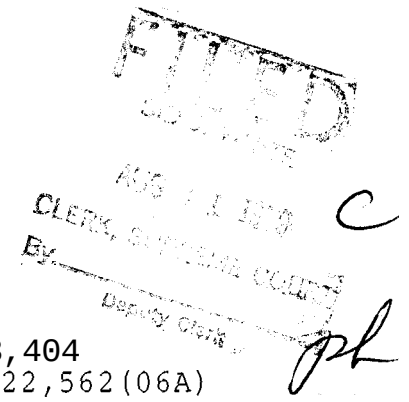

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THOMAS P. COLCLOUGH,

Petitioner,

CASE NO 73,404
TFB NO 87,22,562(06A)

vs

THE FLORIDA BAR,

Respondent.

PETITION FOR REVIEW

INITIAL BRIEF

OF

PETITIONER

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TABLE OF CITATIONS

PRELIMINARY STATEMENT

The parties will be referred to as they stood before the referee and the following symbols used:

T -	Transcript of Grievance Hearing before the referee April 21, 1989
TR-	Transcript of Hearing on Recommendations as to Disciplinary measures June 16, 1989
BAR EX. -	Florida Bar Exhibit
RESP EX. -	Respondent's Exhibit

STATEMENT OF CASE

On December 6, 1988, Respondent, THOMAS P. COLCLOUGH was charged by complaint filed by the Florida Bar with violations of the following disciplinary rules:

Disciplinary Rule 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); DR 1-102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); and DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law).

Respondent filed response and defenses December 27, 1988 and the matter was scheduled for evidentiary hearing before Referee Paul E. Logan on April 21, 1989. (T-Volume 1)

Hearing on Recommendations as to Discipline was held by the referee on June 16, 1989. (TR 1-52).

Report of the referee was issued June 26, 1989, recommending Respondent be found guilty of all counts and recommended a fixed suspension of twelve months and thereafter until Respondent proves rehabilitation and pays court costs of $2,070.63.

The Board of Governors of the Florida Bar

considered the referee's report at its meeting which terminated July 20, 1989. Petition to review the findings of facts and recommended discipline was filed August 2, 1989 pursuant to Rules of Discipline 3-7.6 Procedure before the Supreme Court of Florida.

STATEMENT OF FACTS

On July 1, 1986, Sixth Judicial Circuit Judge, Fred Bryson entered a judgment in the case of Bonnie Lee Holmes, Petitioner vs Gordon B. Hustin, Respondent, determining certain property rights and division of a Charles Schwab investment account. The Court directed Hustin to pay to Holmes the sum of $23,352.08 from said account. (BAR EX. 1) Thomas P. Colclough was attorney for Petitioner, Bonnie Lee Holmes in the litigation resulting in that judgment.

On August 14, 1986, Respondent, Colclough filed a Motion to Assess Costs in the Holmes vs Hustin matter attaching an affidavit for costs in the amount of $4,666.50 and noticing the motion for hearing on September 24, 1986.

The motion, notice and affidavit were served upon Mr. Hustin's counsel, Ms. Margaret Barr. (BAR EX. 2)

After Sheriff's deputies were "knocking on the door for execution..." on the July 1 judgment, Ms. Barr filed a Motion to Stay Execution and Notice of Hearing on Friday, August 15, 1986, setting the matter for hearing before Judge Bryson three days later on Monday, August 18 (T-110-111)

As Ms. Barr was not going to be present for the August 18th hearing, she enlisted attorney Meredith Craig to attend in her place. (T-112)

Ms. Barr also asked attorney Elizabeth Mansfield, an appellate specialist engaged by Mr. Hustin, to attend because she ".... felt like Mr. Colclough

beared (sic) some watching..." (T-113) Ms. Craig testified that Ms. Mansfield went because "..... she was familiar with the files and she had met the client ...." (T-29) Ms. Craig testified that prior to the hearing on August 18, there was some settlement discussion at the courthouse between her and Mr. Colclough and she asked "what would this do to the September 24 hearing on costs? Would this get rid of it." And he said "yes". (T-32) Ms. Craig testified that during the hearing on the Motion to Stay when she discussed a stay on the ..."$23,300 and something..." judgment Mr. Colclough stated execution was to be on a "...twenty eight thousand and something..." and that the difference "...was from a judgment that they had gotten for costs in the amount of $4,666.50." (T-37)

Ms. Craig stated she questioned the $4,666.50 figure because it was the same figure on the cost affidavit for the September 24 hearing she had previously seen in the file. She testified that Mr. Colclough said "that's a different cost hearing. This one is one we've already done." (T38)

Ms. Craig replied that "I think I qualified it and said I have no problem with these figures provided there is that previously entered judgment for that four thousand six hundred some dollars." (T-40) Ms. Craig testified that immediately following the August 18th hearing Mr. Colclough handed her the judgment for costs entered August 18, the Amended Notice of Hearing on costs set for August 18 and execution. (BAR EX. 3 - pages one and two and BAR EX. 5)

Ms. Elizabeth Mansfield testified that Ms. Barr asked her to go to the hearing "....because I was more familiar with the file" (T-76) and that she had reviewed the ..."file"... and ..."record"... (T-76) Further Ms. Mansfield was aware of Mr. Colclough's Motion to Assess Costs prior to the August 18 hearing. (T-77) Ms. Mansfield testified:

> A. Yes, Ms. Craig asked him what cost judgment he was talking about, where that four thousand and some thousand dollars came from. That she --she thought there was a hearing on that scheduled in September. And he said, no, this was something else that he had already gotten a cost judgment for this amount. I was also thinking too--wondering where this amount came from, and was, I think, looking through the file trying to locate something.
>
> Q. All right. What comments did the judge make in reference to the total amount of the execution that was going to be stayed or in reference to the total amount of bond that would have to be posted?
>
> A. The judge ordered a total bond of thirty-four thousand dollars, which included the twenty-three thousand in the final judgment, the forty-six hundred for costs, plus double the statutory rate of interest.
>
> Q. All right. At any time during the hearing did you object to the judge considering the $4,666.50 as part of the total amount of money to be bonded?
>
> A. I personally did not object. Ms. Craig repeatedly asked where this figure came from. However, since Mr. Colclough said he already had a judgment for that amount, and the judge ordered that he would be computing the bond based on a total amount of twenty-eight thousand. That was the end of it.
>
> (T-83,84)

Ms. Mansfield further testified:

> He and Ms. -- let me back up a moment. He and Ms. Craig were discussing where exact figures on the supersedeas bond. He was trying to explain that to Ms. Craig. I asked him again, where did you get this judgment for forty-six hundred dollars? I didn't know about it. Where did it come from?
>
> And at that point he handed me the judgment for cost for forty-six hundred dollars and a writ of execution in the same amount, which were dated that date.
>
> (T-85) (Emphasis supplied)

Ms. Mansfield testified that she received the copy from Mr. Colclough (Cost judgment entered August 18, 1989) with Judge Bryson's stamp. (T-86)

On cross examination by Respondent Colclough's attorney Ms. Mansfield testified:

> Q. Okay. And certainly there would be no cost judgment entered in advance of a final judgment?
>
> A. No, correct.
>
> Q. And the final judgment was entered in July?
>
> A. Correct.
>
> Q. The month previous?
>
> A Correct.
>
> Q. And there was no intervening judgment for costs?
>
> A. Correct.
>
> Q. So --
>
> A. Yeah, that I was aware of.

Q. That you were aware of. And certainly had there been a judgment for costs entered prior to a final judgment on the merits, that would have been highly unusual?

A. Correct.

Q. So you get to this hearing and the subject of this cost judgment comes up at the hearing and you and Ms. Craig rely upon representaton by Mr. Colclough that there had been a previous cost judgment entered, is that your testimony?

A. Unfortunately, that is my testimony.

(T-95,96)

On August 25, 1986, Ms. Margaret Barr filed a Motion to Vacate the Cost Judgment of August 18 (BAR EX. 11 A.B.C.)

Judge Bryson set aside the cost judgment at a hearing on August 29, 1986 (BAR EX. 12) and the matter was reset for hearing on December 15, 1986. (BAR EX. 14) That hearing did not reach the merits due to Mr. Hustin's filing bankruptcy. (BAR EX. 14)

At the hearing on December 15, 1986, Respondent Colclough advised the Court:

Now, the problem is there can't be a hearing today because of the bankruptcy stay. The allegation relates to my subsequently getting a second money judgment against Mr. Hustin for the costs. If you would recall what had happened here originally was Mrs. Barr came into the case and filed a motion for stay of execution. I had a money judgment for $23,352.08. I had that judgment August 26. Margaret filed -- or Margaret had a hearing August the 18th to stay that judgment. Margaret gave me notice of hearing on the 15th, which was a proceeding Friday, so I had previous a motion for costs scheduled for September the 24th. The motion for costs would be for somewhat in excess of four thousand dollars. I had gotten short-

timed on a hearing; Margaret didn't come. I think Elizabeth Mansfield came along with Meredith Craig. So I did my cost hearing at the same time -- you'll get your shot, ma'am. BAR EX. 14, pages 2 and 3

* * *

...because there's an allegation of fraud out here on the part of Margaret Barr. She's made an allegation of fraud and I don't want an allegation running around like that because they're not good things to have running around. BAR EX. 14 page 4

* * *

...and then the remaining issue would be whether or not Margaret Barr would be entitled -- she has a motion for an attorney's fees because she's saying there's been a fraud committed upon the Court and obviously there hasn't been as I've explained it to you today. You know what the circumstances were. BAR EX. 14 page 4 and 5

Respondent Colclough, at the December 15 hearing asked:

Can you go ahead and at least for future reference state at least for the purposes of our reporter that you are aware of how these hearings came about to kill them?

THE COURT: All I have is a recollection of a series of very quick hearings.

MR. COLCLOUGH: That's correct.

THE COURT: Now, what happened, I don't remember. I hear I don't know how many of these things a month. All right.

(BAR EX. 14, page 6)

At the grievance hearing Judge Fred Bryson testified:

Q. Can you, sir, testify directly for his Honor one way or the other as to whether or not any document was presented to you for signature in the matter of Holmes versus Hustin at any time prior to the commencement of or after the conclusion of that hearing on August 18?

A. Yes, sir, there was none.

(T-139)

Judge Bryson further testified with regard to the August 18 hearing:

The Parties appeared. I do have a recollection of the fact that Mr. Colclough sat there to my left and the two ladies, Ms. Craig and the other lady's name I don't remember, sat to her right. They discussed the entry of a stay or supersedeas, at which time Mr. Colclough indicated that he had some time -- it was either in the next week or the week following to have a motion heard for a judgment entered for the taxation of the cost, the cost figure was either in the mid three thousands or mid four thousands, which would seem to be somewhat abnormal.

But I think what we had involved here was an attempt by -- by the lady to, through the use of appraisers, to establish the values of the property to bring to my attention sufficient facts necessary from which I could make an equitable decision (sic) of the property.

Mr. Colclough suggested that even if he had the time set in the week or the week after, was there any reason that we couldn't hear that cost that morning. I recall there being no objection.

I can further say this, that had there been one we would have not had that hearing that morning. We would have had it at a later date. Because I have, throughout my professional career, been in the courtroom and I never like to see people lose by default.

I signed the costs judgment. My recollection I did some arithmetic and told the ladies that were there what it would take in amount of money, bond, or whatever they chose to post in the form of a supersedeas or a stay then included amount of the cost judgment.

If I'm not mistaken the money judgment was either twenty, thirty thousand dollars, somewhere in that neighborhood, and the cost of course in addition to it.

It was signed, it being the cost judgment was signed, and having seen a copy of that judgment since then I can ninety-nine and forty-four one hundred percent pure say that it was not conformed by me. It was conformed by my secretary whose office is immediately adjacent to mine. I say this because my conforming stamp is in the form of a script and her's in a block conforming stamp appears on the copy of that cost judgment.

(T-142-144) (Emphasis supplied)

and

Now, whether these ladies fully understood, I don't know. My recollection was that they were sent over there for one purpose, and then were -- now, we have two purposes, and what they fully understood or didn't understand, I don't know.

But certainly if they felt they had been short sheeted all it would have taken would have been a vocalization of that feeling and everything would have stopped and we would have dealt with it at another time when they felt that they were more fully informed to cope with it.

(T-150)

Judge Bryson's affidavit (RESP EX. 1) reflected:

> There was no representations by Mr. Colclough of a previously obtained judgment in the amount of $4,666.50; there was no misconduct or misrepresentations by Mr. Colclough in any manner in that hearing and the Motion to Tax *Costs* and judgment thereon was entered after affording attorneys for Mr. Hustin to voice any objection they may have had.

Respondent Thomas P. Colclough testified as to the litigation between Holmes-Hustin as follows:

> A. Judge, just very briefly, the parties had been living together from a period of 1980 until 1985. They had acquired, and God love them for it, a tremendous amount of real estate through the use of capital gains that existed at that time, various shelter provisions. There came a point in 1985 where their relationship terminated.
>
> Mrs. Holmes came to see me. More properly, Mrs. Holmes came to see my partner, Jim Wallace. Jim had referred her to me.
>
> And under a theory of -- alternate theories of declaratory judgment, and/or constructive trust, and/or a quantum merit theory I was able to state a cause of action, did the appropriate discovery, had a full blown trial, a final judgment was rendered by Judge Bryson on July the 8th, 1986. (sic July 1, 1986)
>
> Essentially Judge Bryson divvied up the property and gave to Mrs. Holmes a judgment in the amount of $23,352.08.
>
> (T-182-183)

It was on Friday, August 15, that Respondent received Ms. Barr's Motion to Stay and Notice of Hearing setting Monday, August 18, 1986 for hearing on that Motion (T-186)

He stated he felt the short notice improper in that Ms. Barr did not clear the Monday hearing time with his office. (T-187)

As to the presentation of the cost motion on August 18, Respondent Colclough stated:

> And I told Mrs. Holmes that we should in fact have our cost hearing at that time. The reason we should do it, your Honor, would be so that Mr. Hustin could post supersedeas in one amount and so I did not have to come back before Judge Bryson on September the 24th, 1986.
>
> Your Honor, if I had had to come back before Judge Bryson I would have been faced with dual procedures, the duality that I specifically refer to, and -- would be, your Honor, that I would have had to force Mr. Hustin to post a supersedeas bond in the amount of $23,352.08 plus an additional $5,604.50 for his stay on the money judgment and he would have had to post another supersedeas bond after September the 24th, 1986 for the $4,666.50 plus two times the legal rate of interest $1,119.96. I said let's clean up, get it done at one time.
>
> (T-189-190)
>
> ***
>
> A. No, I had no, absolutely no knowledge when I went to that hearing that I would see Meredith Craig or Ms. Mansfield. I fully expected to see Margaret Barr. And in fact, your Honor, my Amended Notice of Hearing that indicates that I would bring on to be heard on August the 18th my cost monies -- or my cost hearing previously scheduled for September the 24th, 1986 would reflect a certificate of service to Margaret Barr of August the 18th, 1986 by hand delivery. The reason is I fully expected when I went to the fourth floor, Judge Bryson's chambers, or more specificially the courthouse that I would run into Margaret Barr but I did not.
>
> (T-191)

***

A. Certainly. Your Honor, prior to going in to see Judge Bryson I met with Meredith Craig. I told Meredith Craig that I would be accelerating the hearing for September the 24th, 1986, and I would be seeking that the Judge entertain that motion and that hearing right now. I made that clear, there was no doubt in my mind whatsoever that that was made fully clear.

(T- 192)

***

And I asked the judge, I said, "Your Honor, so I'm cutting back in here wasting everybody's time let's do the cost hearing of four thousand six sixty-six fifty. If you total up those sums they come to $28,018.58. And then if you calculate the supersedeas on that that comes to thirty-four thousand seven forty-three oh four. I made it abundantly clear I'm not going to come back and waste everybody's time and money. Let's just do it all at the same time.

Judge Bryson specifically asked if Meredith Craig or Ms. Mansfield had any objections. No objection whatsoever was voiced at that time.

Judge Bryson granted the stay of execution. He orally granted it and he said that the amount of the stay would be calculated on the original money judgment in the amount of twenty-three thousand three fifty-two oh eight.

And, your Honor, he did in fact, in my presence and in the presence of the two attorneys, sign a money judgment in amount of $4,666.50. He did in fact in my presence and the presence of the other two attorneys did in fact sign a motion or a writ of execution on that particular sum of money. He did in fact inform all three attorneys that he would entertain the stay and grant the stay with the supersedeas and the proper amount was posted.

(T-193-194)

***

A. Absolutely not. There was no previously obtained cost judgment. I had a straight forward final judgment entered July the lst, 1986 with a part of that judgment in addition to a division of property being a judgment in the amount of twenty-three thousand three fifty-two oh eight.

I had a cost hearing set for September the 24th, 1986, which was perhaps six weeks away from when I was present. These were all of the judgments that this case dealt with. There was nothing for me to represent to the court that there had been some previously obtained judgment in the amount of $4,666.50. That statement, I wouldn't make that statement because it makes no sense.

(T-195-196)

The referee in his report dated June 26, 1989 found, inter alia,

M. Mr. Colclough fraudently represented to Ms. Craig, Ms. Mansfield and Judge Bryson that a hearing on costs had already been held, that a Money Judgment for costs had already been obtained, and that the Cost Hearing scheduled for September 24, 1986 was for something else.

***

Q. As a result of Mr. Colclough's representation that a Cost Judgment in the amount of $4,666.50 had already been obtained, these costs were added to the previously ordered Money Judgment of $23,352.00, and a proposed Order for a supersedeas bond in the amount of the two sums, plus interest, for a total of $34,733.00 was prepared for the Court by Mr. Colclough.

R. Immediately following the hearing on August 18, 1986, Mr. Colclough gave attorneys Mansfield and Craig an executed copy of a Money Judgment for costs and Execution for the sum of $4,666.50. In addition, Mr.

Colclough submitted to Ms. Craig an Amended Notice of Hearing which provided that the Motion to Assess Costs scheduled for September 24, 1986, would be heard August 18, 1986.

***

T. No hearing had been held on the Motion to Assess Costs at the time Mr. Colclough obtained the aforementioned Money Judgment for costs and the Execution.

Based upon the report findings the referee recommended a twelve month suspension and thereafter until Respondent proved rehabilitation.

At the hearing on recommendations as to disciplinary measures Respondent submitted character references from area attorneys and Circuit Judge Thomas E. Penick as to Mr. Colclough's character and legal ability. St. Petersburg Attorney, James D. Eckert, attorney and former Circuit Judge Michael N. Athanason, Pinellas Sheriff and attorney, Everett Rice, Respondent's wife and Respondent testified as to Respondent's character.

Thomas P. Colclough has been married 12 years. He became employed with Howard County Police Force in 1973, at age 19. He attended the Police Academy in 1975, graduated, became a patrolman and later a detective. While employed in law enforcement Mr. Colclough obtained a two year enforcement and a four year degree in business from University of Maryland. (TR-23) Mr. Colclough was cited for significant service in his police work. (TR-27)

Thereafter, Respondent moved to Florida, enrolled in Stetson College of Law, graduating in 1984. Respondent was unable to pursue law enforcement after graduation and became employed in the general practice of law.

Mr. Colclough testified:

> A. Yes. I've turned this over in my mind every day, and I knew it was going to come to this. I knew I'd have to look at you across the table and look at you and I've thought about this every day since I knew that we were going to come to this, and I've considered, if I just say I'm sorry, I was wrong, it was stupid, I apologize. I've considered that because it may very well go to some sort of leniency hearing, and I have kicked that thing over in my mind left and right, back and forth, and the truth of the matter is I didn't do it and I'm very, very sorry that--your Honor, you did your job and that's--you're a judge and I'm not, but I didn't do it and I'm very, very sorry that we see differently, but I didn't do it, and, you know, quite frankly, I mean, I have been offered a public reprimand prior to coming in for the trial.
>
> (TR-33)

Thomas P. Colclough has an unblemished record before the Bar. (TR-37)

SUMMARY OF ARGUMENT

ISSUE I

Respondent, Thomas P. Colclough, submits that the referee's findings of guilt as to alleged fraudulent representations to opposing counsel and the Circuit Judge are not supported by clear and convincing evidence. Examination of the testimony before the referee demonstrates that neither opposing counsel could recall whether Circuit Judge Bryson signed a judgment order during a supersedeas hearing. Both counsel conceded they received the judgment order dated August 18 immediately after the hearing and that the cost judgment amount was added to the money judgment amount to arrive at a supersedeas figure. Judge Bryson and Mr. Colclough both testified the cost judgment was entered without objection of counsel.

ISSUE II

Respondent Colclough's alleged ethical misconduct consists solely of an accusation of misrepresentation as to entry of a cost judgment. While the findings of fact are disputed as not supported by the evidence, Respondent submits that the recommended discipline of one year suspension and thereafter until proof of rehabilitation is a manifestly unjust punishment. Most Supreme Court decisions involving a single episode of fraud or misrepresentation to a court

fall in a penalty range from public reprimand to a ninety day suspension. Suspension is unwarranted. Mr. Colclough has a professional reputation and record free from ethical offenses. As succinctly stated in State ex rel Florida v Murrell, 74 So. 2d 221 (Fla. 1954)

> Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him. 74 So. 2d at page 223

ARGUMENT

ISSUE I

CERTAIN FINDINGS OF FACT IN PARAGRAPH II OF THE REPORT OF REFEREE ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE

The gist of the complaint (paragraph 14) against Respondent Colclough was that he engaged in ethical misconduct by ...."fraudulently representing to Ms. Craig, Ms. Mansfield and Judge Bryson that a hearing on costs had already been held, and that a money judgment for costs had already been obtained and that the cost hearing scheduled for September 24, 1986 was for something else." The referee tracked the wording of the complaint in his finding, paragraph M Report of Referee.

Such finding is not supported by the requisite clear and convincing evidence necessary to sustain a bar discipinary complaint.

By all accounts, all counsel, especially Ms. Craig and Ms. Mansfield, were aware of Respondent Colclough's Motion and affidavit for costs in the amount of $4,666.50 prior to the August 18th hearing. Ms. Barr sought to obtain supersedeas or stay of the $23,350.00 judgment by short notice to Mr. Colclough. Mr. Colclough simply tried to resolve the pending cost matter at the same hearing so that but one hearing and, presumably, one supersedeas be posted to cover the principal judgment and costs.

A finding that Mr. Colclough fradulently represented that a prior cost hearing was held or judgment was obtained is diametrically opposed to Ms. Craig and Ms. Mansfield's testimony that they had reviewed and were familiar with the Holmes vs Hustin file. The referee's finding that Craig and Mansfield were substitute counsel for Ms. Barr and "...were thus unfamiliar with the Holmes-Hustin case..." is totally contrary to the testimony of Ms. Craig and Ms. Mansfield. (T-29 & 76)

Additionally, Craig and Mansfield's claim and the referee's finding that Mr. Colclough stated the hearing on September 24 was for "something else" is inconsistent with the record and those attorneys' professed familiarity with that record. The hearing scheduled for September 24 was only for the motion for costs and could not be interpeted to be for something else. Likewise, it would make no sense for Mr. Colclough to represent that a cost hearing had already been held or that a cost judgment had previously been entered when the court file (in effect, the best evidence) reflected that was not the case.

Respondent submits that the finding in Paragraph R of the Report of Referee, which tracks Paragraph 18 of the Bar Complaint nearly verbatim, that immediately following the August 18th hearing Mr. Colclough "...gave attorneys Mansfield and Craig an executed copy of a money judgment for costs and execution for the sum of $4,666.50" raises the serious question as to why the attorneys did not object at that time.

In addition, Mr. Colclough submitted to Ms. Craig an Amended Notice of Hearing which provided that the Motion to Assess Costs scheduled for September 24, 1986 would be heard August 18, 1986. (Emphasis added). Paragraph S finds "the money judgment for costs and execution were signed by Judge Bryson on August 18, 1986." (Emphasis added).

Thus by all accounts, both Mr. Hustin's attorneys were immediately made aware that the cost hearing on September 24 was for the same costs as the costs sought August 18. Again, Ms. Craig-Ms. Mansfield's testimony of being misled is inconsistent with the clear record. It would seem reasonable to conclude that if either attorney felt deceived or confused over what costs were at issue the cost judgment dated August 18 would cause them to immediately and indignantly revisit Judge Bryson for correction and clarification instead of doing nothing until Ms. Barr's return.

The testimony of Judge Bryson and Mr. Colclough is consistent with the actual record of proceedings in Holmes vs Hustin that the cost issue was raised at the August 18, 1986 hearing without objections from Ms. Craig or Ms. Mansfield. The testimony of Ms. Craig and Ms. Mansfield simply does not find support in the record in Holmes vs Hustin and certainly cannot be considered to be clear and convincing that a fraud or misrepresentation was perpetrated on Judge Bryson or opposing counsel.

Although the referee finds that at a hearing on December 15, 1986 Judge Bryson said he did not remember what happened at the hearings held on August 18 and August 29, 1986 (Paragraph 2) there is no finding that Judge Bryson's subsequent recollection and testimony that there was no fraud or misrepresentation by Mr. Colclough was anything but correct. The referee's finding in Paragraph P that no orders were signed by the judge during the hearing is not supported by clear and convincing evidence. Ms. Craig testified:

> I do not recall him executing any orders during the hearing. (T-40)

Ms. Mansfield testified:

> I don't know when the order was signed. (T-98)

Mr. Colclough testified that the order of August 18 was signed at the hearing on August 18. (T-194) Judge Bryson testified:

> I signed the costs judgment. My recollection I did some arithmetic and told the ladies that were there what it would take in amount of money, bond, or whatever they chose to post in the form of a supersedeas or a stay then included amount of the cost judgment. (T-143)

The referee did not find that Judge Bryson's testimony was not to be credited. Of course, he could make no such finding because a lack of recollection by Judge Bryson on December 15, 1986, is not probative of his recollection at the time of the disciplinary hearing or at the time he executed his affidavit, after he would have had an opportunity to carefully review the

file and otherwise refresh his memory in view of the importance of such recall in a disciplinary proceeding. Such a finding is essential to support a finding of guilt. This is so because the testimony of Judge Bryson, the Circuit Judge before whom this episode occurred, completely exonerates the Respondent. Judge Bryson, contrary to the referee's finding M, categorically denies that Colclough fraudently represented any matter to him or Hustin's attorneys.

The decision in Florida Bar vs Lancaster, 448 So. 2d 1019 (Fla. 1984) holds that failure of a referee to make specific findings of fact as to an allegation precludes a finding of guilt. While findings of fact of a referee are entitled to the same presumption of correctness as the judgment of the trier of fact in a civil proceeding they must be supported by the evidence. Florida Bar vs Hawkins, 444 So. 2d 961 (Fla. 1984), Florida Bar vs McKenzie, 442 So. 2d 934 (Fla. 1983) and Florida Bar vs Hirsch, 359 So. 2d 856 (Fla. 1978)

Since the referee's findings, in critical respects, are not supported by clear and convincing evidence, his recommendation of guilt must be rejected.

ARGUMENT

ISSUE II

THE RECOMMENDED DISCIPLINE OF ONE YEAR SUSPENSION AND THEREAFTER UNTIL RESPONDENT SHALL PROVE REHABILITATION IS EXCESSIVE AND NOT SUPPORTED BY THE EVIDENCE OR FINDINGS OF THE REFEREE

The Florida Supreme Court, in grievance matters, has held disbarment and suspension should not be imposed lightly.

> Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferrable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him. (State ex rel. Florida Bar v. Murrel 74 So. 2d 221, 223 (Fla. 1954)

In the case of The Florida Bar v Wendel, 254 So. 2d 199 (Fla. 1971) the referee concluded that the Respondent misrepresented to the court that opposing counsel knew of a hearing date, that a secret custody agreement was entered into

to perpetrate a fraud on the court and that Respondent falsely testified before the grievance committee that he had prepared the agreement following a discussion with opposing counsel.

In its opinion The Supreme Court stated:

> The evidence in the record is not as clear and convincing to us of misconduct on Respondent's part to the degree the Referee found it. That is to say, we do not conclude therefrom that Respondent's misbehavior reached proportions warranting the extremely severe punishment recommended by the Referee and the Board of Governors, respectively. 254 So. 2d at page 201

(Referee recommended two year suspension. The Florida Bar recommended disbarment.) The Supreme Court on those findings recommended a public reprimand and two years probation.

The threefold purpose of attorney discipline is set forth in The Florida Bar vs Hartman, 519 So. 2d 606 (Fla. 1988):

> 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 sufficient 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. (519 So. 2d at page 605)

Although Respondent maintains that there is no clear and convincing evidence as to any misrepresentation, the referee's finding in paragraph M of his report is the gravamen of this disciplinary action. That paragraph states:

> Mr. Colclough fraudulently represented to Ms Craig, Ms. Mansfield and Judge Bryson that a hearing on costs had already been held, that a money judgment for costs had already been obtained, and that the cost hearing scheduled for September 24, 1986, was for something else.

In canvassing cases which involve fraud, deceit or misrepresentation to the court, no case has been found which imposes a penalty as severe as a one year suspension. In fact, most such cases seem to range between a public reprimand and a ninety day suspension. Respondent submits that the cases cited hereafter involve fact situations much more aggravated than Mr. Colclough's alleged misrepresentation.

In The Florida Bar vs Anderson and McClung, 538 So. 2d 852 (Fla. 1989) the Supreme Court ordered a 30 day suspension for Mr. McClung and a public reprimand for Ms. Anderson for conduct "....that Respondents not only misrepresented the facts to the district court but failed to correct

the misrepresentation even when they were brought to their attention." 538 *So.* 2d at page 854

In Hodkin vs The Florida Bar, 293 *So.* 2d 56 (Fla. 1974) the referee had found "....respondent's initial decision to bring the lawsuit in the name of Alice Lehr demonstrated poor judgment." However, he found that this was a minor infraction as compared to:

> ...the charade of deception which he practiced to carry this cover-up of his ownership of the stamp collection. ...The original decision of respondent to avoid any liability by bringing the suit in his housekeeper's name against the defendants involves a misrepresentation on the court. 293 So. 2d at pages 58-59

Nonetheless, the Supreme Court stated that the "...weight of the evidence is not sufficient to justify disbarment or suspension from the practice of law." 293 So. 2d at page 59 The Court instead imposed a public reprimand.

The case of The Florida Bar vs Kauffman, 498 *So.* 2d 939 (Fla. 1986) involved submission of a forged document to the court.

> ..we agree with the Bar that submitting a forged document to a court is a serious offense which should not, and will not, be tolerated. Such a fraud on the court clearly cannot be considered minor misconduct for which a private reprimand is appropriate. 498 So. 2d at page 940

The Court ordered a thirty day suspension.

The Florida Bar vs Oxner, 431 So. 2d 983 (Fla. 1983) involved respondent's lying to a circuit judge to obtain a continuance. The referee found:

> The evidence is uncontroverted that Respondent deliberately lied to Judge Fine, both by telephone and in Court to obtain a continuance. 431 So. 2d at page 985

The Supreme Court ordered a ninety day suspension.

In The Florida Bar vs Milin, 517 So. 2d 20, (Fla. 1987) Milin submitted false affidavits to the Court and misrepresented her status as an active attorney (when under a suspension for non payment of dues). The referee found:

> On count one, the referee found that respondent, having moved to disqualify a judge in a criminal case, stated in support of her motion that a number of local attorneys had described the judge as prejudiced in certain kinds of cases. The attorneys were found not to have made the statements.
>
> * * *
>
> The final item of misconduct found was based on respondent's appearance as an attorney in court at a time when she had been suspended for nonpayment of dues. She also misrepresented her status to the judge. 517 So. 2d at pages 20-21

The Supreme Court suspended Milin for ninety days.

In The Florida Bar vs Batman, 511 So. 2d 558 (Fla. 1987) the respondent attorney received a public reprimand in a proceeding wherein the referee found that he had "...testified falsely concerning his practice of law in representing clients during his time of suspension for non-payment of dues." 511 So. 2d at page 558

Raising groundless defenses in an action against an attorney for payment of a promissory note warranted a public reprimand in The Florida Bar vs Anderson, 515 So. 2d 224 (Fla. 1987)

The Supreme Court suspended respondent Saphirstein for sixty days in The Florida Bar vs Saphirstein, 376 So. 2d 7 (Fla. 1979). In so doing, the Court stated:

> We reach this conclusion based on the fact that Saphirstein not only attempted to influence a referee's decision in a disciplinary matter but also filed a knowingly false response accusing the referee whom he sought to influence of lying about what happened. Saphirstein's reprehensible conduct of falsely accusing the referee of lying, in addition to attempting to influence her decision in a disciplinary proceeding, is prejudicial to the administration of justice and cannot be excused by the mitigating circumstances delineated in the referee's report in the present case. Saphirstein's false response to the Florida Bar's complaint aggravated the seriousness of his misconduct. A disciplinary penalty must be fair to society and protect it from unethical conduct while not denying the public the services of a qualified lawyer by an

> unduly harsh discipline. It must be fair to a disciplined lawyer by punishing him for the misconduct while at the same time encouraging rehabilitation, and it should be severe enough to deter others from similiar misconduct. 376 So. 2d at page 8

In the recent Florida Supreme Court case of The Florida Bar vs Waller, _____ So. 2d _____, (Fla. unpublished opinion, Case No. 73-111 June 1, 1989) the Respondent was suspended for sixty days. The facts in Waller revealed the attorney agreed to purchase property from a woman who was going through a divorce. Waller later represented the woman in her divorce but did not make public the agreement or reveal it to the husband's attorney. The wife falsely testified at deposition that she did not expect to receive any profit from the sale and Waller did not ask her to rectify the statement. Waller also met with his client and her husband to reach a settlement without first consulting with the husband's attorney.

Colclough's background as brought out at the hearing on Recommendation as to Disciplinary Measures, clearly establishes that he has an outstanding reputation and ability as a practicing attorney. His record is unblemished. His law enforcement career and later pursuit of a legal career exemplify that Thomas P. Colclough is a reputable servant of the law. He certainly obtained no material or personal gain in obtaining a cost judgment after a money judgment was entered. He simply

sought to conserve judicial labor by avoiding an additional hearing to accomplish essentially a ministerial act.

Likewise no undue harm befell the litigant as the controverted cost judgment was promptly vacated. The opposing attorneys claimed to be deceived by a misrepresentation that a simple review of the court file in the Holmes vs Hustin case would establish as incorrect. No doubt Mmes. Craig and Mansfield failed to comprehend all that transpired at the hearing on August 18, 1986, however, it is a quantum leap from their misunderstanding to a finding of misrepresentation by Mr. Colclough. The record simply does not support this leap. Mr. Colclough's conduct does not warrant a suspension from the practice of law.

CONCLUSION

Thomas P. Colclough submits that the evidence does not support a finding of guilt by clear and convincing evidence. Furthermore, the recommended discipline is not supported by clear and convincing evidence and is excessive under the facts brought out at the grievance hearing. Respondent requests this Court enter its judgment finding the Respondent not guilty.

Respectively Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by US Mail this the 30th day of August, 1989, to:

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