IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GENE FLINN,

Respondent.

_____/

Supreme Court Case
No. 72,934

COMPLAINANT'S ANSWER BRIEF

PAUL A. GROSS #032115
Bar Counsel
The Florida Bar
Suite M-100, Rivergate Plaza
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR. #033748
Executive Director
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 561-5600

JOHN T. BERRY #217395
Staff Counsel
The Florida Bar
Tallahassee, Florida 32399-2300
(904) 561-5600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities
Continued

SYMBOLS AND REFERENCES

In this Answer Brief, the complainant, The Florida Bar, will be referred to as either "The Florida Bar" or "the Bar." Gene Flinn, the respondent, will be referred to as "Flinn" or "Respondent."

Abbreviations utilized in this Brief are as follows:

"(RR)" will denote the Report of Referee.
"T" will denote the transcript of the proceedings.
The numbers following "RR" and "T" will refer to the page number, i.e., "(RR. 7)" refers to page 7 of the Report of Referee. "(T.100)" would refer to page 100 of the transcript of the trial by referee.
"(DEN)" will denote Docket Entry Number.

STATEMENT OF THE CASE

The Complaint in this case was filed on August 23, 1988. (DEN 1) On August 31, 1988, the Chief Justice appointed Arthur M. Birkin, a judge of the Seventeenth Judicial Circuit Court of Florida, as referee. (DEN 3) After numerous pleadings filed by the respondent, the final hearings were held on the following dates: June 10, 1989; June 12, 1989; June 13, 1989; June 14, 1989; June 15, 1989; and June 16, 1989.

A Report of Referee with 64 exhibits and 14 volumes of record was filed on September 28, 1989. The referee recommended that the respondent be found guilty of the following counts: I, II, III, V, VI, and VII. With reference to Count IV, the referee recommended the respondent be found not guilty. In addition, the referee recommended that the respondent be disbarred and that he pay costs in the amount of $10,296.05. (RR. Appendix Exhibit 1)

On December 5, 1989, the respondent filed a Petition for Review. Thereafter, he filed many motions and notices with this Court. Although this Court granted three motions to extend the time for filing a brief, this Court denied almost all of the Respondent's other motions. See Appendix Exhibits 2-7. On March 13, 1990, Respondent's Brief was hand-delivered to the Bar Counsel.

The Certificate of Service in the Respondent's Brief states that a copy of said brief was mailed to Bar Counsel on March 10, 1990. However, this is probably a mistake, as Bar Counsel never received the Respondent's Brief via the mail.

The Florida Bar requested, and was granted, two extensions of time to file its Answer Brief, to which Respondent did not object. The latest extension, for an additional ten days, was granted to April 30, 1990 for the Bar to file its Answer Brief.

STATEMENT OF THE FACTS

A seven count complaint was filed against the respondent on August 23, 1988. (DEN 1) The referee recommended guilty findings on each count, except for Count IV. (RR, Appendix Ex.1) A synopsis of the facts is as follows:

COUNT I: The respondent was representing Bohannon in the filing of a claims bill before the Florida Legislature. Although the respondent was informed that he was discharged, he continued to hold himself out as Bohannon's attorney in the claims matter and interferred with the processing of the claims bill. (RR.2, Appendix 1; Transcript, Volume One, Pages 314-317; Bar Ex. 10 and 18; Transcript, Volume three, page 381, pages 449-455, pages 556-564, and Bar Exhibit 13; Deposition of Stephen Kahn, pages 4-8, DEN 173; Transcript, Volume Five, Pages 623-626)

COUNT II: The respondent and his co-counsel received $27,869.40 for costs in a medical malpractice case. During March and April, 1987, the respondent was requested to provide an itemized statement for his portion of the costs, which was $19,700.00.

The respondent failed to provide an accurate or timely accounting. (Transcript, Vol. Two, pages 317-321; Bar Exhibit 10; Transcript, Vol. Three, pages 382-389, 390-404, pages 558-559, Bar Ex. 14 and 18)

The accounting submitted by the respondent shows that he incurred $3,000.00 in costs for payment to a chiropractor. (Respondent's Exhibits 8, 33, 39)

The referee found that the chiropractor's statement of charges (Bar Ex. 22) was false, his testimony was pure fabrication, and that respondent's itemization of costs (at least as concerns the chiropractor) was also false. (RR. 2-4, Appendix Ex. 1)

COUNT III: At a Grievance Committee hearing, the respondent offered into evidence a copy of an affidavit signed by Mattie and William Bohannon. Added to the affidavit were the words, "and employ Gene Flinn and Bob Levy, exclusively to pursue a claims bill to conclusion." The referee found that the words described above were added to the affidavit by the respondent, or at his instruction, without the prior knowledge or consent of Mattie or William Bohannon. (Bar Ex. 15 and Respondent's Ex. 45; transcript, Vol. Three, Pages 449-454; RR. 4-5, Appendix Ex. 1)

COUNT IV: Respondent was found not guilty of this count.

COUNT V: The referee found clear and convincing evidence that the respondent was incompetent as an attorney. In part, because of the poor manner the respondent represented clients before worker's compensation judges, several of these judges recused themselves from hearing his cases. (RR.5-8, Appendix Ex.1)

In addition, the referee stated:

> In addition to the testimony of the worker's compensation judges, and lawyers, and my personal observations of Gene Flinn's incompetent manner in handling his own case, convinces me, clearly and convincingly, that he is an incompetent lawyer. (RR.6, Appendix Ex. 1)

COUNT VI: Worker's Compensation Judge Judith Nelson testified concerning the respondent's incompetence. In addition, the respondent made false accusations against Judge Nelson, accusing her of bribery. (RR. 8-9, Appendix Ex. 1, Transcript, Vol. One, pages 271-278)

COUNT VII: The respondent falsely and knowingly accused the following worker's compensation judges of bribery and corruption:

Alan Kuker, John Tomlinson, Jr., William Johnson and Judith Nelson. (Transcript, Vol. One, pages 234-237, 74-100, 249-155, and 271-280, RR. 9, Appendix Ex. 1)

SUMMARY OF ARGUMENT

The evidence is clear and convincing that the respondent is guilty of all allegations made in the Complaint, except for those in Count IV.

The cummulative effect of respondent's misconduct and the serious nature of the violations warrant disbarment. Submitting a forged document as evidence, in and by itself, warrants disbarment. Further, submitting fraudulent costs as part of an accounting, in and by itself, warrants disbarment.

While the venue in this case was Dade County, the trial was at Broward County. Nevertheless, the venue was waived, as respondent did not object to having the trial in Broward County.

ARGUMENT

I

FAILURE TO OBJECT TO VENUE AND TO AN "OFF-THE-RECORD" DISCUSSION, CONSTITUTE A WAIVER

According to Rule 3-7.5(c), Rules of Discipline, the venue in this case should be Dade County. However, a Re-Notice of Hearing was mailed to the respondent on October 26, 1988, wherein the following appeared in capital letters:

> IF RESPONDENT DESIRES TO HAVE THE FINAL HEARING IN DADE COUNTY, HE SHOULD IMMEDIATELY NOTIFY THE REFEREE BY FILING AN APPROPRIATE MOTION. (DEN 16)

On November 10, 1988, an Amended Re-Notice of Hearing was mailed to the respondent, which included the following:

> The notice that was sent to you on October 26, 1988 had the following statement:
>
> IF RESPONDENT DESIRES TO HAVE THE FINAL HEARING IN DADE COUNTY, HE SHOULD IMMEDIATELY NOTIFY THE REFEREE BY FILING AN APPROPRIATE MOTION.
>
> Since you have not requested that the hearing be held in Dade County, we are assuming that you have waived venue in this matter and have agreed to have the hearing in Broward County. (DEN 19)

It is well established that the venue defense is a personal privilege and is waived if not duly prosecuted in accordance with the Florida Rules of Civil Procedure. Unless the respondent claims his privilege of venue timely and properly, it is waived. Fla. R. Civ. P. 1.140(b) and Gross v. Franklin, 387 So.2d 1046 (Fla. 3d DCA 1980).

Although the respondent was given notice concerning venue (DEN 16 and 19), he never raised the issue of venue and never requested that this matter be heard in Dade County.

It is the Bar's view that the respondent waived his defense of venue in these proceedings. Therefore, the statement made by the referee on page 1 of his report, wherein he states, "I consider the venue in this case as having been waived," is correct. (Appendix Exhibit 1)

On March 20, 1989, a Stipulation for Substitution of Counsel and Withdrawal of Nicholas R. Friedman and a Notice of Hearing were mailed to the Court, with copies to Gene Flinn. (DEN 84 and 82) The hearing was on March 22, 1989. (DEN 86)

On page 11 and 12 of Respondent's Brief, Flinn complains because at the hearing concerning withdrawal of counsel on March 22, 1989 (DEN 86), there was a discussion that was held off the record between the referee, Bar Counsel, and Nicholas R. Friedman. (Page 2 of Transcript, DEN 86) Flinn was not at this hearing, although he was given notice of said hearing. (DEN 82) The only subjects discussed at the aforementioned hearing were withdrawal of counsel, possible substitution of counsel, and venue. With reference to venue, it is noted that the referee stated, on page 3, "If it's not raised, it's waived." (DEN 86)

Also, Mr. Freidman stated, "I'll explain to him that the judge's ruling is - it's here until Mr. Flinn makes a specific, prompt objection. I don't think he will." (DEN 86, page 3 and 4)

A review of the record makes it clear that Mr. Flinn did not object because of venue.

Flinn apparently believes it is prejudicial error because there was an off-the-record discussion. However, he never made an objection to the Referee concerning the "off-the-record discussion," and he made no objection to the venue.

It is the Bar's position that Flinn's failure to object to the referee constitutes an absolute waiver. Marsh v. Sarasota, 97 So.2d 312 (Fla. 2d DCA 1957).

While Bar Counsel realizes that Flinn did not attend the hearing of March 22, 1989 (DEN 86), he did, nevertheless, have the opportunity to attend that hearing, as he was given notice. (DEN 82) Moreover, it was not error to go off the record.

II

THE EVIDENCE IS CLEAR AND CONVINCING THAT THE REPORT OF REFEREE SHOULD BE UPHELD

a. A referee's findings of fact are presumed correct and will be upheld unless clearly erroneous.

The Rules of Discipline and The Florida Bar Integration Rule, are the same, with reference to presumption of correctness of reports of referees and the burden on appeal. Florida Bar Integration Rule, Art.XI, Rule 11.06(9)(a)(1), and Rule 3-7.5(k)(1), Rules of Discipline, state:

> The referee's report shall include:
> (1) a finding of fact as to each item of misconduct of which the respondent is charged, which findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. (underscoring supplied for emphasis.)

The foregoing rule was upheld in The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981).

With reference to who has the burden on appeal, Rule 3-7.6(c)(5), Rules of Discipline and Florida Bar Integration Rule, Art.XI, Rule 11.09(3)(e), are the same and they state the following:

> Burden. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful or unjustified.

In the case at hand, the respondent is the party seeking review (December 5, 1989). Therefore, the respondent has the burden of demonstrating that the report of referee is erroneous, unlawful or unjustified. The respondent has failed to meet this burden.

This Court stated in The Florida Bar v. Wagner, 212 So.2d 770,772 (Fla. 1968), "In disciplinary matters, the ultimate judgment remains with this Court. However, the initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

In The Florida Bar v. Hirsch, 359 So.2d 856,857 (Fla. 1978), this Court stated:

> It is our responsibility to review the determination of guilt made by the Referee upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the referee. His findings should be upheld unless clearly erroneous or without support in the evidence.

This Court has consistently held that "a referee's findings of facts are presumed correct and will be upheld unless clearly erroneous." In addition, this Court has stated, "The standard on review is whether those findings are supported by competent substantial evidence, and this Court will not substitute its judgment for the referee's." The Florida Bar v. Della-Donna, 14 FLW 315 (Fla. June 22, 1989).

The Florida Bar contends that the record provides ample support for the referee's findings. In addition, the respondent has not met the burden of showing that the referee's report is clearly erroneous or without evidentiary support.

Accordingly, it is the Bar's view that the referee's findings of fact should be presumed correct and should be upheld by this Court.

b. The evidence is clear and convincing:

AS TO COUNT I

Flinn was representing Bohannon in the filing of a claims bill before the Florida Legislature. Although Flinn had been discharged, he continued to hold himself out as attorney for Bohannon and interferred with the claims bill. On January 21, March 11, and April 24, 1987, Stephen Hall, Esq., notified Flinn on behalf of Bohannon, by mail, that he was discharged. (T. 315-317, 333, 336, and Bar Ex. 10) In addition, Bohannon told Flinn not to represent her. (T. 487-504)

On July 3, 1986, Ronald Buschbom, who had been co-counsel with Flinn, suggested they hire Mr. Jacobs to represent Bohannon, as neither Buschbom nor Flinn had experience concerning claims bills. (T. 551, Bar Ex. 21) Moreover, Buschbom notified Flinn that it would not be good for Flinn to be involved with the claims bill, as Flinn was suing the Master of the House of Representatives, the person who would have heard the bill. (T.552) Also, Flinn was having problems with the legislature. (T.555) Buschbom told Flinn he was discharged in January, 1987, and he had no business getting involved in the 1987 claims bill. (T. 557) Despite this, Flinn continued to interfere with the claims bill. (T. 558, 560, 596-597) The sponsor of the bill refused to sponsor the bill if Flinn was involved. (T. 563,591)

After Flinn was discharged, Flinn had three contacts with Kahn, the Senate Master, concerning the claims bill. (Depo. of Kahn, DEN 173)

Because of these communications by Flinn, Kahn wrote to Flinn and Jacobs, asking for clarification as to who was representing Bohannon. (Depo. of Kahn, page 8, Exhibit 1 to Depo, DEN 173)

A hearing was called by the House of Representatives because the House was concerned with who was representing Bohannon. (T. 329-330) Flinn was contacting legislatures and notifying them that he was representing Bohannon and lobbying the claims bill, long after he was terminated as Bohannon's counsel. (T. 342, 347, 348, 352)

Flinn admits that he retained Levy as a lobbyist (T. 376), even though he wasn't authorized to do this. In addition, he admits he was discharged. (T. 382-383) Also, Flinn wrote a letter to Buschbom, after he was discharged, wherein he refers to "our claims bill." (Bar Ex. 13)

The record clearly and convincingly establishes that Flinn, after he was discharged as counsel for Bohannon, continued to hold himself out as Bohannon's lawyer and he interferred with the processing of the claims bill. Moreover, the referee recommends that Flinn be found guilty of Count I of the complaint. (RR 2 and 10, Appendix Ex. 1)

AS TO COUNT II

On or about August 25, 1986, Mr. Flinn and his co-counsel received $27,869.40 for costs in a medical malpractice case. During March and April, 1987, Mr. Flinn was requested to provide an itemized statement for his portion of the costs, which was $19,700.00. However, Mr. Flinn failed to provide a timely or accurate accounting. (T. 6/10/89, pages 317-321, Bar Ex. 10, T. 6/12/89, pages 558-559, T. 6/12/89, pages 382, 389, 390-404, Bar Ex. 12 and 18)

At a grievance committee hearing on March 22, 1988, Flinn was asked where the accounting was, and he said it was in his office. At the next meeting of the grievance committee, on March 31, 1988, Flinn presented a document purporting to be an accounting. He admitted at that hearing that the accounting was not in existance at the time of the March 22nd hearing. (T. 402) It is obvious that the "accounting" was not completed prior to the hearing of March 31, 1988. Bohannon testified that she never received an accounting from Flinn. (T. 464)

While Bohannon did sign an affidavit stating that costs had been explained to her (T.452), she did so because Flinn told her that unless she signed the affidavit, he would not sign the $100,000.00 check. (T. 458, 466, 467)

Buschbom testified that there was no accounting for costs, but advised Bohannon to sign the papers, since she needed the money and Flinn would not sign the check unless Bohannon signed the papers. (T. 564-565)

A review of the record clearly and convincingly shows that Flinn did not prepare a proper accounting, as he was required to do.

Flinn's witness, Dr. Mitzner, a chiropractor, testified that he received $3,000.00 to review the medical records and for a consultation. (T. 646-649, Bar Ex. 8, 33, 39) Mitzner is not licensed in general medicine (T. 650), he is a chiropractor, and this case involved an infant (a victim of a medical malpractice case) who had a perforated large bowel and small bowel. (T. 643-653) Chiropractors are not qualified to treat such complications.

Dr. Mitzner was supposedly paid for consultations encompassing the period of October 1981 through April 1985. (T. 651-652, Ex. 23) Dr. Mitzner testified that he had been paid the $3,000.00 in cash and gave Flinn a receipt. (T. 649, 652) However, Dorothea Flinn, respondent's wife and office manager, could not produce such receipts. (T. 1014, 1015)

The Report of Referee, on pages 2-4, describes the conspiracy between Flinn and Dr. Mitzner, and makes it obvious that the $3,000.00 on Flinn's "accounting" was fraudulent.

The referee found Flinn guilty, "beyond a reasonable doubt" of violating Rule 4-8.4(c) of the Rules Regulating The Florida Bar, to wit; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. (underscoring supplied for emphasis) This was specifically related to the "accounting" submitted by Flinn to the grievance committee. (RR. 10 & 11; Appendix Ex. 1)

AS TO COUNT III

Please read the comments made by the referee concerning Count III in the Report of Referee, pages 4, 5, and 11. (Appendix Ex. 1)

The referee found that Flinn offered into evidence, to a grievance committee, an affidavit signed by Mattie and William Bohannon, wherein the following words were added, without authority, to said affidavit, by Flinn, or at his direction, " ... and employ Gene Flinn and Bob Levy, exclusively, to pursue a claims bill to conclusion." (Bar Ex. 15 and Resp. Ex 45, T. 449-454)

On page 19 of Respondent's Brief, Flinn says there is no evidence that the affidavit was altered and he says his expert witness says there was no evidence of tampering.

Bohannon testified that the last line of the affidavit was not on the affidavit when she signed it. (T. 450-453)

Flinn's expert did not testify that there was no evidence of tampering as he represented to this Court. All that this expert testified to was that the same typewriter was used to type most sections. (T.904)

The expert witness went on to testify that he was unable to tell if they were typed at two different times, that a couple different girls could have typed it, and that it was possible that the paper could have been removed from the typewriter, inserted at a later date, and additional lines typed on it - but this was not his field. (T. 905)

On April 26, 1985, the date of the affidavit, Bohannon did not know Bob Levy. Also, on the date of the affidavit, there was no reason for excluding Buschbom, as the relationship between Flynn and Buschbom was good. (T. 553-555) On April 26, 1985, the date of the affidavit, there was no reason to hire a lobbyist. The next step involved post-trial motions and a possible appeal by the County. (T. 554)

In the Respondent's Brief, Flinn makes statements concerning Gene Flinn, Jr., his son. (Resp. Brief, page 21) He mistakingly believes that Gene Flinn, Jr. was testifying about the affidavit (Bar Ex. 15), which is dated April, 1985. Gene Flinn, Jr. is not testifying as to the affidavit (Ex. 15) of April, 1985. Flinn Jr. did not start practicing law until May, 1987.

It was Flinn, Jr.'s testimony that on August 19, 1987, Bohannon didn't want to pursue the Bar Complaint. Flinn, Jr. typed the statement and he saw Bohannon sign that statement. (Ex.17, T. 968-969) Flinn, Jr. was not testifying about the affidavit of April, 1985. Further, respondent's comments concerning the supplemental statements attached as Exhibit B, (Appendix to Respondent's Brief) are not part of the record. All of Gene Flinn, Jr.'s testimony refers to events that occured in 1987, and concerns the claims bill as of 1987, not 1985. (T.970-995)

Flinn's contention that Bohannon signed the affidavit while at the table in the courtroom contradicts Flinn's contention that Flinn, Jr. witnessed Bohannon sign the document. Flinn, Jr. was not at the trial. (T.997)

On page 22 of Respondent's Brief, Flinn attempts to attack the credibility of Bohannon, with the testimony of Randy Ripkey, George Slaton, and Shirley Small. It is for the referee to weigh credibility of witnesses. Ripkey was Mr. Bohannon's employer. (DEN 3) Ripkey found Mrs. Bohannon to be "flakey," because she constantly called the office asking where she could reach Mr. Bohannon. (Depo of Randy Ripkey, page 6) (DEN 67) Ripkey testified that he couldn't comment on the details of what Flinn was doing for them. (Depo of Ripkey, page 9) (DEN 67) Slaton does not state that Mattie Bohannon is completely undependable and not to be trusted. (Depo of Slaton, page 15) (DEN 67) Slaton had no idea what their reputation was. (Depo of Slaton, page 15) (DEN 67) Shirley Small's affidavit is not part of the record.

Attorney Buschbom testified that he had been dealing with Mr. and Mrs. Bohannon since 1981 and that he would believe them and that Bohannon's reputation for truth and veracity is good, i.e., "she tells the truth." (T. 615 -617)

COUNT IV

The referee found respondent not guilty.

COUNTS V AND VI

Please see Report of Referee, pages 5-8, Appendix Ex. 1.

Gregory, a worker's compensation attorney for 35 years, testified that he did not feel Flinn was competent as a worker's compensation attorney. (T. 11) He testified that respondent's actions are dilatory and he brings up ancillary matters that have nothing to do with the worker's compensation case. Flinn fails to appear timely, fails to follow rules and he fails to accept mail. Seventy percent of respondent's questions at hearings are irrelevant or immaterial. Respondent acts to the detriment of his client in regard to obtaining benefits. Respondent is unable to handle these cases properly, procedurally, administratively, and judicially. (T. 16-22)

Within the last 5 years, respondent has not done an adequate job in representing clients because of his manner, because of his asking questions that have no bearing on the issue, because of his bringing in issues that have nothing to do with the matter at hand, because of his inattentiveness, that he cannot make a competent, specific claim and cannot bring a matter to conclusion, and that he circumvents the judicial and administrative process. (T. 39)

Deputy Commissioner John Tomlinson, a deputy commissioner since 1979, testified as to respondent's incompetence. Tomlinson testified that respondent failed to adduce the proper proof in the Nieto case, the case was tried over an excessive period of time. (T. 74, Bar Ex. 1)

Moreover, he said that respondent does not posses the minimum standards. Respondent's train of thought is difficult to follow and he drags things on for inordinate lengths of time for the circumstances. (T. 81, 96) Respondent requires frequent breaks, which is disruptive. (T. 83) The Commissioners had a meeting with respondent in which they discussed these problems and suggested respondent associate with other counsel, since respondent seemed unable to bear the responsibilities. (T. 85) Respondent filed a motion that was legally insufficient. (T. 97, Ex. 7)

Steven Kronenberg, a worker's compensation attorney since 1977, testified that respondent took an inordinately long period of time to conclude a case, and repeatedly asked questions that had no bearing on the case and weren't material. (T. 187) Respondent fails to appear at hearings or depositions, or shows up late. Respondent asks incomprehensible questions that witnesses don't understand. (T. 188-189)

Alan Kuker, Deputy Commissioner, testified that up until the early 1980's, respondent was an average attorney. He then began to notice a lack of preparation in respondent, and believes he is now a below average attorney. (T. 236) He stated that respondent called a chiropractor to testify when he should have called the treating physician. (T. 242-243, 246)

William Johnson, a Deputy Commissioner since 1973, testified that respondent was not adequately representing his clients and the Commissioners had to help him represent those clients which wasn't fair to the opposing side. (T. 252) Respondent rambles alot, gets off the issues and off the point, and takes a long time to ask the questions he does ask. (T. 253)

Judith Nelson, a Deputy Commissioner, testified that respondent filed a legally insufficient motion, showed up with witnesses not on any pre-trial catalog, who had nothing to do with the motion to be heard. (T. 272-273, 280) Respondent is a poor worker's compensation attorney, less than competent, incompetent. (T. 277)

Respondent doesn't prepare, brings numbers of witnesses who are repetitive and irrelevant. Respondent's questions are confused and ramblings, and respondent is not prepared in a cohesive manner. (T. 277)

The three Doctors who testified on behalf of the respondent, Powell, Mitzner, and Burak, were chiropractors retained and paid by respondent as expert witnesses. (T. 628, 634, 671) Gren's sworn statement on Flinn's behalf is not part of the record.

Flinn's witness, Former Commissioner David Trask, couldn't say whether respondent tried cases competently. (T. 689) In Respondent's Brief, he writes about his good mental health. However, the referee made no findings of fact as to respondent's mental health.

Flinn's witness, Judge Wetherington, did not testify as to respondent's competence as a worker's compensation attorney. (T. 857-861) Deputy Commissioner Fontaine has not, in the last ten years, had any cases with respondent, except for one which involved the commissioner approving a joint petition stipulation. (T. 869-871)

Judge Block did not testify as to respondent's competence as a worker's compensation attorney. (T. 949) Respondent's witness, Reinert goes on to testify that at a pre-trial, respondent said he had medical reports which he later did not have. (T. 898) In one case, Reinert made an offer of settlement, he could never get a demand out of respondent, and the verdict was considerably below the offer. (T. 899)

Anagnost testified only as to his involvement with respondent in circuit court matters. (D. 14, 17)

Judge Seppi, a Deputy Commissioner in Broward County, testified that the respondent was asked at least three times for an accounting. However, Judge Seppi did not receive it. (T. 1110-1113)

COUNT VII

The evidence is clear and convincing that Flinn falsely and knowingly accused the following worker's compensation judges, formerly known as Deputy Commissioners, of bribery and corruption:

Alan Kuker (T. 234-237)
John Tomlinson, Jr. (T. 74-100)
William Johnson (T. 249-255)
Judith Nelson (T. 271-280)

Greg Marr, a former Department of Law Enforcement agent, testified that Flinn brought to his attention, allegations involving misconduct and unlawful compensation of the Deputy Commissioners. Marr contacted witnesses furnished by Mr. Flinn, but their information tended to refute those allegations. Marr found Flinn difficult to communicate with, and difficult to get precise information from. Marr concluded that there was not a sufficient factual basis to warrant any further investigation and the Florida Department of Law Enforcement closed its investigation. (DEN 176)

Robert Gregory testified that all the Deputies have integrity and honesty, and he would not question any of them. (T. 20-21)

Commissioner Trask, Flinn's witness, called Deputy Johnson a fine, fine judge. (T. 700) Trask had seen an accusatory letter from Flinn to Deputy Tomlinson involving the Deputy's honor and honesty. (T. 704-705) Trask never heard of a lawyer doing that. (T. 706, 707) There would be nothing to lead him to believe that these judges would be involved in bribery and corruption. (T. 722)

III

THE RESPONDENT'S CUMULATIVE OFFENSES, COUPLED WITH THEIR SERIOUS NATURE, WARRANT DISBARMENT

The respondent was found guilty of six counts, which involved cumulative misconduct, in addition to very serious violations. (RR, Appendix Ex. 1)

The offenses in this case are numerous, and constitute cumulative misconduct and warrant a more severe form of discipline than isolated misconduct. The Florida Bar v. Vernell, 374 So.2d 473, 476, (Fla. 1979).

With reference to Count II, the referee stated, "Although the respondent was not specifically charged with violating Rule 4-8.4(c), Rules Regulating The Florida Bar, the evidence elicited from Dr. Mitzner during cross-examination (Transcript 6/13/89, pages 642-653), plus other evidence, makes it clear and convincing, No, beyond a reasonable doubt, that the respondent violated Rule 4-8.4(c) of the Rules Regulating The Florida Bar, to wit: engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation." (RR 10-11, Appendix Ex. 1) This offense involved a defalcation of funds. (RR, Appendix Ex. 1)

Even though respondent wasn't specifically charged with violating Rule 4-8.4(c), it is considered relevant to the discipline to be imposed.

The Florida Bar v. Stillman, 401 So.2d 1306 (Fla. 1981) and The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1989).

In The Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1979), this Court stated misuse of client's funds is one of the most serious offenses a lawyer can commit. This Court went on to warn, "... henceforth, we will not be reluctant to disbar an attorney for this type of offense even though no client is injured."

In the case of The Florida Bar v. Powers, 458 So.2d 264 (Fla. 1984), this Court held that failing to account for trust monies, ... and failing to maintain records warrant disbarment. Also, the Florida's Standards for Imposing Lawyer Sanctions mandates that respondent be disbarred for his misconduct. Rule 4.11 provides for disbarment, "when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury." In this case, the respondent intentionally charged his client for services not performed and the client was injured. (T. 317-321; Bar Ex. 10; T. 558-559; T. 382, 389, 390-404; Bar Ex. 14 and 18; Bar Ex. 22; T. 642-653, T. 1223-1225)

As to Count III, at a Grievance Committee hearing, the respondent offered into evidence a copy of an affidavit, signed by Mattie and William Bohannon. Added to the affidavit were the words, "... and employ Gene Flinn and Bob Levy exclusively, to pursue a claims bill to conclusion." This was done without knowledge or approval of the Bohannons. (RR. 4 and 11, Appendix Ex. 1).

According to Rule 6.11(1), Florida Standards for Imposing Lawyer Sanctions, disbarment is appropriate when a lawyer: (a) with intent to deceive the court, knowingly makes a false statement or submits a false document.

In this case, the respondent knowingly submitted a false, altered affidavit, to a grievance committee. (RR 4 and 11, Appendix Ex. 1) It is the Bar's contention that altering the affidavit is tantamount to forgery.

Accordingly, Florida Standards for Imposing Lawyer Sanctions, Rule 5.11(b), is applicable in this case. This rule states:

> Disbarment is appropriate when (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

As to Count V and VI, the referee recommended that respondent be found guilty of neglect, incompetence, and lack of diligence. (RR, pages 5-8 and 12, Appendix Ex. 1).

The Florida Standards for Imposing Lawyer Sanctions, Rule 4.51, states that disbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

Rule 4.52 states that suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

As to part of Count VI and Count VII, falsely accusing worker's compensation judges (formerly known as Deputy Commissioners) of bribery and corruption,(RR. 8, 9 and 12, Appendix Ex. 1) the court has held as follows:

In the case of The Florida Bar v. Calhoon, 102, 608, So.2d 604 (Fla. 1958), the court disbarred Calhoon because of false accusations of bribery of a circuit court judge. This Court stated,

> ... a judge as a public official is not sacrosanct or immune to public criticism of his conduct in office, but, administration of the judicial process as an institution of government is a sacred proceeding.

Moreover the Court further stated,

> It would be contrary to every democratic theorem to hold that a judge or a court is beyond bona fide comments and criticism which do not exceed the bounds of decency and truth or which are not aimed at the destruction of public confidence in the judicial system as such. However, when the likely impairment of the administration of justice is the direct product of false and scandalous accusations then the rule is otherwise.

The Bar is aware of other cases involving lawyers who made statements denigrating judges, and said lawyers were disciplined by Public Reprimands.

In The Florida Bar v. Weinberger, 397 So.2d 661 (Fla. 1981), Weinberger, who was newly admitted to the bar, made public statements denigrating the courts and the administration of justice.

Weinberger apologized and offered to take further action to exhibit his remorse.

In The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1988), Mr. Clark was given a public reprimand for making false and unsubstantiated charges against the judiciary.

Like Weinberger, Bret Clark was also newly admitted to practice law when the offense occured.

In the case at hand, the respondent has been practicing law for many years. He was admitted to The Florida Bar on November 4, 1966. (RR. 14, Appendix Ex. 1)

In the Weinberger case, supra, there was an apology. However, in the case at hand, Flinn continues to attack the worker's compensation judges. (Respondent's Brief pages 43-47)

The record reveals that Flinn's responses to adverse rulings are to attack the judges by false accusations. He has alleged that there are many conspirators against him. (RR 7, Appendix Ex. 1) His latest attack is against the referee (Judge Birken) as follows:

Page 19, Footnote 14 of Respondent's Brief, where he states, "Referee is so biased ..."

Page 22 of Respondent's Brief, Flinn again refers to the referee as being biased, to wit: "The Referee is so biased during the trial, he says, "'It won't help you.'"

Again, on pages 42 and 46 of Respondent's Brief, the referee is referred to as being biased.

In the case at hand, Flinn falsely accused four Deputy Commissioners, now known as Worker's Compensation Judges, of bribery and corruption. (RR 9, Appendix Ex. 1)

The referee stated,

> There was not one scintilla of evidence presented to support any allegation of bribery or corruption on the part of the Worker's Compensation Judges. (RR 9, Appendix Ex. 1)

The Florida Bar realizes that disbarment is an extremely serious form of discipline and it does not recommend this discipline unless it is warranted.

According to Florida Standards for Imposing Lawyer Santions, Rule 9.1, "... after misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanctions to impose."

Rule 9.22 sets forth aggravating factors. Those factors which are applicable to this case are as follows:

(b) dishonest and selfish motive;

(d) multiple offenses;

(f) submission of false evidence; (during disciplinary proceedings)

(g) refusal to acknowledge wrongful nature of conduct;

(i) substantial experience in the practice of law.

Rule 9.32 lists factors which may be considered in mitigation. Of the factors listed, only (a), "absence of prior disciplinary record," applies in this case. Although there is a suspicion that factor (h), "physical or mental disability or impairment," may apply, a psychiatrist testified that Flinn was perfectly normal. (T. 912)

The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), discusses the purposes of discipline, as follows:

> (4) Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficent to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

In the case at hand, the Bar believes that a disbarment is warranted. First of all, we have a case which involves numerous serious violations, and as this Court stated in The Florida Bar v. Vernell, supra, cummulative misconduct is treated more severely than isolated misconduct. In addition, as stated in The Florida Bar v. Lord, supra, "the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public services of a qualified lawyer..."

In this case, it is obvious that the referee, several worker's compensation judges and lawyers, and Dr. Stillman do not consider Flinn a "qualified lawyer." (RR 5-8, Appendix Ex. 1)

Flinn's incompetence and misbehavior were so bad that all the worker's compensation judges in Dade County recused themselves from hearing his cases.

In addition to the above, Flinn's behavior was so bizarre, that he wrongfully accused the worker's compensation judges of bribery and corruption. (RR 9, Appendix Ex. 1) These false allegations against the judges were aggravated, as several judges (Deputy Commissioners) were involved and Flinn has not apologized and continues to insist that the judges are corrupt and took bribes, even though the referee found, "There was not one scintilla of evidence to support any allegation of bribery or corruption on the part of the worker's compensation judges." (RR 9, Appendix Ex. 1)

In this case, the discipline should be severe enough to deter others. When considering the defalcation of funds (RR 2-4), the forgery of an affidavit, and submitting said document as evidence to a grievance committee, (RR 4-5), we are referring to felony-type offenses, which require a very strong deterrant, such as disbarment.

The Lord case, supra, refers to being fair to respondent and encouraging reformation and rehabilitation.

However, the Bar submits that reformation and rehabilitation are extremely difficult, if not impossible, when there is no contrition and the respondent is still attacking almost everyone connected with this case, as can be seen by the tone of his brief, and the statements made in his brief, wherein he refers to corruptive practices and conspiracies. (Respondent's Brief, pages 2, 5, 7, 9, 33, 43, 44, 46)

In view of the above, The Florida Bar believes the respondent should be disbarred.

CONCLUSION

The respondent should be disbarred. He defrauded his client by charging for costs of a chiropractor, when no such costs were incurred. He knowingly submitted a falsely altered document in evidence to a grievance committee. In addition, he falsely accused four worker's compensation judges of bribery and corruption. Moreover, the evidence of respondent's imcompetence is overwhelming.

When considering the cumulative misconduct and the serious nature of the violations, a disbarment is warranted in order to protect the public and the reputation of the legal profession in Florida.

Accordingly, The Florida Bar requests this Court to affirm the findings and recommendations of the referee.

Respectfully submitted,

PAUL A. GROSS, ATTY. #032115
Bar Counsel,
The Florida Bar
Suite M-100, Rivergate Plaza
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief was mailed this 23rd day of April, 1990, to Gene Flinn, the respondent, 201 McCormick Building, 111 Southwest Third Street, Miami, Florida 33130.

PAUL A. GROSS, Bar Counsel
The Florida Bar