESPONDENT ON BEHALF OF MS. SHROCK AND AGAINST JUDGE WALKER, ET AL. ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The respondent challenges the Referee's findings of fact in regard to the Shrock v. Judge Walker, et al. lawsuit on the grounds that his conduct did not violate the disciplinary rules of the Code of Professional Responsibility. In challenging the Referee's findings, the Respondent claims that the lawsuit was valid since Judge Walker had acted without jurisdiction in the partition action when he ordered Ms. Shrock to execute the listing agreement with Century 21 and when he found Ms. Shrock in contempt for refusing to do the same.

In The Florida Bar v. Stalnaker, 485 So.2d 815, 816(Fla. 1986) this Court held that "a referee's findings of facts are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support". In addition, Rule 3-7.6(c)(5), Rules of Discipline, specifically states that "upon review the burden shall be upon the party seeking review to demonstrate the Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified."

Respondent has failed to demonstrate in his initial brief that the Referee's findings of fact and recommendations are erroneous, unlawful or unjustified. The Referee's findings of fact are supported by clear and convincing evidence.

The Referee found that the lawsuit filed by the Respondent on behalf of Ms. Shrock against Judge David Seth Walker, opposing counsel, and others was entirely without merit. (RR,p.2). Based on this finding, the Referee recommended that the Respondent be found guilty of violating DR 7-102(A)(2), Code of Professional Responsibility, which provides in part that "a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law."

The aforementioned finding and recommendation by the Referee is based on the Respondent's own testimony. At the final hearing, the Respondent testified that he relied on the case of Harper v. Merkle, 638 F.2d 848(5th Cir. 1981) to support the viability of the lawsuit he filed on behalf of Ms. Shrock against Judge Walker, et al. In Merkle, supra, the Fifth Circuit Court of Appeals set forth a two prong test to determine whether or not a judge has absolute judicial immunity for his acts. The two (2) prong test is as follows: (1) Whether the judge's actions were "judicial acts," and if *so,* (2) whether or not they fell clearly outside of the judge's jurisdiction. Merkle, supra, at p.858.

In determining whether Judge Walker had absolute judicial immunity for ordering Ms. Shrock to sign the Listing Agreement and holding Ms. Shrock in contempt for failing to execute the Listing Agreement, it must first be determine whether or not Judge Walker's actions were "judicial acts". In Merkle, supra, four (4) factors were set forth to determine whether a Judge's

actions are "judicial acts". The four factors were as follows: (1) Is the precise act complained of a normal judicial function?; (2) Did the events involved occur in the Judge's chambers?; (3) Did the controversy center around a case then pending before the Judge?; and (4) Did the Judge's act arise directly and immediately out of a visit to the Judge in his official capacity? Merkle, supra, at p.858 (quoting McAlister v. Brown, 469,F.2d 1280, 1282 (5th Cir. 1972)).

The lawsuit filed by the Respondent on behalf of Ms. Shrock against Judge Walker, et al., dealt with Judge Walker's Order that Ms. Shrock execute a Listing Agreement with Century 21, and with the Judge's Order of Contempt against Ms. Shrock for failing to list the former marital home for sale. The issuance of Orders and the use of contempt power is a normal judicial function; the Orders involved were issued in Judge Walker's chambers; the Orders centered around the Partition action which was pending before Judge Walker; and the Orders arose directly and immediately out of a hearing before Judge Walker in his official capacity; therefore Judge Walker's Orders were "judicial acts" and the first prong of the absolute judicial immunity test is answered in the affirmative.

At the final hearing, the Respondent admitted that Judge Walker had subject matter jurisdiction over the Partition action and personal jurisdiction over the parties. (TR1,p.109,L.17-21 and RR,p.2). Therefore, the second prong of the judicial immunity test is answered in the affirmative.

Since the Respondent reviewed and relied on Merkle, supra, he knowingly advanced a claim or defense that was unwarranted under existing law, and therefore he violated DR 7-102(A)(2).

The Referee also found that the Respondent filed the lawsuit on behalf of Ms. Shrock and against Judge Walker, et al. merely to harass opposing counsel and Judge Walker in an attempt to force them to take some action that would be to the benefit of the Respondent's client. (RR,p.2). In addition, the Referee found that the Respondent filed a lawsuit against Judge Walker, Mr. Colclough, Mr. Boake, and others to intimidate Mr. Colclough into not moving forward with the Partition action, and in addition, to cause Judge David Seth Walker to have to recuse himself from the Partition action. (RR,p.2). Based on the aforementioned findings, the Referee recommended that the Respondent be found guilty of violating DR 7-102(A)(1) and DR 7-102(A)(7), Code of Professional Responsibility. DR 7-102(A)(1), Code of Professional Responsibility, states that "a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of a client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another." In addition, DR 7-102(A)(7), Code of Professional Responsibility, states in part that " a lawyer shall not knowingly counsel or assist his client in conduct that a lawyer knows to be illegal or fraudulent." The Respondent's own testimony supports the aforementioned Referee's findings of fact and recommendations.

At the final hearing, the Respondent testified as follows in response to questions propounded by Bar Counsel:

> Q. So, its your testimony today that you didn't intend or you didn't think about filing such a lawsuit prior to the August 9, 1985 hearing, is that correct?
> A. I hadn't...or I hadn't given it any thought particularly except I had hoped to intimidate Mr. Colclough from going further with selling this property in that fashion. (TR1,p.93,L.5-11).
>
> Q. You filed a lawsuit against Judge Walker and the other parties in order to obtain permanent alimony for your client, isn't that correct?
> A. No, that wasn't the gist of the action.
> Q. O.K. Well do you recall making the statement to Mr. Woodworth as he testified today, "I don't know what your getting all sexed up about, all I am trying to do is obtain alimony for my client."
> A. That is all that I am trying to do and that was all I was ever trying to do... (TR1,p.105,L.5-11).
>
> Q. So one of your reasons for filing the lawsuit was also because you knew Judge Walker would have to recuse himself from the partition case, isn't that correct?
> A. Well, he did.
> Q. But you knew that before you filed, or you knew he would have to before you filed the lawsuit, didn't you?
> A. Well, of course-- (TR1,p.107,L.10-18).

In addition to the foregoing, the Respondent testified during the final hearing that he counseled his client not to sign the Listing Agreement with Century 21. (TR1,p.90,L.24-25, p.91,L.1-5). The Respondent's advise to his client was contrary to Orders of the Court and contrary to the Final Judgment in the

Complaint for Partition of Real Property which referenced the fact that Ms. Shrock stipulated to cooperate in the listing and sale of the former marital home. (R. Bar Exhibit 1).

Based on the aforementioned testimony of the Respondent, the Referee's findings and recommendations as to DR 7-102(A)(1) and DR 7-102(A)(7) are supported by clear and convincing evidence.

Further, the Referee found that the Respondent filed a lawsuit against Judge Walker and the other parties solely as a vendetta, out of spite. (RR,p.2). This finding was supported by the testimony of Thomas Colclough.

At the final hearing, Thomas Colclough testified as follows in regard to a confrontation he had with the Respondent after a hearing held on August 9, 1985:

Q. Mr. Colclough, do you recall what happened immediately after the hearing on August 9, 1985 when you were leaving Judge Walker's courtroom?
A. Yes, ma'am.
Q. Could you tell the Court what happened?
A. Yes, ma'am, I can....
The Witness: Judge, what happened then after the hearing on August 9, 1985 was that I left the hearing with Mr. Bishop and we were all outside to what would be the hallway going into the Judge's courtroom. And Mr. McKenzie walked outside with his client and then Mr. McKenzie looked at me and he said words to the effect "You'll get yours", or words to the effect "I will see that you get yours." And I made note of that because I thought there may be problems later on.

And I have made a little note for the file and I have the original note in the file with me, I brought it over. And that is what happened immediately after the hearing....

Q. What was Mr. McKenzie's tone of voice and demeanor outside of Judge Walker's chamber on August 9, 1985?

A. Mr. McKenzie was angry. He was very hostile, upset, I think a confrontation would be a fair accurate description of it. (TR1,p.13,L.24-25,p.14,L.1-4 and 16-25, and p.17,L.13-18).

Based on the testimony of the Respondent, the Referee's recommendation of guilt as to violations of DR 1-102(A)(1), DR 1-102(A)(5), DR 1-102(A)(6), DR 7-101(A)(1), DR 7-102(A)(2), and DR 7-102(A)(7) is supported by clear and convincing evidence established through the record in this cause.

THE FLORIDA BAR'S COSTS IN THIS PROCEEDING ARE REASONABLE AND ARE IN ACCORDANCE WITH RULE 3-7.5(k)(1).

The Respondent challenges The Bar's costs of $2,052.80 in this case. On May 1, 1989, a Disciplinary Hearing was held before the Referee. Prior to the commencement of the disciplinary hearing, Bar Counsel provided the Respondent with a Preliminary Statement of Costs. (TR5,p.8,L.8-9). The Preliminary Statement of Costs provided for an administrative cost of $500.00, court reporter fees, staff investigator expenses and staff counsel expenses. (R. Preliminary Statement of Costs).

During the May 1, 1989 hearing, the Respondent objected to The Florida Bar's costs on the grounds that they were not in compliance with Rule 3-7.5(k)(1). Specifically, Respondent objected to the administrative cost of $500.00, the court reporter fees, the staff investigator expenses, and staff counsel's travel and out-of-pocket expenses. (TR5,p.17,L.14-25, p.18,L.1-3,9-12,p.23,L.13-15).

Prior to April 20, 1989, Rule 3-7.5(k)(1) Rules of Discipline, provided in part:

> ...The costs shall include court reporter fees, copy costs, witness fees, and traveling expenses, and reasonable traveling and out-of-pocket expenses of the Referee and Bar Counsel, if any. Costs shall also include a $150.00 charge for administrative cost at the grievance committee level and $150.00 charge for administrative cost at Referee level....

On April 20, 1989, this Court amended Rule 3-7.5(k)(1), Rules of Discipline, to provide in part, as follows:

> ...The costs of the proceedings shall include investigator costs, including traveling and out-of-pocket expenses, court reporter fees, copy costs, witness fees and traveling expenses, and reasonable traveling and out-of-pocket expenses of the Referee and the Bar Counsel, if any. Costs shall also include a $500.00 charge for administrative costs.. ..

The Florida Bar's Preliminary Statement of Costs complied with Rule 3-7.5(k)(1), Rule of Discipline as amended on April 20, 1989. However, since the final hearing in this cause occurred on April 6, 1989, which was prior to the rule amendment, the Referee disallowed staff investigator expenses with the exception of expenses related to the investigator's serving of subpoenas. In addition, the Referee ruled that The Bar's administrative cost was to be $300.00 rather than $500.00. (TR5,p.33,L.9-25,p.34,L.1-20).

Subsequent to the hearing on May 1, 1989, Bar Counsel prepared an Amended Statement on Costs and served the Respondent with a copy of the same. (R. Amended Statement of Costs). On May 16, 1989, the Respondent sent a letter to the Referee objecting to the Amended Statement of Costs. The Respondent objected to staff counsel's travel expense of .30 cents per mile and claimed that the same was not an "out-of-pocket" expense. In addition, the Respondent objected to the staff investigator's expenses which were for service of subpoenas only. The Respondent also objected to the court reporter's fee as being unreasonable and excessive. Further, the Respondent objected to the pace delivery fee charged by the court reporter for mailing

the transcripts to The Florida Bar office. (R. Respondent's letter to the Referee dated May 16, 1989).

After the Referee received the Respondent's letter of May 16, 1989, the Referee scheduled a hearing for June 2, 1989 to determine the assessment of costs. Prior to the commencement of the hearing on June 2, 1989, Bar Counsel submitted a Second Amended Statement of Costs to the Respondent. The Bar's Second Amended Statement of Costs deleted a duplicate charge contained in the Amended Statement of Costs. (R. Second Amended Statement of Costs). During the hearing, Bar Counsel produced, for the inspection of the Referee and the Respondent, all of the vouchers which supported the costs contained in the Florida Bar's Second Amended Statement of Costs.

At the conclusion of the hearing, on June 2, 1989, the Referee ruled that all of The Florida Bar's costs were reasonable and substantiated with the exception of the staff counsel expenses for Richard A. Greenberg on February 22, 1989 in the amount of $16.70. (TR3,p.17,L.21-25,p.18,L.1-9). The Referee disallowed the aforementioned expense of Mr. Greenberg due to the fact that Bar Counsel, Bonnie L. Mahon, was unable to advise the Court of where Mr. Greenberg went in relation to this case on February 22, 1989. (TR3,p.17-19).

The Respondent in his brief again challenges The Bar's costs as they relate to the court reporter fees, Bar Counsel's mileage charge of .30 cents per mile, and the staff investigator expenses

for serving subpoenas. The Respondent's objection to the court reporter's fees is without merit, in light of the fact that The Florida Bar does not set the fee charged by the court reporter and the court reporter fee is chargeable to the Respondent pursuant to Rule 3-7.5(k)(1). The Respondent's objection to Bar Counsel's mileage fee of .30 cents per mile is without merit since the same is a reasonable travel expense and is also chargeable to the Respondent pursuant to Rule 3-7.5(k)(1). Further, the Respondent's objections to postage and staff investigator expenses for serving subpoenas is without merit since the same are reasonable out-of-pocket expenses of the Florida Bar and are recoverable against the Respondent pursuant to Rule 3-7.5(k)(1), Rules of Discipline.

Based on the foregoing, The Florida Bar requests that this Court approve the Referee's Report finding the Respondent guilty of misconduct and suspending him from the practice of law for a period of ninety-one (91) days. In addition The Bar requests that this Court approve The Florida Bar's costs in this proceeding and assess the same against the Respondent.

CONCLUSION

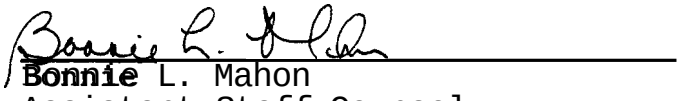
The issue before this Court is whether or not the Referee's findings of fact in his report are supported by the record in this cause. The Referee's findings of fact in his report are clearly supported by the record, and, in many instances, are supported by the Respondent's own testimony. The Respondent seeks to obscure the facts of this case and in his attempt to do *so,* he included in his Brief numerous facts which were not part of the record. In fact, in the Respondent's Initial Brief, the Respondent admitted to including facts outside of the record. This conduct by the Respondent violates the Rules of Appellate Procedure and evidences the Respondent's lack of respect for the rules that govern attorneys. Further, the Respondent insinuates in this Brief that Bar Counsel engaged in unethical conduct during the Final Hearing in this case as he did during the proceeding before the Referee. The Respondent's allegations are without merit and he does not have support for the same. This conduct by the Respondent is identical to the Respondent's misconduct in the Lanham case and evidences the Respondent's lack of respect for the Referee's rulings in this case.

The Referee, as the trier of fact, had the opportunity to assess the credibility and observe the demeanor of the witnesses. Accordingly, his findings of fact and conclusions of

law should be upheld unless it can be shown that they are clearly erroneous or lacking in evidentiary support. The Respondent has failed to show the same.

WHEREFORE, The Florida Bar respectfully requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline of a ninety one (91) day suspension from the practice of law and his recommendation that costs of $2,052.80 be assessed against the Respondent.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by Certified Mail, Return Receipt Requested, to James C. McKenzie, Respondent, at his record bar address of P. O. Box 4579, Clearwater, Florida 34618; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, FL 32399-2300, this 22 day of November, 1989.

Bonnie L. Mahon

BONNIE L. MAHON