IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

CASE NO.: 74,030

THE FLORIDA BAR, :

Petitioner, :

vs. :

FLORIDA SERVICE BUREAU, INC., :

Respondent. :

RESPONDENT'S INITIAL BRIEF

BERNARD B. WEKSLER, ESQ.
522 Gables International Plaza
2655 Le Jeune Road
Coral Gables, Florida 33134
(305) 446-2826

FLORIDA BAR NO.: 086117

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INTRODUCTION

Respondent, FLORIDA SERVICE BUREAU, INC., objects to the Referee's written Report recommending that the Respondent be enjoined from certain activities and from otherwise engaging in the practice of law. The original record should have been filed with this Court together with the Report.

The symbol "T" will be used to designate the 135 page transcript of the hearing. The exhibits introduced into evidence will be designated as they were in the trial court. The pleadings will be referred to by name. All emphasis has been added unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

On April 18, 1989, The Florida Bar as Petitioner, filed a verified Petition Against the Unlicensed Practice of Law in the State of Florida, charging the Respondent with engaging in the unlicensed practice of law in the State of Florida. The Petition referred to the Respondent as an "eviction service" servicing clients in Dade and Broward Counties.

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The Petition further alleged that the Respondent performed one or more of various acts including: (1) offering legal services to the public through members of The Florida Bar, (2) maintaining control over the legal services that are offered and controlling who the clients will be, (3) being paid by the client for rendering legal services with a percentage being paid by the Respondent to an attorney, (4) employing lay personnel to assist the attorney, (5) retaining the clients' files and having access to the clients' files, and (6) maintaining and controlling all communications with the client.

The Florida Bar further alleged that such acts violated the spirit and intent of this Court's decisions in four (4) cases, i.e., The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962); The Florida Bar v. Consolidated Business and Legal Forms, 386 So.2d 797 (Fla. 1980); The Florida Bar v. Mickens, 465 So.2d 524 (Fla. 1985); The Florida Bar v. Mickens, 505 So.2d 1319 (Fla. 1987). The Florida Bar prayed for a permanent injunction preventing the Respondent from engaging in the acts complained of and from otherwise engaging in the practice of law.

This Court issued an Order to Show Cause on April 21, 1989, requiring the Respondent to show cause why it should not be enjoined from the alleged practice of law. The

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Respondent was served in Dade County on May 4, 1989. The Respondent's Answer to Petition Against the Unlicensed Practice of Law was mailed to this Court on May 22, 1989, and received on May 23, 1989.

In its Answer, the Respondent denied that it engages in the practice of law in the State of Florida. The Answer alleged that the Respondent is not an eviction service, but is an independent Landlord/Tenant consultant, and assists landlords in tenant evictions and rent collections. The Respondent's employees obtain information from the Landlord verbally and in writing.

The Landlord, not the Respondent, prepares the Statutory Three-Day Notice, with the Respondent posting or delivering the Three-Day Notice to the Tenant. The Respondent denied that it prepares any Complaints for Tenant Eviction. The Complaint is prepared by a licensed attorney, Jay L. Fabrikant, or a paid employee of Jay L. Fabrikant, under the supervision of the attorney. The Complaint is signed by the attorney for the Landlord. The Landlord client is aware that the preparation of the Complaint, and the legal services in the Court proceedings will be performed by the attorney.

The Letter Agreement form attached to the Petition as Exhibit "A" recognizes that Attorney Fabrikant is retained

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to act as legal counsel for the Landlord client. The Respondent is not paid by the Landlord for any legal services. The Respondent does not fill out or complete any eviction forms, and does not appear in court or in any other judicial tenant eviction proceedings.

The Respondent's Answer denied that Attorney Fabrikant receives any percentage of the Respondent's fixed charges. The attorney receives a fixed fee for his legal services in preparing and prosecuting a court action filed on behalf of the Landlord client, and receives an additional fee from the Landlord client in the event of a final evidentiary hearing. It was admitted that the Respondent remains in contact with the Landlord during the eviction process, because the Respondent performs varied non-lawyer services for the Landlord, such as courier services, and maintains communications regarding the tenants' arrearages, maintenance complaints, rent collections, rental charges, etc.

The Answer denied that the Respondent is in the business of offering legal services. The Respondent is not paid by any Landlord customer for rendering legal services. The Respondent recognized the authority of the four (4) cases cited in the Petition, but denied their applicability.

In concluding its Answer, the Respondent alleged that

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the Letter Agreement attached to the Petition as Exhibit "A" had been submitted to The Florida Bar during the course of an investigation involving a member of The Florida Bar. The Respondent was never advised or informed by The Florida Bar that the Letter Agreement and the arrangement with a Member of the Bar placed the Respondent in an "Unauthorized Practice of Law" situation. The Respondent concluded that it was not engaged in the unauthorized practice of law, and offered to make any changes or adjustments in the course and conduct of its business in order to eliminate any such alleged improper activity.

EVIDENTIARY HEARING

An evidentiary hearing was held before the Referee, HONORABLE MARGARITA ESQUIROZ on August 7, 1990. The Florida Bar counsel, Scott Sakin, presented two (2) witnesses and offered seven (7) exhibits into evidence.

PETITIONER'S WITNESS QUINTERO

Witness Quintero, a police officer with the Sweetwater Police Department (Tr. 14), and who had been dismissed by the City of Miami Police Department (Tr. 40), testified that the Florida Service Bureau, Inc. in 1988 was licensed as a

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Subpoena Service and as a Tax Service. (Tr. 15) He spoke to a gentleman, Norm Bragis, at the landlord/tenant section in the Dade County Courthouse, and obtained a computer print-out of court eviction cases involving Sabal Palm Villas Housing. (Tr. 19) The computer print-out introduced into evidence as Petitioner's Exhibit 3, refers to a code number, and did not list the name of the Respondent or the Respondent's President.

The witness did not review any court files. (Tr. 21)

On May 16, 1988, the witness traveled to the Dade County office of the Respondent. (Tr. 24) Three persons were inside the office, "two males and one Latin female". (Tr. 24) The witness did not obtain the names of the males. He stated that he had recently purchased an apartment building in the southwest area of Miami (Tr. 24), and that he had problems with tenants. (Tr. 24)

The witness pretended to be a landlord and visited the Respondent's office to, "see what services they were rendering". (Tr. 25) He spoke to Lollie, the Latin female. When he first observed Lollie, she was signing some checks and doing "eviction notices". (Tr. 26)

He asked Lollie what was needed in order to evict a tenant. (Tr. 27) Lollie told him that he had to get the tenant's name and address, and that such information would

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be involved in an eviction notice. (Tr. 27) He told Lollie that he had a bad memory and asked her to write the costs on a piece of paper. (Tr. 27) She wrote the costs down on the letterhead of the Florida Service Bureau. (Tr. 27; Exhibit 4)

The witness described his conversation with Lollie:

> "She told me that it takes a three-day notice, $15.75. The entire case was going to cost $178.50. That in case, after a three-day notice, they don't evict, they don't move out, the whole thing was going to be basically $178.50, that's what she wrote in there." (Tr. 29)

The numbers were for the "entire eviction process" (Tr. 29) There were no further discussions between the witness and Lollie. (Tr. 29) He then left the building (Tr. 30) after taking a business card of Florida Service Bureau. (Tr. 30; Exhibit 5)

There was no mention of an attorney or any questions about attorneys or lawyers. (Tr. 31) Quintero did not know where the $178.50 was going to go after he paid the only money Lollie asked for. (Tr. 31)

On cross-examination, the witness testified that he never returned to the building. (Tr. 32) He saw something on Lollie's desk that said law office. (Tr. 33) He did not

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recall seeing any cards for Jay Fabrikant, attorney. He did not pay Lollie any money. (Tr. 33) He was not shown any type of agreement that would be entered into between a landlord and Florida Service Bureau and Jay Fabrikant. (Tr. 34) All of the information he obtained was verbal. (Tr. 34)

There was no discussion about attorneys. (Tr. 34) The witness did not ask for names of the two males who were in the office with Lollie. (Tr. 34) In the witness' written report of August, 1988, not introduced into evidence, the report stated that he could read "law office" on the top of a check he had seen on Lollie's desk. (Tr. 35)

The witness testified that he had seen some eviction notices, but did not know if a notice, "was a three-day notice or whatever it was". (Tr. 36) He described the difference between an eviction notice and a request as:

> "to me, an eviction request is requesting to evict and notice is notification that you're going to be thrown out." (Tr. 37)

In the witness' written report of August, 1988, he referred to eviction requests, not to eviction notices. (Tr. 37) He did not take any samples of the so-called eviction requests. (Tr. 38) He did not know who prepared the eviction requests or notices. (Tr. 38)

He did not ask Lollie the name of her employer. (Tr.

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38) He did not ask her who she was employed by.

> "Because I was only there to find out exactly on the procedure that I needed to do in order to file an eviction notice, that's why I didn't ask her. (Tr. 39)

The witness was in the building for approximately twenty (20) odd minutes. (Tr. 39) He admitted that Mr. Norm Bragis at the Dade County Courthouse told him that Mr. Schwartz of the Florida Service Bureau had been filing eviction suits on behalf of attorney Jay L. Fabrikant. (Tr. 40)

PETITIONER'S WITNESS RODRIGUEZ

Issac Rodriguez, paralegal/investigator/consultant (Tr. 41) did an investigation into the Florida Service Bureau in June of 1990. /1 (Tr. 41) He was contacted by attorney Sakin to make an investigation. (Tr. 42)

On June 4, 1990, he proceeded to the Florida Service Bureau office in North Miami. (Tr. 43), where he was introduced to Lollie Vasquez, identified by him as the office manager. (Tr. 44) He conversed with her in Spanish. (Tr. 44)

The witness told Lollie that he had some apartments on the Beach where the tenants were not paying their rent, and

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/1 Respondent objected to Rodriguez testifying in that the Petition herein was filed on April 18, 1989, verified as to the "facts" existing as of April 13, 1989. The Referee overruled the objection. (Tr. 43)

his building managers did not know what to do. (Tr. 45) Lollie told him that he could have the people out of the premises within twenty-one (21) days. (Tr. 46) She told him that certain procedures would have to be followed which would take twenty-one (21) days. (Tr. 46)

The witness posing as a Landlord, asked Lollie about the procedure involved. Lollie said that the procedure involved a three-day notice on the door. (Tr. 46) Then the tenant has three (3) days to respond. In the event the person does not respond by paying the rent, then a complaint would be filed at the courthouse. (Tr. 47) A process server would then have to personally serve the people. (Tr. 47) After the person had been served, it would then take an additional five (5) days for the person to respond. (Tr. 47)

Lollie told the witness:

> "In the event that the people contested or fought the eviction, then they would get an attorney for me to go to a hearing for an additional $100.00." (Tr. 47)

The witness asked Lollie if he had to go to court or do anything. (Tr. 47) Lollie told him no, and that the only time that he would have to go to court is if the people argued or fought the eviction, and then there would be a hearing and there would be an attorney present, "that he

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would provide for me". (Tr. 47)

Rodriguez did not leave any money or information with Lollie. (Tr. 48) He asked her to provide him with the fees in writing and her telephone number or business car. (Tr. 48) She gave him a blank Three-Day Notice form, and a Florida Service Bureau business card. (Tr. 49; Ex. 6) She advised him as to fees and charges, and that the charge for an attorney was $100.00, in the event the person contested the eviction and an attorney was required to go to court. (Tr. 50) The Sheriff's fee was quoted at $33.00, and the process server was $26.00. (Tr. 50)

The transcript shows the following question by The Florida Bar counsel and the witness answer as follows:

> "Q. Who was going to fill out the paperwork for this eviction?
>
> A. She never made it clear to me. She said she was going to handle, give her the call, give her the name. She didn't make clear whether she was going to do it or someone else." (Tr. 51)

During cross-examination, the witness admitted that during his investigation he did not find Florida Service Bureau filling out any forms. (Tr. 58-59) He saw one complaint for an Artis Williams, but he did not know who signed the complaint, and whether the complaint was signed

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by an attorney or not. (Tr. 59)

He did not pay Lollie any money. (Tr. 60) He did not request her to complete any forms for him, and she did not complete any forms for him. (Tr. 60) He did not discuss with her who would have to sign the Three-Day Notice. (Tr. 60) He never went back to Lollie or the Florida Service Bureau to have eviction papers filed. (Tr. 60) He was not requested to do so. (Tr. 60)

After witness Rodriguez testified, The Florida Bar rested its case. The Respondent moved the Referee to dismiss the case because The Florida Bar had failed to prove the allegations of their complaint. (Tr. 65) The Referee denied the Motion. (Tr. 71)

ATTORNEY JAY H. FABRIKANT

Attorney Fabrikant subpoenaed by The Florida Bar, but not called as a Petitioner's witness, was called as a witness by the Respondent. (Tr. 72) He testified that he was a Florida attorney licensed since October, 1973, with a specialty in landlord/tenant law. (Tr. 73)

During his testimony, he stated that Florida Service Bureau, Inc. was one of his clients. (Tr. 73) He has a private office in Dade County where the Respondent is located. (Tr. 74) He goes there on a daily basis to review

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work that he does for the Respondent, and other landlord clients. (Tr. 74) He employs two people there, a Delores "Lollie" Vasquez, and a Claudie Alvarez. (Tr. 74) Lollie is employed on a part-time basis splitting her time with Attorney Fabrikant and with Florida Service Bureau, Inc. (Tr. 74)

The services performed by Lollie Vasquez for Mr. Fabrikant include talking to landlords who come in or call in on the telephone can give her information that is necessary to prepare a complaint or to complete a form in landlord practice. (Tr. 74) She does all of Mr. Fabrikant's typing pertaining to his landlord clients. (Tr. 75) She deals with tenants, talks to them, and acts basically as a legal secretary. (Tr. 75)

Mr. Fabrikant signs the complaints that are filed in connection with landlord tenant matters. (Tr. 75) He uses process servers to actually pick-up the forms, complaints, and summons, and deliver them to the courthouse. (Tr. 75) On occasions he has used Mr. Orville Schwartz of the Respondent firm as a courier to take papers to a courthouse. (Tr. 76) He attends the court cases. (Tr. 76) Nobody from the Florida Service Bureau represents the tenants in court. (Tr. 76)

The complaints are prepared by his two salaried

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employees. (Tr. 76) He reviews the complaint, and if it is legally correct, he will sign the complaint. (Tr. 76) The vast majority of the landlords prepare their own Three-Day Notices, (Tr. 76), and have them served by their employees.

He receives calls in his Hollywood office opened to the public, and his private office in Dade County. (Tr. 78) He returns the calls. He provides the legal advice to the landlords and building managers. (Tr. 78) He did not know of any situation where the Respondent was giving legal advice to his clients. (Tr. 78) He has advised the Respondent not to give legal advice. (Tr. 79)

Mr. Fabrikant testified that when a client comes into the offices, and a complaint has to be prepared, the complaint will be reviewed by him and then it would be filed with Lollie telling the clients the time periods involved with the court processing. (Tr. 89) The files are kept in the office with Florida Service Bureau having been designated by the landlord as agent on various files. (Tr. 90) The open files are kept by Lollie's side, and the closed files are kept in his private office. (Tr. 91)

After Mr. Fabrikant concluded his testimony, The Florida Bar did not present any rebuttal testimony. The Respondent moved to have the Referee deny the request for relief on the grounds that the Petitioner had not proven

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their case. (Tr. 92, 113) During argument, the Referee, over the objection of the Respondent, made the Letter Agreement attached to the Petition as Exhibit "A", part of the record as Court Exhibit No. 1. (Tr. 105) The post testimony motions were implicitly denied when the Referee announced at the conclusion of the hearing that a permanent injunction would be issued. (Tr. 126)

REPORT OF THE REFEREE

The Report of the Referee entered on August 17, 1990, contained a Finding of Fact that the Respondent was not and is not a member of The Florida Bar. Under the title of "Narrative Summary of Case", the Referee found that the Respondent is an eviction service that also assists landlords in rent collection; that the Respondent advises landlords regarding legal matters, and that the Respondent is paid by the landlord/client for rendering legal services. The Report also stated that the attorney does not verify the information contained in any complaint, and does not establish any attorney/client relationship.

The Report does not contain any conclusions of law. The Report's Recommendations are that the Respondent be found to have engaged in the unlicensed practice of law in Florida, and that the Respondent be restrained from: (a)

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offering to fill out eviction forms where the landlord orally communicates the information to be filled in, (b) offering to file initial tenant eviction complaints for corporations and landlords in residential eviction matters, (c) counseling landlords and the public regarding legal matters, and (d) from otherwise engaging in the practice of law in the State of Florida.

Florida Service Bureau, Inc. objects to the Report of the Referee and the Recommendations therein, and seeks review by this Court.

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SUMMARY OF ARGUMENT

The Referee's findings that the Respondent is engaged in the Unlicensed Practice of Law are clearly erroneous or wholly lacking in evidentiary support. The Florida Bar has failed to prove its charges.

There is no showing by either the witnesses or the exhibits as to the nature or type of legal services performed or legal advice given by the Respondent, a licensed tax and subpoena service, and landlord/tenant consultant. There is no proof of fees charged by the Respondent for legal services. The Referee has disregarded the testimony of an independent licensed Florida attorney who testified that he prepared the necessary legal papers, provided legal advice, appeared in court, and charged fees for his legal services.

Hearsay testimony and exhibits were erroneously admitted into evidence by the Referee. The Petition was filed herein in April, 1989, and was never amended. However, the Referee permitted one witness/investigator to testify as to his investigation made in June, 1990.

The Referee erroneously failed to comply with The Florida Bar Rule 10-5(c)(6) in that her written report did

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not state any conclusions of law. In the absence of written conclusions of law, the Respondent is unable to object to same and to refute them. This is a denial of Due Process!

ARGUMENT

I.

THE REFEREE'S FINDING THAT THE RESPONDENT IS ENGAGED IN THE UNLICENSED PRACTICE OF LAW IS CLEARLY ERRONEOUS OR WHOLLY LACKING IN EVIDENTIARY SUPPORT

The Florida Bar charged the Respondent with six (6) instances of engaging in the unlicensed practice of law. The Respondent denied all of the instances with the exception of employing a part-time employee who is a part-time employee of an attorney, and who is paid by the attorney.

The Florida Bar has failed to prove its charges!

The Florida Bar did not present the testimony of any "landlords" who had used the Respondent's services! The Florida Bar did not introduce into evidence any completed forms or Complaints allegedly prepared by the Respondent! The Florida Bar did not introduce into evidence any documents, letters, memoranda, or other instruments of any legal nature purporting to have been prepared by the

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Respondent! The Florida Bar did not place into evidence any bills prepared by the Respondent wherein the Respondent had charged a landlord any monies or fees.

It is well established that the initial fact finding responsibility is imposed on the Referee. The Referee's findings of fact should be accorded substantial weight and not be overturned unless clearly erroneous or lacking in evidentiary support, The Florida Bar v. Furman, 451 So.2d 808 (Fla. 1984), or if there is manifest error therein. State ex rel. The Florida Bar v. Bennett, 246 So.2d 107 (Fla. 1971). In the case at bar, the Referee's findings of fact are clearly erroneous or lacking in evidentiary support.

After the Petitioner's attorney rested the case and the Respondent's attorney moved for a dismissal of the Petition due to the lack of establishing a prima facie case, the Referee commented that, "I realize they could have a lot better proof." (Tr. 71) The proof was not forthcoming but nonetheless, the Referee submitted a Report wherein the "better proof" was erroneously supplied by the Referee, without support in the record.

The following line by line, sentence after sentence, "fact" after "fact", review of the Referee's findings in her FINDINGS OF FACT, Narrative Summary of Case, demonstrates

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how and why the findings are clearly erroneous and lack evidentiary support.

(1) "Respondent is an eviction service that also assists landlords in rent collections."

The Referee did not define "eviction service", the services performed, the activities involved, etc. A "mover" can be involved in eviction services. A Deputy Sheriff can be involved in eviction services. A lay person can assist a landlord in rent collections. Legal services are not involved in rent collection activities. There was no testimony describing the activities involved in an "eviction service".

(2) "An employee of Respondent obtains information from the landlord verbally, in person or over the telephone."

What information? Does it pertain to the service charges for serving a Three-Day Notice? Does it pertain to the issue of rent collection?

(3) "Based on the information received from the landlord the Respondent prepares and serves a statutory three-day notice."

No witness testified to such "fact". There is no exhibit supporting such "fact". There is no exhibit of a completed statutory Three-Day Notice prepared by the

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Respondent. Furthermore, the Referee stated that a lay person may prepare a Three-Day Notice. (Tr. 126)

(4) "Respondent offers to file a tenant eviction complaint on the landlord's behalf."

No witness testified to such "fact". It was admitted that a courier or even the Respondent's President would physically take a Complaint down to the Courthouse and "file" same, but this layman type of activity is not preparing the Complaint or signing a Complaint. Many attorneys will use a courier or process server service to take and file complaints, have the summons issued by the Clerk of the Court, and then either serve the defendants or return the papers to the attorney for further action.

(5) "The Respondent advises landlords regarding legal matters."

There was no proof whatsoever of this "fact". The Petitioner's witnesses did not testify as to such "fact". They did not request legal advice, and they did not receive any. They requested information as to fees and charges, and the time involved with Three-Day Notices, response time to a Complaint, the time period between the filing of the Complaint and the date of the final hearing. This type of information is layman information and not the giving of legal advice.

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(6) "Specifically, the Respondent counsels landlords as to various legal remedies available to them, prepares legal forms necessary for the tenant eviction process and fills out the eviction notice and complaint where the landlord orally communicates this information."

There was no proof, no testimony, no exhibits whatsoever supporting the above "fact". There was no testimony regarding "various legal remedies". The Referee conceded that there had been no showing of a lay person preparing any complaint. (Tr. 126)

(7) "The Complaint is prepared by the Respondent, then signed by an attorney. The attorney, who is not an employee of Respondent does not verify the information contained in the Complaint nor establish any attorney-client relationship."

This "finding of fact" was not testified to by the Petitioner's witnesses. This "finding of fact" was completely refuted by Attorney Jay H. Fabrikant. He testified, without contradiction, that his part-time secretary obtains information from the landlord for the attorney, (Tr. 74), the attorney reviews the complaint after it is typed by the secretary, and then only if it is legally correct, he will sign it. (Tr. 76) His credibility was not questioned. He did establish an attorney-client

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relationship, and charges a fee for his legal services.

(8) "The attorney only has contact with the client, if and when the case is litigated."

This "fact" is not supported by the record. Attorney Fabrikant testified that he received calls from various landlords at his two offices, and that he gave them legal advice, finding out their problems, and trying to answer their questions. (Tr. 78)

(9) "Respondent maintains control over the legal services that are offered, maintains control over the day-to-day operation of the business and controls who the clients will be."

We can concede the "fact" that any business activity whether it be a lawyer, a physician, an exterminator, a collection agency, a landlord/tenant consultant, a restaurant owner, a manufacturer, a retailer, etc., maintains control over the day-to-day operation of the business and controls who the client, patients, patrons, customers, etc., will be. However, there was no proof that the Respondent maintained any control over Jay Fabrikant, or the "legal services" offered by Jay Fabrikant. There was no credible testimony as to any "legal services" allegedly offered by the Respondent. The "Letter Agreement", Exhibit "A" to the Petition, did not offer any "legal services" to

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be rendered by the Respondent. The Letter Agreement specifically stated that Jay Fabrikant was retained as legal counsel.

(10) "Respondent is paid by the landlord/client for rendering legal services."

Another erroneous "fact" not supported by the record. The Respondent is not paid for rendering legal services. The Respondent is to be paid for preparing copies of documents, delivering documents, obtaining necessary affidavits, and generally assisting Attorney Fabrikant at the attorney's direction so as to expedite matters on the landlord's behalf. See Letter Agreement Exhibit "A" to Petition. The fees paid to the Respondent cover the court filing fee and service of process fee. A separate fee is to be paid to the attorney for the preparation and prosecution of the court action, and for a court appearance at a final hearing.

(11) "Respondent maintains the client's files and has access to the client's files."

No files were introduced into evidence by the Petitioner. The Petitioner's investigator did not testify as to such "fact". Attorney Fabrikant testified that he keeps client's files in his office, but that the Respondent has access to the files, because the client has specifically

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appointed the Respondent to have access to the files. (Tr. 90) All of the closed files are kept in the attorney's private office in Miami or in his Hollywood office. (Tr. 91) He has a part-time secretary in both offices. (Tr. 91)

(12) "Respondent maintains and controls communications with the client."

What communications? Communications can be about rental arrearages, building maintenance, collections, delivering Three-Day Notices, etc., not with regard to legal advice. There was no testimony that the Respondent "controls" communications with the client.

NO CASE OF UNLICENSED PRACTICE OF LAW

The Petitioner is properly charged with the duty and responsibility of initiating and prosecuting, in this Court, proceedings against the unlicensed practice of law. However, under the facts herein, and the established law, there is no case against the Respondent. The actions of the Respondent have not violated the letter and spirit of this Court's decision regarding the unlicensed practice of law.

In The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1972), judg. vacated on other grounds, 373 U.S. 379 (1963), the Respondent, not a member of The Florida Bar, held

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himself out as a patent attorney, maintained an office on the door of which appeared the words "Patent Attorney", and was so listed in the Tampa telephone directory, rendered opinions as to patentability of items, prepared legal contracts, briefs, and authorities with points of law. The material facts were admitted by the respondent and, therefore, there was no need for the taking of testimony. We do not have such facts in this case. Therefore, Sperry is easily distinguishable on its face.

Sperry did establish a measure in testing the acts of the respondent as to practicing law. The Supreme Court held:

> "We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law."

Under the Sperry test, the activities of the Respondent herein, as shown in the record, do not constitute the

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practice of law.

The Florida Bar v. Consolidated Business and Legal Forms, 386 So.2d 797 (Fla. 1980), facts are easily distinguishable from the facts shown in the record herein. In Consolidated, the referee set out his findings and recommendations in a comprehensive manner. The referee, unlike the case at bar, concluded that the respondent had shown no other means of producing income other than by the providing of legal services, which is clearly the practice of law. The respondent employed licensed Florida attorneys and advertised that certain specified legal services may be obtained from its offices by paying a fee. The legal services included, (1) uncontested dissolution of marriage, (2) personal bankruptcy, (3) change of name, (4) simple wills, (5) uncontested adoptions, and (6) other unidentified legal services. The respondent was a for profit corporation "law office".

The exhaustive facts shrieked out that the Consolidated corporation was practicing law without a license. We do not have any such facts in the case at bar. Attorney Fabrikant is not an employee of the Respondent. There has been no showing or even an attempt to show that the Respondent, a licensed subpoena service and tax service, (Tr. 15; Petitioner's Exhibits 1 and 2), and independent

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landlord/tenant consultant, had no other means of producing income other than by the providing of legal services. The Referee did not make any such finding of fact in this case.

In The Florida Bar v. Mickens, 465 So.2d 524 (Fla. 1985), the respondent admitted that he engaged in the unauthorized practice of law by preparing legal documents in tenant eviction proceedings for residential and commercial landlords; counseled landlords regarding legal matters; filled out eviction forms where the landlord orally communicated the information to be filled in, and appeared in court or other judicial tenant eviction proceedings. The referee noted that Mickens would file initial complaints on behalf of natural persons in nonresidential tenant eviction actions, and could fill in eviction forms where the landlord furnishes the required information in writing. The referee's report was not contested. The Supreme Court approved a stipulation for settlement and the referee's report, and enjoined the respondent from engaging in the unauthorized practice of law.

Mickens did not obey the injunction, and in The Florida Bar v. Mickens, 505 So.2d 1319 (Fla. 1987), Mickens was incarcerated for continuing the unauthorized practice of law. Mickens received $170.00 from a landlord to file residential tenant eviction proceedings, and he filed the

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proceedings as president of Evictors of Florida, Inc.

After a hearing before a referee where Mickens had shown no remorse, the referee made certain conclusions that the non-lawyer's actions consisted of filing initial eviction complaints for residential landlords, counseling landlords about legal matters with regard to tenant eviction actions, typing or printing orally communicated information on to tenant eviction forms, and appearing in court and judicial proceedings constituted the "unauthorized practice of law".

This case is not a Mickens case! Although the Respondent is a Florida corporation, and a non-lawyer, the record does not show that the Respondent committed any of the Mickens actions. There is no showing that the Respondent has accepted or received any fee for filing any initial eviction complaints for residential landlords, or that the Respondent has counseled landlords about legal matters with regard to tenant eviction actions.

The fact that Lollie Vasquez, a part-time employee for the Respondent, and a part-time employee for a licensed attorney, told the Petitioner's investigator the amount of the fees for the court filing fee, for service of process, for a Sheriff's fee, the service of a Three-Day Statutory

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Notice, and the time periods associated with litigation, does not constitute the counseling of landlords about legal matters. In the case at bar, there were no tenant eviction forms set forth in the Petition, and there are no exhibits showing tenant eviction forms prepared or filled out by the Respondent. The Petitioner made no attempt to show that the Respondent appears in court and judicial proceedings. Attorney Fabrikant is the person who appears in court to represent his landlord/clients.

In the case of The Florida Bar v. Brumbaugh, 355 So.2d 1186 (Fla. 1978), this court held that the protection of the public is the primary goal in determining whether a particular act constitutes the practice of law. No member of the public has complained about the Respondent's actions or conduct. There has been no showing of any injury or damage to the public by any of the Respondent's limited actions. There has been no showing or proof that the Respondent's customers or clients believe that the Respondent is an attorney or acting as an attorney on their behalf. Furthermore, non-lawyers may give individuals information regarding routine administrative matters. Amendment to Rules Regulations Florida Bar (Chapter 10), 510 So.2d 596 (Fla. 1987).

(Advisory Opn Non-lawyers)

The recent decision in The Florida Bar, 544 So.2d 1013

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(Fla. 1989), held that it is not the unlicensed practice of law for non-lawyers to engage in communications with their customers for the purpose of completing the notice to owner forms and preliminary notice to contractor forms with respect to mechanics liens, although the non-lawyer is not to give any legal advice in connection with the preparation and service of the notices.

Assuming, arguendo, that the Referee considers the Statutory Three-Day Notice to be a legal paper not to be completed by the Respondent, we submit that on the principle of The Florida Bar case, the Respondent, if it so desires, should be permitted to engage in communications, oral or written, with its customers or clients for the purpose of completing the statutory form.

Based on the complete lack of competent evidence to support the findings of fact of the Referee, the Referee should have granted the Respondent's Motion to Dismiss after the Petitioner rested its case.

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II.

THE REFEREE ERRED IN PERMITTING INTO THE RECORD, (A) EVIDENCE OF 1990 ACTIVITIES WHEN THE PETITION WAS FILED ON APRIL 18, 1989: (B) HEARSAY TESTIMONY; (C) A WRITTEN REPORT OF A TESTIFYING WITNESS; (D) THE LETTER AGREEMENT ATTACHED TO THE PETITION AS EXHIBIT "A"; AND (E) AN UNAUTHENTICATED COMPUTER PRINT-OUT OF THE DADE CIRCUIT COURT.

Florida Bar Rule 10-5, governs Civil Injunctions, and Rule 10-5(c)(4) states that the Florida Rules of Civil Procedure, not inconsistent with the Bar Rules, shall apply in injunctive proceedings before the referee. The powers and jurisdiction generally reposed in the court under those rules may be exercised by the referee. The Rule further provides that The Florida Bar may in every case amend its petition one time as of right, within sixty (60) days after the filing of the order of reference to a referee.

The Order of Referee was made by this Court on June 6, 1989. The Florida Bar did not attempt to amend the Petition within sixty (60) days, or at any time, after the filing of the Order of Referee. The Petition is sworn to on the 13th day of April, 1989, and filed in this Court on April 18, 1989.

In the absence of any amendment, The Florida Bar is restricted to the allegations of the Petition, and to a time

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period of the Respondent's activities culminating on the verification date of the Petition. Due Process requires the cut-off date. The Respondent files its Answer and prepares the defense based upon the actions alleged in the pleadings of the Petition.

When the Petitioner called Issac Rodriguez as a witness, and Rodriguez testified that his investigation of the Respondent commenced in June of 1990, (Tr. 41), the Respondent's counsel objected to the witness testifying. (Tr. 42) The objection was:

> "In the complaint served upon over here as sworn to as of April 13, 1989, we are prepared to go ahead and respond to the Complaint, not prepared to respond to something that happened in June of 1990 when there has been no amendment to the complaint or anything of that nature." (Tr. 42)

The Referee erroneously overruled the objection and permitted the testimony, "in the sense that it goes to the weight of the evidence, not to prove the complaint". (Tr. 43) However, it is obvious from the Referee's report that she must have relied upon the Rodriguez testimony in some fashion to "prove the complaint".

The Referee erroneously permitted hearsay testimony by permitting witness Quintero to testify as to questions he

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asked of a Mr. Norm Bragis, a Metro-Dade County employee working in the landlord/tenant section at the Dade County Courthouse (Tr. 17), and Mr. Bragis told him certain information pertaining to Mr. Schwartz of the Respondent Corporation, and Sabal Palm Villas. This hearsay testimony was objected to by the Respondent as hearsay. (Tr. 22) The Referee overruled the objection. (Tr. 23)

Witness Quintero went on to testify that he had received a computer print-out of the Sabal Palm Villas Housing cases, which print-out did not name or mention to Respondent. The witness had asked Mr. Bragis for the print-out through a computer code number. (Tr. 21) The Petitioner offered the unauthenticated computer print-out into evidence as an exhibit. The Respondent objected. (Tr. 21) The Referee overruled the objection. (Tr. 22)

Florida Evidence Code 90.901, requires as a condition precedent to its admissibility the authentication or identification of evidence. The computer print-out obtained through a hearsay conversation with a County employee is not properly authenticated, and was erroneously admitted into evidence.

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TESTIFYING INVESTIGATOR'S REPORT WAS INADMISSIBLE AS HEARSAY

Issac Rodriguez, the self-described paralegal investigator, consultant, testified as to an "investigation" made by him on June 4, 1990, made at the request of special counsel Sakin. When he was cross-examined, the Respondent's counsel asked if he could see the witness' written report. (Tr. 52) Mr. Sakin objected on the grounds that the witness did not testify from the report, and the report was not in evidence. (Tr. 52)

The witness had read his report prior to testifying. (Tr. 54) The Referee permitted the Respondent's counsel to read the report. The report was then returned to the witness. (Tr. 61) Thereupon the Referee asked if the Respondent wanted the report admitted into evidence. (Tr. 61) The Respondent's counsel objected to placing the report into evidence, and stated that there were many things in the report which were not inquired into. (Tr. 61)

The Referee commented that the rules of evidence were "more relaxed", and that the report would be received over the Respondent's objection, into evidence as "Plaintiff's Ex. No. 7". (Tr. 62) The report should not have been received in evidence as it is hearsay, and inadmissible, and does not come within any exception of the

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hearsay rule. Florida Evidence Code 90.902. We do not know whether or not the Referee may have considered some of the statements in the report as "facts" in preparing her Findings of Facts and Recommendations.

III.

THE REFEREE'S FAILURE TO COMPLY WITH RULE 10-5.1(6) AND MAKE CONCLUSIONS OF LAW IS ERROR.

The Florida Bar Rule 10-5.1(6), requires the Referee, after the conclusion of the hearing, to file a written report with the Court stating findings of fact, conclusions of law, and recommendation for final disposition of the cause. The Referee's report does not conform with or comply with the Rule in that the report does not state any conclusions of law.

We cannot assume that the Findings of Fact stated in the report are conclusions of law. In the absence of any stated concludions of law, the Respondent is unable to attack or refute them, and cannot make objections to non-stated conclusions of law. The Respondent is denied Due Process.

Although we have not been able to find any decision or authority as to the effect of the failure of the Referee to comply with the Rule of the written report, we submit that

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this Court should declare such failure as harmful error, and determine that the report should be a nullity and the Petition dismissed.

CONCLUSION

The Findings of Fact are clearly erroneous and wholly lacking in evidentiary support. The Referee committed error in a number of her rulings.

The Recommendations of the Referee recommending that this this Respondent be found to be engaged in the unlicensed practice of law in the State of Florida, and that the Respondent be restrained and enjoined from certain actions, should be rejected and denied by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that the original of the foregoing was sent via Federal Express this 31st day of October, 1990 to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that true and correct copies of the foregoing were mailed to Scott W. Sakin, Esq., Florida Bar Counsel, 1411 Northwest North River Drive, Miami, Florida 33125, Mary Ellen Bateman, Esq., UPL Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, and to Mr. Jorge Luis Doimeadios, Judicial Assistant to the HONORABLE MARGARITA ESQUIROZ, Dade County Courthouse, 73 West Flagler Street, Room 505, Miami, Florida 33130.

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