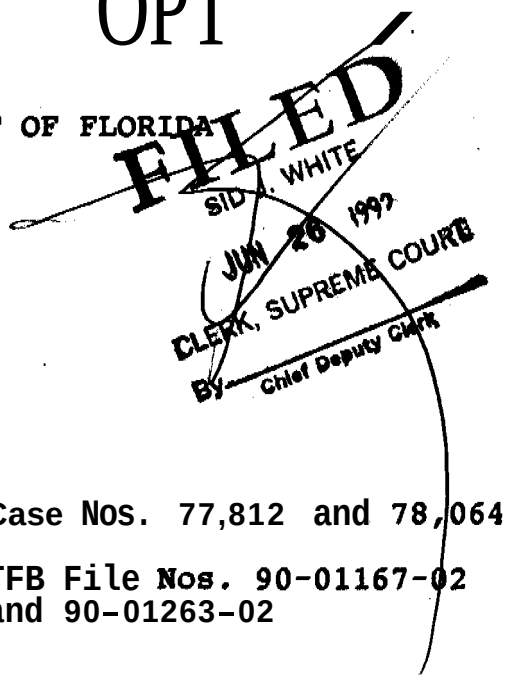
OPT

IN THE SUPREME COURT OF FLORIDA



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THE FLORIDA BAR,

Complainant,

vs.

CURLEY R. DOLTIE,

Respondent.

Case Nos. 77,812 and 78,064

TFB File Nos. 90-01167-02 and 90-01263-02

ANSWER BRIEF

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TABLE OF CITATIONS

Other Authorities Cited

Rules Of Professional Conduct:

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PRELIMINARY STATEMENT

Appellant, Curley R. Doltie, will be referred to as Respondent or as Mr. Doltie throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as The Bar.

References to the Report of Referee shall be by the symbol "RR, p. ____" followed by the appropriate page number.

References to the transcript of the hearing before the Referee will be made as "T-____," followed by the appropriate page number.

References to the exhibits submitted into evidence at final hearing shall be as follows: "TFB's Exh. ____," followed by the appropriate number, if any.

References to Respondent's brief shall be as follows: "R's Brief, p.____" followed by the appropriate page number.

References to the Complaint filed in Case No. 77,812 will be referred to as "Complaint 1" followed by the appropriate page number.

References to the Complaint filed in Case No. 78,064 will be referred to as "Complaint 2" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The following supplements the Respondent's statement of the case:

Following the Respondent's filing of his Petition for Review, on or about March 26, 1992, the Complainant filed a Motion for an Order to Show Cause Why Respondent's Petition for Review Should Not Be Dismissed, alleging that more than thirty (30) days had elapsed since the filing of the Petition for Review, yet Respondent had not yet filed a brief.

On or about April 2, 1992, the Respondent filed a Motion for Extension of Time to File Initial Brief alleging, although working diligently, complex factual issues in this matter prohibited timely filing of the brief.

The Complainant filed a Response to Respondent's Motion for Extension of Time, opposing the requested extension and motion as being untimely filed.

This Honorable Court entered an Order on May 19, 1992 granting the Respondent until June 1, 1992 to file his brief.

Respondent's initial brief was filed on June 1, 1992.

Since the Respondent did not provide a statement of facts, The Florida Bar submits the following:

CASE NUMBER 77,812

Client David L. Peoples entered into a contingency fee contract with the Respondent to represent him in his "insurance claim." The contract allowed attorney's fees in the amount of one-third of the recovery and "not to exceed **$1,000.00** in fees, unless a lawsuit is filed and a recovery is accomplished." (TFB's Exh. **1).**

Respondent proceeded to negotiate a settlement with Allstate Insurance Company. **The** driver of the other vehicle involved in this accident was represented by Allstate (T-9). Negotiations with Prudential Insurance Company on behalf of its insured, David Peoples, also began **(T-12).**

On August 18, **1989,** Mr. **Peoples** executed, at the Respondent's direction, a Release in Full in exchange for a check from Allstate, in the amount of **$2,125.29,** thereby releasing Allstate from any damages or claims resulting from the automobile accident (**TFB's** Exh. **2).** Of that **$2,125.29,** Respondent kept $1,000.00 for his fee (T-10).

Respondent advised Mr. Peoples to rent an automobile, even taking him to the rental site, claiming that the insurance company would reimburse the costs involved **(T-10-11,** 23; RR, **p. 1-2).** Respondent **was** concerned about obtaining more monies from

Allstate since he understood a release to mean that the company would be held harmless on future claims (T-11).

Thereafter, Respondent negotiated a settlement of the Prudential claim, Prudential initially denied coverage because a written policy had never been issued. Proof of insurance was based upon a receipt of payment provided by Prudential to Mr. Peoples (T-16, 18).

On November 6 and 15, 1989, Respondent wrote letters to Allstate demanding additional monies (Complaint 1, para. 20-21; RR, p. 1), in spite of the full release executed in August 1989 by Mr. Peoples at Respondent's direction. Again on May 8, 1990, Respondent sent a demand letter for $4,000.00 to Allstate for expenses incurred in this matter (TFB's Exh. 6).

On November 15, 1989, Prudential sent a settlement check in the amount of $3,063.50 for full and final release of the client's claim. Respondent retained an additional $1,000.00 for his fee and delivered $2,063.50 to Mr. Peoples (TFB's Exh. 4; T-13, 35).

During this time period, the Respondent performed various other legal tasks for the client relating to a property damage claim to another automobile, payment of repairs for the automobile that was the subject of the insurance claims, and client's violation of his probation in an unrelated matter (T-28-29, 35, 38). Respondent never discussed a fee for any of these matters, nor did he ever provide any billings and/or statement to the client for these services (T-29, 40-43).

Respondent took a total of $2,000.00 in fees from Mr. Peoples, although the contract for services clearly showed the fee would not exceed $1,000.00.

The Referee found the Respondent guilty of violating Rules 4-1.1 (failed to provide competent representation to his client) and 4-1.5(d) (charged an excessive fee), of the Rules of Professional Conduct of The Florida Bar (RR, p. 4).

Respondent undertook the representation of Sabrina Skipper, who was appealing a decision by the Unemployment Compensation Claims Examiner which denied her request for benefits (TFB's Exh. 1; T-62, 80). The Unemployment Appeals Commission remanded the case in order to supplement the record on September 13, 1988. The Respondent was noticed with the remand order (RR, p. 5). A hearing was scheduled for October 12, 1988, but there is no indication that the Respondent was served with notice of this hearing (RR, p. 5; T-81). On October 10, 1988, the Respondent was served with a Motion for Continuance of the October 12, 1988 hearing (T-81-82; TFB's Exh. 3). A notice scheduling the hearing for October 27, 1988 was sent on October 14, 1988. There is no indication that Respondent was served with this notice (RR, p. 5; Complaint 2, para. 8). Respondent, though not served, became aware of the hearing scheduled for October 27, 1988 (RR, p. 5; T-91). The opposing counsel served Respondent with a Second Motion for Continuance and suggested November 10, 1988 as one of several possible dates (T-82; TFB's Exh. 4; RR, p. 5). On October 28, 1988, a notice rescheduling the hearing for November 10, 1988 was sent. There is no indication Respondent was served with the notice (RR, p. 5). Ms. Skipper contacted the Respondent about the November 10, 1988 hearing and Respondent told her that she would not be penalized for not going to the hearing because of his being her counsel (RR, p. 5-6; T-65-67, 73-74). Respondent denies that the conversation

took place (RR, p. 5-6; T-84). Respondent also told the client she was in "Victory Lane" regarding her claim with the City, meaning that she was going to prevail in her claim (RR, p. 6; T-65, 76). Respondent did not appear at the November 10, 1988 hearing (T-84). At no time did Respondent contact the Unemployment Compensation referee to inquire as to why he was not receiving notices of the hearings (RR, p. 6; T-85-88). At no time did Respondent attempt to determine when the hearing had been rescheduled (T-83, 88-89). Yet Respondent was on notice that this hearing was going to be set (RR, p. 5).

The Referee found the Respondent guilty of violating Rules 4-1.3 (failed to act with reasonable diligence and promptness), 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), and 4-1.4(b) (failed to explain matter to his client to extent reasonably necessary to make informed decisions), of the Rules of Professional Conduct of The Florida Bar (RR, p. 6-7).

Based on both cases, the Referee recommended as appropriate discipline, a one month suspension, followed by one year probation with the conditions that the Respondent successfully take the Ethics Section of The Florida Bar Exam and successfully complete the "Bridge the Gap" seminar (RR, p. 7).

SUMMARY OF ARGUMENT

I

CASE NO. 77,812

The Referee's Report is supported by competent and substantial evidence. The record in this case supports the allegations that the Respondent did not provide competent representation to Mr. Peoples and that he charged Mr. Peoples an excessive attorney's fee.

II

CASE NO. 78,064

The Referee's Report is supported by competent and substantial evidence. The record supports the allegations that the Respondent failed to act with reasonable diligence and promptness and failed to keep his client reasonably informed and failed to reasonably explain the matter to her in a way that she could understand it.

III

RECOMMENDED PENALTY IS APPROPRIATE DISCIPLINE

The Referee's recommendation is appropriate in light of the Respondent's disciplinary record, the Florida Standards for Imposing Lawyer Sanctions and the relevant case law.

ARGUMENT

I

CASE NO. 77,812

THE REPORT OF THE REFEREE IS SUPPORTED BY COMPETENT *AND* SUBSTANTIAL EVIDENCE; THE REPORT OF THE REFEREE CONSIDERS ALL TESTIMONY AND EVIDENCE WHICH IS BEFORE HIM.

A. INCOMPETENT REPRESENTATION

The Report of the Referee is supported by competent and substantial evidence. Respondent alleges that there is no evidence which could support a finding of incompetent representation of his client. However, there is evidence that indicates the Respondent sent a letter to Allstate Insurance Company requesting additional monies several months after the Respondent's client, at the direction of the Respondent, signed a release from Allstate Insurance Company (Complaint 1, para. 20, 21, 32; RR, p. 1). The Release released Allstate from any other claims for the accident that had occurred. Respondent's demand was for claims arising out of the released incident. Respondent, thereafter sent additional demand letters to Allstate requesting payment for the rental vehicle costs. Again, Allstate had already been released from this matter. By advising his client that the client could seek additional monies from Allstate, Respondent incompetently represented his client.

Respondent instructed his client to obtain a rental vehicle while the client's vehicle was being repaired (RR, p. 1-2). The Respondent told the client that Allstate Insurance Company would

pay for the rental car (RR, p.2). It is clear from the record that the Respondent had never seen a copy of any Prudential insurance policy which indicated that it would pay for a rental vehicle and that Respondent had already released Allstate from any future claims (RR, p. 2; T-14). Therefore, Respondent could not reasonably and competently tell his client that he would be reimbursed for the cost of the rental vehicle.

Mr. Peoples signed the settlement statement with Prudential on approximately November 2, 1989 because he "felt he had no other choice" (RR, p. 3; T-36). Respondent represented to his client that he, the client, would have an additional claim against Allstate based upon the "breach of contract" (RR, p. 3; T-14, 31, 36-37). But Allstate had already been released from all claims in August 1989. Respondent could not reasonably and competently counsel the client that he had a breach of contract claim against Allstate at the time the Prudential release and settlement statement were executed (RR, p. 1-2, 4).

Respondent also failed to discuss any additional attorney's fees and failed to provide the client with a statement for services prior to unilaterally taking an additional $1,000.00 fee (T-29, 40-43). This, too, amounts to incompetent representation.

These facts support the Referee's finding that the Respondent failed to provide competent representation to his client, David Peoples.

B. EXCESSIVE ATTORNEY'S FEE

The Report of the Referee is supported by competent and substantial evidence in its conclusion that the Respondent charged and retained an excessive fee in this matter. Respondent had a contract for attorney's fees which allowed for a fee not to exceed $1,000.00 (TFB's Exh. 1) on representation of the insurance claim. It is clear from the evidence that the Respondent took $2,000.00 as his fee for representation of the client, David Peoples. The representation of Mr. Peoples against Allstate was an insurance claim as was the claim against Prudential. Although the contract was not clear as to what "insurance claim" meant (RR, p. 4), it is clear that both cases for which Respondent took a fee were for insurance claims and the amount is clearly in excess of the contract's limitations of $1,000.00.

Although the Respondent claims that the Report of the Referee overlooked the testimony that the Respondent had rendered other legal services to the client, the Respondent fails to acknowledge that there was testimony that 1) he had not billed the client for these separate legal services (T-50); 2) that he had not entered into a separate fee agreement for these separate legal services (T-42); 3) that there had not been any other discussions about a fee agreement or arrangements above and beyond the $1,000.00 contract that was entered into regarding the "insurance claim" (T-40-43); and 4) that these other legal services did not involve any insurance claim (T-49).

This evidence supports the Referee's conclusion's that the Respondent violated Rule 4-1.5(d) (Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule), of the Rules of Professional Conduct of The Florida Bar.

C. REWEIGHING THE EVIDENCE BEFORE THE REFEREE

It is within the purview of the Referee to draw conclusions and to consider all the facts and evidence which are before him. This Court ruled in The Florida Bar v. Scott, 566 So. 2d 765, 767 (Fla. 1990), that "a referee's finding of fact will be upheld unless it is clearly erroneous or lacking in evidentiary support. The burden is upon the party seeking review to demonstrate that the referee's report is 'erroneous, unlawful, or unjustified.' Rules of Discipline 3-7.6(c)(5). This Court cannot reweigh the evidence or substitute its judgment for that of the trier of fact.''

Respondent herein asks that this Court reweigh the evidence. The Referee, in his report, clearly states that he has considered all of the evidence which was presented (RR, p. 1).

The Respondent asserts in his brief that the client's motive in filing this complaint should be considered herein (R's Brief, p. 8). Motive for filing a complaint is irrelevant to whether the attorney in question actually committed the actions which are alleged; rather, motive *goes* to the credibility and/or weight of the client's testimony. Respondent raised the client's motive for the complaint at the referee hearing (T-53-54). The Referee, as the trier of fact, weighed that testimony in reaching his conclusion.

Respondent's arguments -- 1) that he obtained a settlement in this matter and, therefore, competently represented his client and 2) that he performed legal services above and beyond "insurance claim'' work and, therefore, did not charge and/or collect an excessive fee -- effectively ask this Court to reweigh all of the evidence which was before the trier of fact. As has been previously pointed out to the Court in this brief and in the record of the case, there exists competent and substantial evidence to support the Referee's findings.

The Respondent has failed in this burden to show that the Referee's Report is erroneous, unlawful or unjustified. Rule 3-7.7(a)(5), Rules of Discipline.

II

CASE NO. 78,064

THE REPORT OF THE REFEREE IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

A. LACK OF DILIGENCE

The Respondent claims that the Report of the Referee is contrary to the testimony and evidence received at this hearing in that "it erroneously assumes that Respondent had knowledge of the November 10, 1988 Unemployment hearing." Respondent also asserts that this is the sole and controlling issue in this matter.

The Florida Bar has never asserted nor has the Referee ever found that the Respondent had received actual notice of the November 10, 1988 unemployment compensation hearing. Rather, The Florida Bar asserts that the Respondent had knowledge, either actual or constructive, of the hearing. Respondent's client contacted him by telephone regarding the necessity of her attendance at the hearing (T-65-67, 73-74). The Referee found that the "client was unshakeable in her testimony" that Respondent knew of the hearing date (RR, p. 5). Respondent told her she need not attend since he was her counsel (RR, p. 5-6; T-73-74). Additionally, the record supports, and Respondent admits, the fact that the Respondent received two (2) motions for continuances, which asked that the hearings (for which Respondent was not served with notice) be continued (Complaint 2, para. 7, 10; RR, p. 4-5; T-81-82). The first continuance

resulted in a hearing being set only two (2) weeks ahead (Complaint 1, para. 8).

The second Motion cited November 10, 1988 as a possible date for the hearing (TFB's Exh. 4). In fact, November 10, 1988 was the latest date listed in the Motion for Continuance. Every other date was even closer to the date the Motion was filed. Respondent was on notice that this matter would be set soon (T-87; RR, p. 5). In spite of this, Respondent made no effort to ascertain the date on which the hearing was to be held (T-83, 88-89).

Respondent admits that although he was not served with notice of the October 27, 1988 hearing, he became aware (i.e., had knowledge) of that hearing date. (RR, p. 5; T-91). It is further clear from the evidence and testimony at the referee hearing that the Respondent made no attempts to contact the opposing counsel and made no attempts to contact the Referee in the Unemployment Appeals Compensation Commission to determine why he was not being copied with these Notices of Hearing (T-83-89). Based on this, the Respondent knew or should have known of the November 10, 1988 hearing date.

Reasonable diligence requires that an attorney inquire as to why he is not receiving notices of hearing. Reasonable diligence requires that an attorney find out when a hearing has been set. Reasonable diligence requires an attorney to follow through in setting a hearing on a matter which concerns his client (RR, p. 6).

It was incumbent upon the Respondent to follow through to determine why he was not receiving notices of hearing. The Respondent should have followed through in determining the hearing date which he knew was being set soon after as the Motion for Continuance indicated November 10, 1988 as the latest possible hearing date.

Respondent, in his initial brief, submits several dates and events which allegedly occurred after the November 10, 1988 hearing occurred. This information was not presented at the hearing before the Referee in this case but was presented in a post hearing submission and should be a part of the Statement of the Facts and not an Argument on appeal. Of the material submitted after the hearing, the Referee commented only upon an appeal filed by the Respondent where the Respondent, once again, does not follow through. Respondent asked the Appeals Commission to contact him regarding a hearing date. Approximately two months later, the lower tribunal ruling was affirmed (RR, p. 6). The Referee found no evidence that the Respondent made any attempts to follow up the status of the appeal (RR, p. 6). There is competent and substantial evidence in the record which supports the Referee's findings of fact.

B. FAILURE TO KEEP CLIENT INFORMED AND FAILURE TO REASONABLY EXPLAIN MATTER TO CLIENT

Respondent states that his client chose not to attend the November 10, 1988 hearing because she went to a seminar (R's

Brief, p. 10). He ignores the testimony that the client did not attend the hearing based upon the counsel offered by the Respondent. Respondent told the client she would not be harmed because he was her counsel and he would represent her interests (T-65-67, 73-74). Respondent even told his client she was in "victory lane" (T-65, 76), meaning she was going to prevail.

This evidence supports the Referee's finding that the Respondent is guilty of failing to keep a client reasonably informed and failing to explain the matter to the client to the extent reasonably necessary for her to make an informed decision.

III

THE RECOMMENDED DISCIPLINE IS APPROPRIATE IN LIGHT OF RESPONDENT'S PAST DISCIPLINARY RECORD AND FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

The Respondent fails to present any support for his allegations that the recommended penalty in this matter is excessive.

The starting point in determining the proper discipline to be imposed upon a lawyer who has been found guilty of violating the Rules of Professional Conduct of The Florida Bar is to review the Florida Standards for Imposing Lawyer Sanctions.

Section 3.0 of the Florida Standards for Imposing Lawyer Sanctions provides that:

> **3.0 - Generally**
>
> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty 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 factors.

Respondent has violated the following sections of the Standards and, in the absence of aggravating or mitigating circumstances and upon application of the factors set forth in Section 3.0, the following actions are appropriate:

> 4.12 - Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.
>
> **4.42** - Suspension is appropriate when:
>
> (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or
>
> (b) a lawyer engages in a pattern of neglect **and** causes injury or potential injury to a client.
>
> **4.52** - Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.
>
> 4.53 - Public reprimand is appropriate when a lawyer:
>
> (a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

The aggravating factor in this case is the Respondent's disciplinary history. He has received two private reprimands and one public reprimand.

The next step in determining the appropriate discipline is the review of applicable case law. The following cases appear to be similar in nature to the case under consideration and may be helpful when determining discipline to be imposed in this matter.

The Florida Bar v. Grant, 465 So. 2d 527 (Fla. 1985). The attorney failed to answer discovery requests and did not respond to court orders or attend hearings on discovery. This negligent conduct warranted a public reprimand.

The Florida Bar v. Schilling, 486 So. 2d 551 (Fla. 1986). Attorney who failed to diligently pursue two legal matters entrusted to his care warranted public reprimand, six-month suspension, and assessment of costs.

The Florida Bar v. Baker, 431 So. 2d 601 (Fla. 1983). Neglect of matter by excessive delay in filing pleadings warrants public reprimand.

The Florida Bar v. Johnson, 530 So. 2d 306 (Fla. 1988). $3,500.00 for criminal defense without clearly communicating to client that the fee covers only preliminary matters and not representation at trial warrants public reprimand and two years supervised probation.

The Florida Bar v. Griggs, 522 So. 2d 24 (Fla. 1988). An attorney's neglect of client matters and failure to accurately advise clients of status of case warrants 45 day suspension and two years probation.

However, a more stringent discipline is appropriate in this matter in light of Respondent's disciplinary record. It is evident that the Respondent has not been deterred by his three prior disciplinary actions, therefore, a more harsh penalty is appropriate. This Court said in The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979) that it "deals more severely with cumulative misconduct than with isolated misconduct." Id at 476. In Vernell, the Respondent had two prior reprimands, one private and one public. This Court held that a suspension in this matter was appropriate in light of the cumulative misconduct. See also, The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982).

The purpose of discipline for professional misconduct are delineated in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

> In cases such as these, three purposes must be kept in mind in reaching our conclusion. 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.

The Referee's recommendation of one month suspension followed by one year probation meet the purposes enunciated in Pahules and *is* appropriate under the Florida Standards for Imposing Lawyer Sanctions and the case law.

CONCLUSION

The Referee considered all of the pleadings and evidence before him prior to making his decision (RR, p. 1).

The Referee found the Respondent guilty of violating Rules 4-1.1 (incompetent representation) and 4-1.5(d) (excessive fee), of the Rules of Professional Conduct of The Florida Bar, regarding Case No. 77,812. The Referee found the Respondent guilty of violating Rule 4-1.3 (Diligence); 4-1.4(a) (keep client reasonably informed) and 4-1.4(b) (reasonably explain matter to client), of the Rules of Professional Conduct of The Florida Bar, regarding Case No. 78,064.

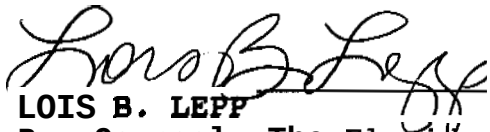
The Report of the Referee is supported by competent and substantial evidence. The evidence which the Referee offers in support of his position is all contained within the record before the Referee. Respondent asks the Court to reweigh the weight and sufficiency of the evidence to come to a different conclusion in favor of him. This Court has said that it does not reweigh the evidence received by the Referee.

The Respondent has offered no support to his allegation that the penalty recommended by the Referee (one month suspension, followed by one year probation, with conditions that Respondent successfully take the Ethics Section of The Florida Bar Exam and successfully complete "Bridge the Gap" seminar) is excessive. The Referee found that this was the appropriate discipline in light of the Respondent's 1985 and 1987 private reprimands and 1991 public reprimand. The Florida Standards for

Imposing Lawyer Sanctions and the case law support this recommendation.

The Referee's Report should be accepted by this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief regarding Supreme Court Case Nos. 77,812 and 78,064; TFB File Nos. 90-01263-02 and 90-01167-02, has been forwarded by regular U.S. mail to CURLEY R. DOLTIE, Respondent, at his record bas address of 118 N. Gadsden Street, Post Office Box 1327, Tallahassee, Florida 32302 on this 26th day of June, 1992.

LOIS B. LEPP
Bar Counsel