2-23

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN H. MYERS,

Respondent.

Case No: 75,609

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

RULES OF DISCIPLINE

SYMBOLS AND REFERENCES

The symbols and references used in this brief are as follows:

R. =	Transcript of Referee hearing of August 17, 1990
R.R. =	Referee Report
Pet. Brief =	Petitioner's Initial Brief
Pet. Ex. =	Petitioner's Exhibit
Resp. Ex. =	Respondent's Exhibit

STATEMENT OF THE FACTS AND OF THE CASE

In July, 1987, Respondent was retained by Rolf Coldeway to prepare a petition for dissolution and property settlement agreement. [R.20]. The Coldeways had separated on previous occasions when Mrs. Coldeway had "taken off" with "various different men". [R.20]. At the time Respondent's advice and counsel was sought, Mrs. Coldeway wanted to reconcile the marriage. Although Mr. Coldeway "really didn't feel it would work out", he agreed to the reconciliation under the condition that he get custody of his young daughter in the event of a subsequent separation. [R.21]. An agreement was drafted by Respondent to effectuate Mr. Coldeway's desire, and signed by Mr. and Mrs. Coldeway. [R.22]. Mrs. Coldeway also signed an Answer, Waiver of Notice of Final Hearing, and Consent to Enter a Final Judgment. [R. 39].

With respect to the effect of the anticipated reconciliation on the property settlement agreement, the agreement specifically provided that the husband would receive no child support from the wife unless there was a subsequent separation. [Resp. Ex. 1 page 4].

Thereafter, the parties lived together for a period of about eight months at which time Mrs. Coldeway, in Mr. Coldeway's words, "took off again and took off with my daughter". [R.22]. However, Mr. Coldeway did not immediately

attempt to enforce the property settlement agreement as his wife lived nearby and Mr. Coldeway was getting to see his daughter "two or three times a week". Moreover, further attempts at reconciliation were discussed. [R.23].

At the time of this separation Mrs. Coldeway hired Floyd E. Ferguson, Esquire for the purpose of representing her in a divorce. Although Mr. Ferguson discussed a possible property settlement agreement with Respondent, no agreement was reached. On July 28, 1988, Mr. Ferguson sent a proposed property settlement agreement to Respondent for Mr. Coldeway's signature, [Pet. Ex. 2]. However, Mr. Coldeway would not sign the agreement because in his opinion "we already had a settlement and it wasn't open for discussion for me." [R. 29, 33,41].

Despite the Petitioner's claim that "Respondent did not advise Mr. Ferguson of his client's refusal to sign the Ferguson property settlement agreement", [Pet. Brief at 3], the record below is contrary.

When asked by Bar Counsel if he ever wrote to Mr. Ferguson advising him of Mr. Coldeway's unwillingness to sign the proposed settlement agreement, Respondent testified "[N]o, I did not. My recollection is that he was notified by phone that my client would not sign the agreement." [R. 59, 60].

Moreover, Petitioner's claim that Respondent did not advise Mr. Ferguson of the documents that Mrs. Coldeway

executed in July, 1987, is an incorrect reading or interpretation of the record. [Pet. Brief at 2]. In fact, Respondent testified that he was "not sure" that he and Mr. Ferguson discussed the early property settlement agreement, or that he advised Mr. Ferguson of its existence. [R. 56]. Such testimony is equally consistent with the proposition that Respondent may have told Mr. Ferguson about the earlier agreement.

Sometime after Mr. Ferguson forwarded his proposed property settlement agreement, Mrs. Coldeway absconded with the parties' minor child. Thereafter, she telephoned and informed Mr. Coldeway "that she was out-of-state and she was not returning and I was not going to get to see my daughter anymore." [R.24].

As a result, Mr. Coldeway contacted Respondent to file the previously executed documents necessary to obtain a divorce. [R. 24]. Thereafter, Respondent filed the Petition for Dissolution of Marriage, Property Settlement Agreement, and Answer, Waiver of Notice of Final Hearing and Consent to Enter a Final Judgment previously executed by the parties. [R. 39]. Respondent did not give notice to Attorney Ferguson. [R. 41]. Respondent acknowledged before the Referee below, the impropriety of failing to contact Mr. Ferguson. Candidly, Respondent attributed his bad judgment to his own overlapping two year ordeal in finding his son who was secreted by his

ex-wife. [R. 42, 43]. Due to his efforts to locate his son, Respondent was aware that his client needed, at least, a temporary order to obtain assistance from federal and state organizations designed to help find missing children. [R. 42, 68].

Respondent further acknowledged the impropriety of his failure to advise the presiding judge of Mr. Ferguson's involvement in the case. [R. 45, 46]. However, Respondent felt his attempts to locate his own son clouded his judgment. [R. 46].

After Mr. Coldeway received a final judgment granting him custody, he learned of his wife's whereabouts through his insurance agent. [R. 25]. Mr. Coldeway then retrieved his daughter from Ohio utilizing the final judgment obtained by Respondent. [R.26].

Thereafter, Mrs. Coldeway returned to Florida, contested the final judgment through new counsel, which judgment was set aside. Although Mr. Coldeway was ordered to pay a portion of his wife's expenses, Respondent charged him no legal fee for any work performed after entry of the final judgment, the value of which Respondent estimated to be $1,500.00 to $1,800.00. [R. 28, 49]. Moreover, Respondent, as ordered, paid attorney's fees for Mrs. Coldeway. [R. 27].

Thereafter, when this matter was brought to the attention of The Florida Bar, the case proceeded as set forth in the statement of the case in Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The Respondent's conduct in this cause does not rise to the level requiring a six month suspension from the practice of law.

The Referee below had the opportunity to hear and evaluate the witnesses called on behalf of Respondent. More importantly, the Referee could, and did, assess and consider Respondent's testimony and character and the circumstances surrounding his bad judgment.

The cases cited by The Florida Bar in support of its position involve conduct far more egregious, (some criminal conduct) and therefore, are far more compelling of stricter discipline.

Consideration of the appropriate case law and the Florida Standards for Imposing Lawyer Sanctions along with Respondent's background, character, and the attendant mitigating circumstances require the imposition of a public reprimand and a two year probationary period as recommended by the Referee.

ARGUMENT

ISSUE: WHETHER THE REFEREE WAS CORRECT IN RECOMMENDING A PUBLIC REPRIMAND AND TWO YEARS PROBATION, BASED UPON THE FACTS BELOW AND THE OVERWHELMING EVIDENCE OF MITIGATION.

The Referee below recommended a public reprimand and two years probation as the sanction for Respondent's conduct in this cause. The Petitioner argues a six month suspension is the appropriate discipline. [Pet. Brief at 8].

In support of its position, Petitioner cites four earlier decisions of this court. First, Petitioner relies on The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988). In an estate matter wherein the decedent had no will, nor any heirs, the accused attorney created a phony heir and forged a signature on an affidavit submitted to the court in order to obtain the estate assets for his own benefit. The accused was also charged with grand theft and sentenced to nine months specified residency in the county jail followed by five years probation.

However, Petitioner concedes that the facts in Roman are more egregious and that the mitigation here is particularly compelling in that Respondent experienced a situation involving his ex-wife and child which was nearly identical to his client's dilemma. Petitioner admits that neither disbarment, nor a lengthy suspension are appropriate here due to these two distinctions. [Pet. Brief at 10, 11].

However, Petitioner feels that a six month suspension is appropriate since Respondent "committed a fraud on the Court and deprived Mrs. Coldeway of an opportunity to litigate the validity of the property settlement agreement and to litigate her right to the primary custody of the parties' minor child". [Pet. Brief at 11].

Respondent submits that Petitioner's comparison of Respondent's conduct as fraud similar to Roman's is transparent. While Roman filed a bogus, forged document, Respondent filed a pleading which was what Respondent represented it to be; a sworn property settlement agreement executed by Mrs. Coldeway.

Moreover, Petitioner's characterization of Mrs. Coldeway as a victim is comparably thin. If Mrs. Coldeway wanted the opportunity to litigate the validity of the earlier property settlement agreement and the issue of custody, it is odd that she would flee the state and call her husband from an undisclosed location and gloat that he would never see his daughter again. Such conduct is inconsistent with that of a person who desires an impartial decision, and who is the victim rather than the perpetrator.

Petitioner next relies on The Florida Bar vs. Kickliter, 559 So.2d 1123 (Fla. 1980). In Kickliter, the disbarred attorney was criminally charged with three felonies for forging a client's signature to a will and presenting that will to a

probate court as genuine. Moreover, Kickliter forced two employees of his office to become accomplices to his crimes by having them witness the fraudulent will. Again, as Respondent filed a document that was genuine, not fraudulent, no valid comparison between Respondent's conduct and Kickliter's conduct can be drawn.

Yet, the Petitioner insists that a six month suspension is appropriate. In support, Petitioner points out that Respondent testified that he believed the documents filed with the court were valid even though the Coldeways reconciled their marriage after the documents were executed. [Pet. Brief at 12]. Petitioner suggests Respondent is being untruthful in this regard. Petitioner avers that Respondent knew the documents were invalid, despite the corroborating testimony of Mr. Coldeway and the clear meaning of the property settlement agreement itself. Examination of this critical testimony and the settlement agreement illustrates the fallacy of Petitioner's contention.

Mr. Coldeway testified that he sought Respondent's assistance with the property settlement agreement during a period in his marriage when he and his wife were contemplating reconciliation. It was clearly anticipated by the parties and Respondent that Mrs. Coldeway was going to come back to the marital home. [R. 20, 21]. In fact, because Mrs. Coldeway had run off with "various different men" in the past, Mr. Coldeway

would not agree to reconcile unless he could be sure of providing a stable household in the event of a subsequent separation. [R. 20].

Respondent also testified that the parties were contemplating reconciliation at the time the agreement was requested and drafted. He further testified that he attempted to draft the agreement so that the expected reconciliation would not render it void. [R. 47]. In further, uncontroverted support of Mr. Coldeway's and Respondent's testimony is the settlement agreement itself. The property settlement agreement reads, in pertinent part;

> 9... "Primary physical residence of the child shall be with the Husband subject to liberal and extensive visitation with the wife, not being less than the contact and visitation guidelines.
>
> 10. The Husband shall not receive child support so long as the parties are residing together. Should the parties separate physically and live apart, the Wife agrees to pay the Husband child support in the amount of $25.00 per week. [Resp. Ex. 1, page 4]. (emphasis added).

Mr. Coldeway's and Respondent's testimony, as well as the unambiguous language of the property settlement agreement, confirm that it was the understanding and intention of all parties concerned that reconciliation was anticipated, but would not alter the agreement.

Furthermore, Petitioner's contention that Respondent knew the agreement was invalid when presented to the court is not only without evidentiary support, but, most respectfully,

illogical. If Respondent knew the property settlement agreement was rendered invalid by the reconciliation, then it necessarily follows that he knew it was invalid when he drafted it, since the agreement contemplated the very act which Petitioner claims invalidated it. However, there is no suggestion, even by Petitioner, nor any evidence indicating that Respondent knew the property settlement agreement was invalid at the time it was drafted.

Finally, although the final judgment obtained with the property settlement agreement was overturned upon appeal, such an after the fact finding does not show Respondent had knowledge of the invalidity of the agreement at any earlier time.

Accordingly, Petitioner's insistence that a six month suspension is justified due to his submission of a pleading known to be invalid is without even a scintilla of evidentiary support.

The Petitioner also relies on The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981). Again, contrary to the instant case, the offending attorney was charged with a felony for perpetrating a fraud on the court by counseling a witness to give false sworn testimony. Agar pled nolo contendre to a lesser included offense and was disbarred by this court for "deliberate, knowing elicitation or concealment of false testimony." Id. at 406.

Nevertheless, the Petitioner draws some unidentified parallel between the cases and continues to demand a six month suspension citing prejudice to Respondent's client and the continued portrayal of Mrs. Coldeway as a victim. However, the record below confirms that both positions are unsupported.

First, the prejudice perceived by Petitioner is that Mr. Coldeway was ordered to pay half of his wife's attorney's fees incurred in having the Final Judgment overturned. [Pet. Brief at 15]. However, it is clear that no prejudice to Mr. Coldeway resulted from this payment, as Respondent waived all post-judgment fees to his client. [R. 28, 74]. The estimated post-judgment fees that were waived were in range of $1,500.00 to $1,800.00. [R. 49], while Mr. Coldeway paid approximately $850.00 towards his wife's attorney's fees. [R. 27].

Moreover, while Petitioner protests the payment on behalf of Mr. Coldeway, it is clear he does not share Petitioner's feelings. When questioned about his feelings towards Respondent, Mr. Coldeway provided the following insight.

> Q. The times that you've used Mr. Myers as a lawyer, have you been satisfied with his services?
>
> A. Yes.
>
> Q. Has he always been honest with you, as far as you know?
>
> A. Yeah.
>
> Q. Has he been fair with you in terms of his billing practices and whatnot?

A. From what I understand about legal fees, he's more than fair.

Q. If you had another legal problem, would you go to Mr. Myers?

A. Definitely.

Q. Why did you come here today?

A. Because John needed me and he's done me good and it's time I do the same for him. [R. 28].

The preceding colloquy bespeaks a man not prejudiced by his attorney, but one who feels gratitude and respect towards him.

Yet again, Petitioner laments Mrs. Coldeway's predicament claiming Respondent deprived her the opportunity to contest the property settlement agreement and to litigate the issue of custody. Moreover, Petitioner claims Respondent caused Mrs. Coldeway to be deprived of her child for the period of time taken to have the Final Judgment set aside and the custody issue resolved. [Pet. Brief at 15]. Petitioner's contention is indeed curious, based upon the record below.

Mrs. Coldeway's surreptitious flight from the state, concealment of the minor child and stated intention of depriving Mr. Coldeway of ever seeing his daughter again, do not square with a person interested in contesting the validity of the agreement and litigating the issue of custody. [R. 24]. Moreover, the deprivation of her child during the post-judgment proceedings was no different than the deprivation

of Mr. Coldeway when Mrs. Coldeway made her unilateral decision on custody and visitation by sneaking out-of-state with the parties' daughter.

Therefore, while Respondent has admitted wrongdoing in this cause and accepts that sanctions must follow, Petitioner's request for enhanced penalties due to Mrs. Coldeway's inconvenience is unpersuasive based upon the evidence.

Lastly, Petitioner relies on The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). Hoffer was suspended for two years for misconduct involving a three count disciplinary complaint. Hoffer's violations included altering a release after it was executed by a client and lack of diligence in filing a complaint against the wrong party. In the third count, the following facts were shown. Hoffer represented a party named Lantzy in a foreclosure action against J.B. White and Government National Mortgage Association (hereinafter GNMA). On June 1, 1976, Colonial Mortgage Service Company of California (hereinafter CMSC), filed a Motion to Intervene because the mortgage being foreclosed upon had been assigned to CMSC from GNMA. Upon receipt of the Motion to Intervene, Hoffer contacted counsel for CMSC and agreed to continue a scheduled final hearing until after the Motion to Intervene was heard. Thereafter, Hoffer apparently rescheduled the final hearing and obtained a final judgment without notifying counsel for CMSC. Moreover, when the Motion to Intervene was heard,

Hoffer attempted to thwart the motion by arguing CMSC was precluded from asserting its interest by reason of the final judgment. Based upon findings of guilt as to all three counts, this court suspended Hoffer for two years.

Obviously, in Hoffer the suspended attorney engaged in two separate instances involving allegations of fraud i.e., altering the signed release, and scheduling the hearing without notice after promising to postpone the matter until opposing counsel could have his motion heard. Moreover, the Referee and this court found Hoffer's testimony at the disciplinary hearing to be unworthy of belief.

Conversely, Respondent here did not present a forged or altered document. Admittedly, Respondent failed to notice opposing counsel of the filing of the documents and failed to advise the court of other facts concerning an absolutely genuine document. Respondent, despite Petitioner's statements to the contrary, did advise opposing counsel of Mr. Coldeway's rejection of the proposed property settlement agreement. [R. 56]. Moreover, Petitioner's conclusory statement that Respondent intentionally failed to advise Mr. Ferguson of the earlier executed agreement is wholly without record support. Only the Respondent testified about conversations between he and Mr. Ferguson and he could not recall if the earlier agreement had been discussed. [R. 56]. Respondent's unrefuted

testimony certainly does not support Petitioner's contention that Respondent intentionally failed to advise Mr. Ferguson of the agreement.

Finally, Petitioner attempts to draw some parallel between Hoffer's conduct in opposing the motion to intervene with the Final Judgment obtained without notice, to Respondent's attempts to have the property settlement agreement upheld when Mrs. Coldeway hired new counsel to attack the final judgment. Yet, Petitioner continues to fail to recognize that the property settlement agreement was absolutely authentic and that the agreement was originally drawn in contemplation of the reconciliation.

Petitioner also cites the Florida Standards for Imposing Lawyer Sanctions (hereinafter The Standards), in support of its recommendation. Petitioner, in arguing for a suspension, cites Section 6.1 of The Standards which deals with the making of false statements, or submission of false documents, and withholding of information. However, the Respondent's conduct does not involve false statements or false documents.

Petitioner also cites Section 6.3 of The Standards which deals with a lawyer who makes "an unauthorized ex-parte communication with a judge or juror with the intent to affect the outcome of the proceeding. However, this Section has no applicability to the instant cause.

Section 6.3 of The Standards applies to corresponding Rule 4-3.5 of the Rules Regulating The Florida Bar. Rule 4-3.5, entitled "Impartiality and Decorum of the Tribinal", reads in pertinent part:

(b) In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending . . .

(d) A lawyer shall not:

(2) During the trial of a case with which he or she is connected communicate or cause another to communicate with any member of the jury.

Clearly, Respondent did not violate Rule 4-3.5, but instead failed to notice opposing counsel of the filing of documents and failed to advise the court of certain pertinent facts in contravention of Rule 4-3.3(d). Accordingly, Section 6.3 of The Standards simply does not apply.

Inexplicably, Petitioner does not mention Section 5.13 of The Standards which reads "Public Reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law." (emphasis added). Respondent urges that based upon the facts and the rules violated, particularly Rule 4-8.4(c), (Conduct involving dishonesty, fraud, deceit, or misrepresentation)

Section 5.13 is clearly more applicable than the Section 6.1 or Section 6.3.

Additionally, past decisions of this court and other courts within Florida suggest that the Referee's recommendation of a public reprimand is appropriate. In Hays v. Johnson, 15 FLW D1130 (5th D.C.A.) May 4, 1990, Attorney James Shook filed a petition for writ of habeas corpus seeking the release of a child to the custody of its mother. Attorney Shook's petition omitted several material facts. Specifically, Shook failed to reveal the mother had consented in writing to the appointment of the custodian, with discretion to place the child as he saw fit until further order of the court. Additionally, Shook failed to disclose that the temporary custody order was entered due to the petitioner's incarceration for contempt of court for violating the child's father's visitation rights and for refusing to reveal the child's whereabouts, among other things. As a result, the court issued a rule to show cause why sanctions should not be imposed against Shook. In responding to the show cause order, Shook attempted to reargue the merits of the petition, rather than explaining the material omissions in the pleading.

The 5th District Court of Appeals found that Shook did not comply with Rule 4-3.3(a) and Rule 4-3.3(d) (Candor toward the tribunal). As a result of these findings the court admonished Shook and directed him to pay the attorney's fees of the

opposing party in responding to the petition. No other sanction was imposed, nor was the matter referred to The Florida Bar.

This Court has also dealt with a case with facts substantially similar to the facts below in The Florida Bar v. Wendel, 254 So.2d 199 (Fla. 1971). Wendel represented a husband in a dissolution of marriage proceeding. During that proceeding, the husband was notified that the United States Selective Service System intended to draft him. Accordingly, Wendel was afraid that a custody order in favor of the wife would cause the husband to lose his draft exempt status. To avoid this situation, Wendel drafted a secret agreement which was signed by the parties which gave custody of the minor child to the wife. Meanwhile, the Final Judgment purported to give custody to the husband so that he could avoid the draft. The trial judge was not informed of the behind-the-scenes agreement and was led to believe by Wendel that custody was with the father.

This court found that "[t]here can be no doubt Respondent was not frank and candid with the court in this matter . . ." Id. at 202. In deciding to publicly reprimand Wendel, this court stated "[O]nly for such single offenses as embezzlement, bribing 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." Id. at 202.

Obviously, the facts below are more in line with those in Hays and Wendel, than they are with the cases cited by Petitioner. Moreover, the evidence of mitigation here is far greater than the mitigation set forth in Wendel.

Respondent had six witnesses appear on his behalf including Mr. Coldeway whose testimony has been mentioned above. In addition, Circuit Judge Gilbert Smith testified that he had known Respondent as an attorney for ten to twelve years. [R. 52]. Judge Smith indicated that Respondent was a very competent attorney whose reputation for character and ability was very good among the judges of the Twelfth Judicial Circuit. [R. 53, 54].

Moreover, Circuit Judge Andrew B. Owens, Jr. testified that he had been a circuit judge for eight years and had known Respondent for approximately ten years. [R. 6, 7]. Judge Owens opined that Respondent was a very capable, well prepared attorney. [R. 7]. Judge Owens further testified that Respondent was a person of honesty and integrity, and that he had a reputation as being a very good advocate with other circuit judges. [R. 8].

Charles Hagan, Executive Director for Florida Lawyer Assistance, Inc. also testified. (hereinafter FLA, Inc.). Mr. Hagan testified that he knew Respondent since 1986. Mr. Hagan indicated that Respondent started an attorney AA support group in Sarasota in conjunction with FLA, Inc. [R. 12]. Furthermore, Mr. Hagan informed the Referee that Respondent pays the costs of renting the building for such meetings. [R. 13]. According to Mr. Hagan, Respondent has also annually participated in the presentation of the Bridge the Gap Seminar as it relates to FLA, Inc. [R. 13]. Finally, Mr. Hagan stated that Respondent is an outstanding attorney with FLA, Inc. and that Respondent is the first person he thinks of when an FLA, Inc. matter arises in the Bradenton, Sarasota area. [R. 14, 15].

Parenthetically, Mr. Hagan confirmed the custody problems between Respondent and his ex-wife and that Respondent had problems locating his child. [R. 15]. Mr. Hagan described this as a "horrible situation" that was "distracting" to Respondent. [R. 15, 16].

Attorneys James R. Hutchens and Daniel Scott also testified on behalf of Respondent. Mr. Hutchens described Respondent as a "first rate lawyer" with "good, caring character". [R. 77, 78]. Mr. Hutchens also believed that Respondent's conduct in this proceeding may have been influenced by the stress from the situation with the mother of

his son. [R. 78]. Mr. Hutchens stated that he never had reason to question Respondent's honesty or integrity and that his reputation in the legal community was that of a capable, competent attorney of good moral character. [R. 78].

Daniel Scott testified that Respondent has a reputation among the bar and bench as being competent and well prepared. [R. 82, 83]. Moreover, Mr. Scott believed Respondent was viewed by most attorneys in Sarasota to be moral and upstanding and someone who could be trusted. [R. 83, 84].

Based on the testimony of all the witnesses as well as all other evidence, the Referee found the following mitigating factors to exist as set forth in Section 9.3 of The Standards.

1. absence of prior disciplinary record. [R.R. page 6]
2. absence of dishonest or selfish motive. [R.R. page 6]
3. full and free disclosure to the disciplinary board and cooperative attitude towards proceedings. [R.R. page 7]
4. good character and reputation. [R.R. page 7]
5. interim rehabilitation. [R.R. page 7]
6. remorse. [R.R. page 7]
7. "Respondent's misconduct in this case was influenced by the fact that Respondent's former wife had absconded with the Respondent's six (6) year old son and refused to divulge to the Respondent the location of the son for over two years. During the period of time involved in the Coldeway's case, the Respondent

was required to attend numerous hearings in an effort to locate and obtain the custody of his own minor child. The Respondent's own predicament in locating his minor child made Respondent aware of the fact that a number of private and public organizations designed to help parents locate children that had been abducted by a parent or step-parent would not assist Mr. Coldeway in locating his minor child, unless he had an order or final judgment awarding him custody of the child. [R.R. page 5]

Respondent would suggest that a further mitigating factor exists that was not noted in the Referee's report. Respondent feels that "imposition of other penalties or sanctions" as found in Section 9.32(k) of The Standards is present here based upon Respondent waiving his client's fees in the post dissolution proceedings, and additionally being required to pay a portion of the wife's fees.

Given the facts of this case and the overwhelming mitigating evidence, particularly Respondent's unique domestic problem which mirrored the dilemma of Mr. Coldeway, it is abundantly clear that the Referee's recommendation of a public reprimand followed by two years probation is appropriate. Furthermore, that Respondent be required, as recommended by the Referee, to continue his participation in F.L.A., Inc. and report such participation on a quarterly basis to The Florida Bar.

CONCLUSION

The Respondent's misconduct in this cause is an isolated incident in an unblemished legal career spanning fifteen years. The testimony at referee trial established that this episode probably would not have occurred if not for Respondent's contemporaneous two year fight to find his own child which clouded his judgment.

The cases cited by Petitioner are not sufficiently similar to the instant cause to warrant disturbing the Referee's recommendation. A suspension of any duration would have a devastating effect on Respondent's practice as a solo practitioner. Worse yet, following Petitioner's recommendation of a six month suspension would be tantamount to being removed from his practice for a period of one year or longer. Past experience in the time needed to process and approve a reinstatement petition support this time frame. Such a sanction is not supported by the record and would not serve the purposes of discipline as previously enunciated by this court. In The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970) this court stated:

> 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.

Given the unique facts of this case it is clear the recommended discipline serves all purposes listed above. The Referee's recommendation is appropriate and should be approved.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 29 day of January, 1991, to: Bonnie L. Mahon, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607; and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

SCOTT K. TOZIAN, ESQUIRE