

FILED  
SID J. WILSON  
DEC 11 1970  
CLERK OF THE SUPREME COURT  
By *[Signature]*  
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,  
Complainant,

Case No. 75,351  
TFB Nos. 89-10,262(06C)  
89-10,308(06C)

v.

ROBERT K. HAYDEN,  
Respondent.

\_\_\_\_\_ /

ANSWER BRIEF  
OF  
THE FLORIDA BAR

SUSAN V. BLOEMENDAAL  
Assistant Staff Counsel  
The Florida Bar  
Suite C-49  
Tampa Airport, Marriott Hotel  
Tampa, Florida 33607  
(813) 875-9821  
Florida Bar No. 347175

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS.....	ii
SYMBOLS AND REFERENCES.....	iii
STATEMENT OF THE FACTS AND OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	6

ISSUE: I. THE REFEREE'S FINDINGS ARE NEITHER ERRONEOUS, UNLAWFUL, OR UNJUSTIFIED.

II. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.2(a) AND 4-3.1, RULES REGULATING THE FLORIDA BAR, IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING 4-1.2(a), RULES REGULATING THE FLORIDA BAR, IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

B. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING 4-3.1, RULES REGULATING THE FLORIDA BAR, WAS AN APPROPRIATE FINDING OF GUILT.

III. A SIX (6) MONTH SUSPENSION FROM THE PRACTICE OF LAW, REQUIRING PROOF OF REHABILITATION, IS AN APPROPRIATE DISCIPLINE IN THIS CASE.

CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	24

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>Riley v. Riley,</u> 509 So.2d 1366 (Fla. 5th DCA, 1987).....	15, 16
<u>The Florida Bar v. Bajoczky,</u> 558 So.2d 1022 (Fla. 1990).....	21
<u>The Florida Bar v. Barley,</u> 541 So.2d 606 (Fla. 1989).....	21
<u>The Florida Bar v. Colclough,</u> 561 So.2d 1147, 1150 (Fla. 1990).....	6, 10
<u>The Florida Bar v. Fertig,</u> 551 So.2d 1213 (Fla. 1989).....	21
<u>The Florida Bar v. Greer,</u> 541 So.2d 1149 (Fla. 1989).....	21, 22
<u>The Florida Bar v. McKenzie,</u> 557 So.2d 31 (Fla. 1990).....	21
<u>The Florida Bar v. Sax,</u> 530 So.2d. 284 (Fla. 1988).....	21
<u>The Florida Bar v. Stein,</u> 545 So.2d 1364 (Fla. 1989).....	21
<u>Florida Standards for Imposing Lawyer Sanctions</u> .....	17, 18, 19
<u>Rules Regulating The Florida Bar</u> .....	15

SYMBOLS AND REFERENCES

In this Brief, the Appellant, Robert K. Hayden, will be referred to as the "Respondent." The Appellee, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." "C" will refer to the Complaint filed in this cause. "TR" will refer to the transcript of the Final Hearing held on May 11, 1990. "RR" will refer to the Report of Referee. "R" will refer to the record in this case.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent, Robert K. Hayden, represented June Ferreri in an uncontested dissolution of marriage action. Mr. Hayden's representation consisted essentially of filing the Petition for Dissolution of Marriage, preparation of a Motion for Default, attendance at an ex-parte Final Hearing, and preparation of the Final Judgment of Dissolution of Marriage. (TR, p. 10, l. 9). For these services, Mr. Hayden was paid an initial retainer in the amount of Five Hundred and 00/100 Dollars (\$500.00) by June Ferreri on May 3, 1988. (R, Bar Composite Exhibit #4). Additional fees were incurred and, as of Mr. Hayden's bill dated June 30, 1988, Mr. Hayden was owed by June Ferreri Three Hundred Thirty-Four and 00/100 Dollars (\$334.00) in fees. (R, Bar Composite Exhibit #4). The June 30, 1988 bill does not include charges for the Final Hearing or for the preparation of the Final Judgment.

On July 11, 1988, the date of the Final Hearing, June Ferreri authorized Mr. Hayden to contact Frank Ferreri and advise him of what had transpired at the hearing and attempt to work out payment of the lump sum alimony award. (TR, p. 28, l. 3). Mr. Hayden did contact Frank Ferreri on the day of the Final Hearing. Before the Final Judgment was signed, a second telephone call was made by Mr. Hayden to Frank Ferreri several weeks after the first phone call. (TR, p. 45, l. 12).

After receiving the second phone call from Respondent, Frank Ferreri and June Ferreri entered into a settlement regarding the

lump sum alimony obligation on July 25, 1988. (TR, p. 47, l. 5). Frank Ferreri gave June Ferreri a check in the amount of Three Hundred and 00/100 Dollars (\$300.00) in full settlement of the lump sum alimony obligation. (TR, p. 47, l. 12 and R, Bar Exhibit #3). A settlement agreement was executed by June Ferreri. (R, Bar Exhibit #12). The Final Judgment of Dissolution of marriage was signed by the Court on August 16, 1988 and copies were distributed to the parties. (R, Bar Exhibit # 2 and TR, p. 46, l. 8). Subsequent to the entry of the Final Judgment, Respondent initiated contact with both June Ferreri and Frank Ferreri. When Mr. Hayden contacted June Ferreri on September 8 or September 9, 1988, Mr. Hayden was advised by June Ferreri not to initiate or pursue contempt proceedings against Frank Ferreri. (TR, p. 18, l. 11 and TR, p. 19, l. 6). Ms. Ferreri never authorized Mr. Hayden to initiate proceedings to collect the Two Thousand Five Hundred and 00/100 Dollar (\$2,500.00) lump sum alimony payment. (TR, p. 19, l. 6)

Mr. Hayden continued to pursue the lump sum alimony payment by making telephone calls to Frank Ferreri at his place of employment. (TR, p. 48, l. 1). Although Mr. Hayden was advised by Frank Ferreri that a settlement had been reached and that Frank Ferreri had a release signed by June Ferreri for the lump sum alimony obligation, Respondent initiated contempt proceedings by filing a Motion for Contempt/Notice of Hearing on September 14, 1988. (TR, p. 48, l. 10).

After being served with a subpoena to appear at the hearing on the Motion for Contempt, Mr. Ferreri telephoned Mr. Hayden to advise him again that the matter had previously been settled.

(TR, p. 49, l. 18). After Frank Ferreri promised Mr. Hayden that he would come to Mr. Hayden's office on September 27, 1988 and take care of June Ferreri's outstanding fee, Mr. Hayden then agreed to cancel the hearing on the Motion for Contempt. (TR, p. 51, l. 16; and TR, p. 52, l. 8). The hearing was canceled on September 26, 1988.

After a finding of probable cause on April 11, 1989, a Complaint was filed by The Florida Bar on January 18, 1990. The Final Hearing was held on May 11, 1990 before The Honorable Morison Buck. Final Arguments were heard on July 30, 1990, and both parties submitted written Memoranda as to the appropriate level of discipline on or about August 6, 1990. The Report of Referee was served on August 9, 1990, and a Petition for Review was filed by the Respondent on October 19, 1990. Respondent's Initial Brief in support of his Petition was served on November 16, 1990.

## SUMMARY OF ARGUMENT

I. The Referee's Findings of Fact are neither erroneous, unlawful, or unjustified. The record is replete with evidence upon which the Referee could base his conclusion that Mr. Hayden's actions were motivated by a desire to recover his legal fees. The totality of the circumstances supports, with clear and convincing evidence, the Referee's conclusions that Ms. Ferreri never authorized or requested Mr. Hayden to proceed with contempt proceedings against Mr. Frank Ferreri. The Referee, as finder of fact, is best able to assess the credibility of all witnesses and assign appropriate weight to their testimony. The Report of Referee is a reflection of these assessments. The Florida Bar concedes that the record does not support that part of the Referee's finding which indicates that the hearing on the Motion for Contempt was canceled after the September 27, 1988 meeting between Mr. Hayden and Mr. and Mrs. Ferreri. (RR, Section II-7, p. 2). It is clear from the record that the hearing was canceled by Respondent on September 26, 1988.

II. A. The Referee's finding of guilt as to Rule 4-1.2(a) is fully supported by the record. Respondent initiated contempt proceedings after his client directed him not to proceed. Respondent's representation of June Ferreri was concluded with entry of the Final Judgment, and Ms. Ferreri was under no obligation to provide Mr. Hayden with any information concerning subsequent dealings with her former husband.



B. Mr. Hayden violated both the spirit and the letter of Rule 4-3.1 by filing frivolous proceedings against Frank Ferreri. These proceedings were filed after being advised by Mr. Ferreri that a settlement had been entered into between the parties. Further, lump sum alimony, which is not in the nature of support, may not be enforced by a contempt action. Respondent was well advised that the lump sum alimony award was based on June Ferreri's Two Thousand Five Hundred and 00/100 Dollar (\$2,500.00) contribution for a down payment on the marital home. There was never any indication that this lump sum alimony award was for the purpose of support.

III. The Referee's recommendation of a six (6) month suspension takes into consideration the seriousness of the misconduct, the fact that Respondent's primary motivation was his own self-interest, and Respondent's considerable disciplinary record. A six (6) month suspension is both appropriate and is supported by the Florida Standards for Imposing Lawyer Sanctions and previous decisions of this Court.

ARGUMENT

I. THE REFEREE'S FINDINGS ARE NEITHER ERRONEOUS,  
UNLAWFUL, OR UNJUSTIFIED.

The Referee's findings of fact come to this Court cloaked in a presumption of correctness and should be upheld absent the showing that the findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla. 1990) (rules and cases cited therein).

Respondent challenges the Referee's findings that the initiation of contact by Respondent with Mr. Ferreri was done in an effort "at least secondarily to recover his legal fees from the proceeds." (RR, p. 2). The record is replete with evidence upon which the Referee could base such a conclusion. It is clear from the record that June Ferreri still owed fees to the Respondent at the time the dissolution of marriage was granted. (R, Bar Composite Exhibit #4). Mr. Hayden's own response to The Florida Bar, in pertinent parts, states as follows:

"Mr. Ferreri's wife retained me on February 10, 1988 to represent her in a dissolution action. I prepared the petition and served same on Mr. Ferreri, seeking chiefly child support and lump sum alimony for Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) representing her equity in the marital home which had been sold by the husband. Any amounts owed by her to this office, above and beyond her initial retainer amount, she desired to pay out of the Two Thousand Five Hundred Dollar (\$2,500.00) lump sum alimony." (Emphasis supplied).

\*

\*

\*

"It is important to note that she is requesting I get this not only to get her attorney's fees but, also, wanted that amount, as he had kept it from the sale of their home and was not happy with him about that. After

Final Judgment was entered, I phoned her to tell her I would prepare the final bill--I noted to her that nothing had been sent to her since the May 31 bill and the time would be put together and sent to her. At this point, she told me that she had no money and didn't know how long it would take to pay. I thought about the \$2,500.00, and she said she would never get it unless I forced it under contempt. I told her I would file it and would not charge her attorney's fees for the post-judgment motion. She never said not to do it, as there was (sic) two ways to go. Per our written agreement, she could pay me and was required to do so within ten days of billing. The second way was her request--she would pay once she got the money from her ex-husband. Consequently, she told me to file the contempt as long as she did not have to pay any further attorney's fees and I could collect it from her ex-husband. I agreed." (Emphasis supplied). (R, Bar Exhibit #11)

Respondent's own letter to The Florida Bar indicates that his client had advised him that she had no money to pay the remaining balance of fees owed to Respondent. Mr. Hayden, quite clearly, recognized the Two Thousand Five Hundred and 00/100 Dollar (\$2,500.00) lump sum alimony obligation as a source for payment of these fees. Additionally, the Motion for Contempt/ Notice of Hearing requests the award of attorney's fees and costs for bringing that motion. (R, Bar Exhibit #5). Respondent apparently expected to recoup the cost of bringing a contempt proceeding through a court-ordered award of attorney's fees against Frank Ferreri.

In further support of the Referee's findings is Frank Ferreri's testimony concerning the harassing and intimidating character of telephone calls from Mr. Hayden to Frank Ferreri, some of which took place even before the Final Judgment had been signed. (TR, p. 46, l. 3). Respondent called Frank Ferreri repeatedly at his place of employment. (TR, p. 48, l. 4). The

purpose of these telephone calls was to pressure Mr. Ferreri into paying the lump sum alimony to June Ferreri. Even after being advised by Mr. Ferreri that the lump sum alimony obligation had been settled, Mr. Hayden proceeded to file a Motion for Contempt. (TR, p. 48, l. 10). Only after Frank Ferreri promised to come to Respondent's office to take care of the fee owed by June Ferreri did Respondent cancel the hearing on the Motion for Contempt. (TR, p. 49, l. 18; TR, p. 50, l. 17; and TR, p. 52, l. 10).

Frank Ferreri testified that Mr. Hayden admitted to him being primarily motivated by securing payment of his fees. (TR, p. 49, l. 24; and TR, p. 50, l. 1).

Bills submitted to June Ferreri clearly show charges by Mr. Hayden after the Final Hearing. The Final Hearing took place on July 11, 1988, and Respondent's bills indicate telephone calls and other work done after July 11, 1988. Several charges by Respondent indicate that these charges related to telephone calls to his client and to "opposing attorney." (R, Bar Exhibit #4). Respondent's August 31, 1988 and September 27, 1988 bills to June Ferreri list four (4) dates containing a description of fees charged to June Ferreri.

Although the authority to represent entered into by June Ferreri and Mr. Hayden on February 10, 1988 indicates that the purpose of the retention was to obtain a dissolution of marriage, Mr. Hayden continued to charge June Ferreri for work done after the dissolution of marriage was concluded. (R, Bar Exhibit #1). No further agreement, oral or written, was made between June Ferreri and Robert Hayden with regard to further representation.

At the Final Hearing in this matter, June Ferreri testified that she considered Mr. Hayden's representation of her to be concluded on the date of the Final Hearing in the dissolution of marriage action. (TR, p. 36, l. 21).

No charges for preparation of the Motion for Contempt/Notice of Hearing were reflected on bills to June Ferreri because, according to Respondent's own testimony, he intended to pursue payment of fees for those services through the Motion for Contempt. (TR, p. 86, l. 5).

II. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.2(a) AND 4-3.1, RULES REGULATING THE FLORIDA BAR, IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

A. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING 4-1.2(a), RULES REGULATING THE FLORIDA BAR, IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

During the course of the Final Hearing before the Referee, testimony was heard concerning whether or not Mr. Hayden had been authorized by June Ferreri to proceed with contempt proceedings for collection of lump sum alimony. There can be no doubt, from examination of the transcript of record, that this testimony is conflicting. The Referee, however, as finder of fact, is in a unique position to assess the credibility of witnesses based on their demeanor and other factors which might influence testimony. For this reason, the Referee's findings are cloaked in a presumption of correctness. The Florida Bar v. Colclough, 561 So.2d 1147, 1150 (Fla. 1990) (rules and cases cited therein).

The only individuals with personal knowledge as to whether there was authorization for Mr. Hayden to proceed with contempt proceedings are June Ferreri and Robert Hayden. Both of these individuals testified at the Final Hearing before Judge Morison Buck. Judge Buck had an opportunity to observe both witnesses during their testimony and make determinations concerning their credibility. Judge Buck's findings were as follows:

"On or about September 9, 1988, Respondent contacted Mrs. Ferreri to inquire whether or not she wanted him to petition for contempt of Court against Mr. Ferreri for nonpayment of the alimony. Mrs. Ferreri instructed Respondent not to proceed with the contempt proceeding, with her primary motivation being to avoid incurring any additional lawyer's fees . . .

Nevertheless, Respondent proceeded with the contempt proceeding, serving the husband on September 14, 1988 with notice of the action for non-payment of the alimony judgment." (RR, Section II, par. 5, 6, p. 2)

Mrs. Ferreri testified before Judge Buck that she wanted the dissolution of marriage to be over and done with as of July 11, 1988. (TR, p. 20, l. 12). According to Mrs. Ferreri's testimony, she agreed to allow Respondent to call her former husband on the date of the final hearing in the dissolution. (TR, p. 35, l. 6). Mrs. Ferreri further testified that on September 9, 1988, she specifically told Mr. Hayden not to file a contempt proceeding and that she told him not to do anything further until she contacted him. (TR, p. 35, l. 13-19). Mrs. Ferreri testified before the Referee that she never advised Mr. Hayden she wanted to pursue a contempt action, that she never told him to initiate contempt proceedings, and, specifically, that she advised him not to pursue a Motion for Contempt against her former husband. (TR, p. 18, l. 16-25; and TR, p. 19, l. 1-11).

In Mr. Ferreri's testimony before the Referee, he stated he had been advised by June Ferreri that she had instructed Respondent not to file a Motion for Contempt. (TR, p. 49, l. 5-13).

The Referee apparently placed little weight on the testimony of Mr. Winecker. Mr. Winecker testified that, at the time of the Final Hearing, he shared office space with Mr. Hayden in a building owned by Mr. Hayden. (TR, p. 66, l. 15-18). Additionally, Mr. Winecker testified that he occasionally

received work from Mr. Hayden. The Referee was entitled to assess Mr. Winecker's credibility based on this information concerning Mr. Winecker's business relationship with Mr. Hayden.

With regard to the substance of Mr. Winecker's testimony concerning his September 14, 1988 telephone conversation with June Ferreri, Respondent asserts that June Ferreri was under some obligation to advise Mr. Winecker concerning her previous settlement with Mr. Ferreri. Clearly, Ms. Ferreri was under no such obligation. Mr. Hayden was no longer her attorney, their professional relationship had ceased when the dissolution of marriage was entered. Further, Ms. Ferreri had never retained Mr. Winecker in any capacity. She was under no obligation to volunteer any information concerning her personal or legal affairs. Ms. Ferreri responded truthfully to Mr. Winecker's question, that Mr. Ferreri was current on his child support payments and he had paid Three Hundred and 00/100 Dollars (\$300.00) of the Two Thousand Five Hundred and 00/100 Dollar (\$2,500.00) lump sum alimony amount. (TR, p. 67, l. 8).

According to Mr. Winecker's testimony under cross-examination, Ms. Ferreri never asked him to go forward with the Motion for Contempt. (TR, p. 71, l. 19-23). Although Mr. Winecker testified that he mentioned a Motion for Contempt in his telephone call to June Ferreri, her testimony contradicts this. She testified that Mr. Winecker did not mention anything about a Motion for Contempt. (TR, p. 30, l. 15).

Arguments made to the Referee and in Respondent's Initial



Brief indicate that he is attempting to shift the burden to June Ferreri for not having advised him of a settlement in full with regard to the lump sum alimony obligation. Once an attorney/client relationship has concluded, the client is under no obligation to continue to provide the attorney with information of any sort. Clearly, the decision rests with a client whether or not to pursue post-judgment proceedings, and Ms. Ferreri testified before the Referee that she instructed respondent not to go forward with contempt proceedings.

Despite repeated urgings on the part of Mr. Hayden, June Ferreri elected not to pursue contempt proceedings against her former husband. She had the absolute right to make this decision, and Mr. Hayden was obligated to accede to his client's wishes in this regard. Mr. Hayden advised his client of options available to her concerning pursuit of the lump sum alimony obligation. Ms. Ferreri elected not to avail herself of these options. Instead, she entered into an agreement with her former husband to settle the obligation in full for a payment of Three Hundred and 00/100 Dollars (\$300.00).

In his Initial Brief, Respondent has characterized the agreement between June and Frank Ferreri as a "secret" agreement. This characterization is totally unsupported by the record. There is no testimony or evidence of any kind to suggest that any of the parties involved attempted to keep secret the settlement agreement between June and Frank Ferreri. In fact, Mr. Ferreri testified that, when contacted by Mr. Hayden after the settlement had been entered into, he immediately advised Mr. Hayden that

there had been a settlement, that there was a signed settlement agreement, and the matter was over. (TR, p. 48, l. 10). Mr. Hayden filed the Motion for Contempt after being informed that the settlement had been reached. (TR, p. 48, l. 19). The hearing on the Motion for Contempt was canceled only after Mr. Ferreri promised to come to Respondent's office to pay June Ferreri's outstanding fee. (TR, p. 49, l. 18; and TR, p. 51, l. 16-22).

B. THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING 4-3.1, RULES REGULATING THE FLORIDA BAR, WAS AN APPROPRIATE FINDING OF GUILT.

Rule 4-3.1 states as follows:

"A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . ."

The Referee found that Respondent had violated this disciplinary rule by initiating contempt proceedings without authority from his client. (RR, Section III, p. 2).

The finding of guilt is also supported for reasons other than those explicitly stated in the Report of Referee. Mr. Hayden initiated a contempt proceeding after being told that the lump sum alimony obligation no longer existed. His own client had, in the words of the Referee, given him "instructions to desist from taking such action in the first instance." (RR, Section III, p. 3). The opposing party had advised Mr. Hayden that the matter had been fully settled and that a settlement agreement had been executed. There is nothing in the record to indicate that Mr. Hayden ever questioned June Ferreri about Frank Ferreri's assertion concerning the settlement. Instead, Respondent filed a Motion for Contempt without determining whether the matter had, in fact, been settled.

As a matter of law, the Motion for Contempt was a frivolous pleading because it attempted to enforce a lump sum alimony payment through contempt. Riley v. Riley, 509 So.2d 1366 (Fla.

5th DCA, 1987) cited to the Referee and in Respondent's Initial Brief indicates that the Courts may not enforce, through contempt proceedings, alimony payments which may be characterized as "pure property settlement." Riley, p. 68-69. There was never any doubt that the lump sum alimony provision contained in the Ferreri Final Judgment of Dissolution of Marriage was part of a pure property settlement. (Final Judgment, p. 2, par. 5). The Final Judgment states that the Two Thousand Five Hundred and 00/100 Dollars (\$2,500.00) constituted repayment to June Ferreri for funds unconnected to the marriage which were used to purchase the marital home. The Final Judgment noted that the parties had already sold the home. The lump sum alimony was clearly not in the nature of support and was, therefore, not enforceable by contempt.

III. A SIX (6) MONTH SUSPENSION FROM THE PRACTICE OF LAW, REQUIRING PROOF OF REHABILITATION, IS AN APPROPRIATE DISCIPLINE IN THIS CASE.

Each case involving a disciplinary offense must be considered based on the facts particular to that case, together with all factors relevant to imposing the appropriate level of sanctions in that case. As noted in the Respondent's Initial Brief, the Florida Standards for Imposing Lawyer Sanctions urges consideration of the following:

- a. duties violated;
- b. the lawyer's mental state;
- c. the potential or actual injury caused by the lawyer's misconduct; and
- d. the existence of aggravating or mitigating circumstances.

Respondent, Robert K. Hayden, has been found guilty of violating several duties. First, Respondent has violated the duty owed to his client to abide by that client's decisions concerning the objectives of representation and by failing to consult with the client as to the means by which the objectives were to be pursued. Respondent has also violated a duty owed to the legal system. By filing frivolous proceedings, Respondent needlessly involved both his former client, the opposing party, and the legal system.

None of the sections of The Florida Standards describe misconduct identical in nature to that cited in this case. However, Section 6.2 deals with a lawyer's abuse of the legal process and states in pertinent part as follows:

"Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Florida Standards for Imposing Lawyer Sanctions, Section 6.2. (Emphasis supplied).

Subsection 6.22 of Florida Standards for Imposing Lawyer Sanctions provides that suspension is appropriate for a knowing violation of a court order or rule which is accompanied by injury or potential injury to a client or a party, or where an attorney causes interference or potential interference with a legal proceeding. Respondent, in the instant matter, has not been found guilty of violating a court order or rule, but he has caused interference with a legal proceeding. This conduct by Mr. Hayden was found by the Referee to be intentional.

Therefore, pursuant to the Standards, suspension is an appropriate level of discipline for Mr. Hayden's conduct, without considering aggravating and mitigating factors. When aggravating factors are considered, the Referee's recommendation of a six (6) month suspension is justified under the Standards. While the Referee did not, in his Report, make reference to specific provisions of the Standards relating to aggravating or mitigating factors, the Bar submits that the Referee's findings acknowledge the presence of certain aggravating factors. There is no dispute that the Respondent's prior disciplinary offenses constitute an aggravating factor. The Referee's Report also notes that Respondent's motivation in filing the contempt action was an attempt to enhance recovery of his fees.

This constitutes a selfish motive. Dishonest or selfish motive is specifically noted as an aggravating factor in Section 9.22(b) of the Standards. Respondent has been found guilty of multiple offenses by his violation of two (2) separate disciplinary rules. Section 9.22(d), Florida Standards.

A fourth aggravating factor, substantial experience in the practice of law, is acknowledged by Respondent. He was admitted to practice law in 1973. Section 9.22(i), Florida Standards.

It appears from the Referee's Report that the Referee was most influenced by the intentional and deliberate nature of the Respondent's misconduct. The Referee's Report states in the findings of fact that Mr. Hayden moved forward with contempt proceedings despite his former client's instructions to the contrary. The intentional nature of Mr. Hayden's conduct, coupled with the selfish motivation which prompted the filing of a frivolous proceeding, combined to make this misconduct by Mr. Hayden far more serious than a negligent or neglectful act.

With regard to Respondent's prior discipline, the Referee recognized Mr. Hayden's propensity to engage in unethical misconduct.

Mr. Hayden was privately reprimanded in 1981 for misconduct arising out of five (5) separate disciplinary complaints. After a hearing, Mr. Hayden agreed to a private reprimand for all five (5) instances of misconduct.

The first of these five (5) consolidated complaints arose out of Mr. Hayden's representation of a co-defendant in a criminal trial. Mr. Hayden's conduct during the course of the

trial resulted in a complaint against him by the presiding Judge.

The second case upon which the private reprimand was based resulted from Mr. Hayden's failure, for over a year, to provide an executed release to opposing counsel.

The third consolidated case concerned Mr. Hayden's representation of one client against another client. In this case, the Grievance Committee's Summary of Evidence noted the existence of conflicting testimony on almost every facet of the case.

In the fourth case upon which the private reprimand was based, Mr. Hayden failed to file a quit claim deed and double billed a client for that service.

The fifth and final case concerned a letter from Mr. Hayden threatening the complainant with criminal prosecution. The testimony in that case revealed a phone call from Mr. Hayden to the complainant at the complainant's place of employment.

In addition to the private reprimand, Mr. Hayden was suspended for a period of thirty (30) days in 1986. This suspension was for violation of disciplinary rules relating to the handling of funds and property belonging to clients. Mr. Hayden entered into a conditional guilty plea for a consent judgment for two (2) separate complaints which were consolidated for the purpose of the suspension. The Florida Bar's complaint in that matter alleged Mr. Hayden's improper handling of property entrusted to him by the judgment creditor of his client. In the second matter, an audit conducted by The Florida Bar revealed



violation of trust accounting rules and procedures.

Respondent's Initial Brief contained citations to numerous disciplinary cases in support of his contention that other instances of serious misconduct have received lesser sanctions. Six (6) of the cases cited in Respondent's Initial Brief involved misconduct by attorneys who had no prior disciplinary record. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990); The Florida Bar v. Fertig, 551 So.2d 1213 (Fla. 1989); The Florida Bar v. Stein, 545 So.2d 1364 (Fla. 1989); The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989); The Florida Bar v. MacPherson, 534 So.2d 1156 (Fla. 1988); and The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1988).

In all but the Bajoczky case, Court opinions noted significant mitigating factors.

In the case at bar, Mr. Hayden has two (2) instances of prior discipline, and the Referee's Report is devoid of any mention of mitigating factors. In The Florida Bar v. Greer, 541 So.2d 1149 (Fla. 1989), cited by Mr. Hayden, the Court found that a sixty (60) day suspension, coupled with probation, was appropriate for four (4) separate instances of misconduct. All four (4) instances of misconduct involved negligent or neglectful conduct on the part of Mr. Greer. There is no indication in the Court's opinion of intentional misconduct or of any dishonest or selfish motive.

Likewise, in The Florida Bar v. McKenzie, 557 So.2d 31 (Fla. 1990), it does not appear from the Court's opinion that Mr. McKenzie was motivated by greed or self-interest.

In The Florida Bar v. Greer, 541 So.2d 1149 (Fla. 1989), this Court recognized the Referee's unique position trier of fact:

"While there are some inconsistencies in the version of events as presented by Greer and the version of events presented by the witnesses, the Referee is in a better position to make determinations concerning a witness's credibility because he is privileged to observe the witness's demeanor while we are forced to review the cool transcript of proceedings." Greer at 541.

In the instant case, the Referee took into consideration the demeanor of all witnesses, including Respondent, and found that Respondent had engaged in intentional conduct motivated by his own self-interest. Additionally, the Referee specifically noted: "Respondent's record of unacceptable professional conduct in the past appears not to have been corrected by the moderate treatment administered." (RR, p. 3, par. 3).


Based on cases previously decided by this Court, together with Florida Standards for Imposing Lawyer Sanctions, the discipline recommended by the Referee is appropriate.

CONCLUSION

The Referee's findings are neither erroneous, unlawful, or unjustified. Further, the findings of fact made by the Referee are supported by the record and, as such, should not be overturned by this Court.

A six (6) month suspension from the practice of law is appropriate discipline based on the seriousness of the misconduct and the presence of numerous aggravating factors.

Respectfully submitted,



SUSAN V. BLOEMENDAAL  
Assistant Staff Counsel  
The Florida Bar  
Suite C-49  
Tampa Airport, Marriott Hotel  
Tampa, Florida 33607  
(813) 875-9821  
Florida Bar No. 347175

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by U.S. Mail to Richard A. Greenberg, Esquire, Attorney for Respondent, P. O. Box 925, Tallahassee, Florida 32302, and to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 10th day of December, 1990.

  
SUSAN V. BLOEMENDAAL