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FILED
SID J. WHITE
AUG 11 1992
CLERK, SUPREME COURT.
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,226

THE FLORIDA BAR,

Complainant,

vs.

HARRY WINDERMAN,

Respondent.

RESPONDENT'S INITIAL BRIEF IN SUPPORT OF PETITION FOR REVIEW

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CITATIONS OF AUTHORITY

PREFACE

This is a Petition for Review taken by the Respondent, HARRY WINDERMAN, from Report of the Referee, rendered April 9, 1992. HARRY WINDERMAN was the Respondent in the lower court and The FLORIDA BAR was the Complainant. The parties are referred to herein as WINDERMAN and The FLORIDA BAR.

The following symbols will be used herein:

(Plds) - Pleadings

(Ex) - Exhibits

(Dep) - Depositions

(T) - Transcript of Final Hearing, Pages 1-264

(RR) - Referee's Report

STATEMENT OF THE CASE

The FLORIDA BAR filed its complaint against WINDERMAN, on or about July 3, 1991 (Plds-Complaint). WINDERMAN filed his answer and affirmative defenses to the complaint on or about August 1, 1991 (Plds-Answer). The Final Hearing was conducted before the appointed referee, Robert Collins, on March 23 and 24, 1992 (RR). On April 9, 1992, the Referee rendered the Report of Referee (RR).

On May 27, 1992, WINDERMAN timely filed his Petition for Review pursuant to the rules regulating the FLORIDA BAR, Rules of Discipline, Rule 3-7.7.

STATEMENT OF THE FACTS

On or about February of 1989, WINDERMAN became engaged to represent Donald F. Wells ("Wells") in connection with a claim by Wells against Security and Investment Cooperation of the Palm Beaches, Willis B. Mall, Phyllis V. Mall, Gaylee C. Gulley, Darryl Mall and Richard T. Stierer (RR-2). Hereafter, Security Investment Cooperation of the Palm Beaches will be referred to as ("Security") and the other Defendants will be referred to as ("Defendants").

The basis of Wells' claim was that he invested money with Security and that Security and the other Defendants had improperly induced such investment and improperly dealt with it after the investment was made, thereby causing Wells to lose his investment (RR-2). As part of his representation, WINDERMAN negotiated a detailed settlement agreement with Security, which settlement agreement, if honored would have provided Wells with almost all of his investment (T-7). However, Security ultimately refused to execute the agreement (T-7, 186).

Subsequent to the preparation of the settlement agreement, Security commenced a reorganization in bankruptcy court (T-7). WINDERMAN reasonably believed that based on the pending bankruptcy action that the only manner for Wells to recover anything was to be able to sue the principals of Security which would prevent them from being able to discharge those liabilities in bankruptcy themselves (T-7,8). WINDERMAN maintained that the only practical solution available for Wells would be to institute an action under "RICO" or Florida Security laws which might prevent the discharge

of judgments against the principals/Defendants. At that point, WINDERMAN petitioned the bankruptcy court for permission to institute an action on behalf of Wells (T-8). WINDERMAN moved the bankruptcy action to lift the stay provided by the bankruptcy code to enable Wells to file an action against Security and the principals of Security (Plds-Respondent's Finding of Fact).

Thereafter, in March of 1989, WINDERMAN filed a summons and complaint and various discovery pleadings in an action commenced on behalf of Wells against Security and Defendants venued in the Circuit Court, Fifteenth Judicial Circuit bearing case no.: 89-2394 AE. (RR-3). The suit included counts for Federal and Florida Securities Violations and "RICO" Actions, civil fraud, misrepresentation and enforcement of the settlement agreement (T-227,228) (Plds) (RR) (Plds-Respondent's Findings of Fact).

Security was included as an indispensable party, however, Security had already listed Wells as a creditor for the entire amount of his investment and did not object to the amount of the claim (T-13). At all times in the underlying action, each of the parties' claims for payment of their principal sum investment had already been acknowledged by Security in the United States Bankruptcy Court and those claims continue unaffected by the state court action. The state court action was intended to gain additional judgments against the individual Defendants who were believed to have personally benefited from the alleged transactions (Plds-Respondent's Findings of Fact) (T-13). Thus, WINDERMAN maintained that a breach of contract or any other action against

Security would have been redundant and provided Wells with no greater standing in the bankruptcy court (Plds-Respondent's finding of fact).

By motion filed on March 31, 1989, Security and the Defendants sought an order dismissing the complaint (RR-3). WINDERMAN filed the First Amended Complaint on May 26, 1989 (RR-3). By motion filed June 23, 1989, Security and the Defendants sought an order dismissing the first amended complaint (RR-3). WINDERMAN filed the second amended complaint on July 21, 1989 (RR-3). As of June 1989, certain other investors in Security and Wells agreed to join as a group to prosecute the Wells actions, which at that time had already been amended (Plds-Respondent's finding of fact).

Subsequent to his undertaking representation of Wells, WINDERMAN, in or about July ox August of 1989, was retained by and undertook representation of John and Betty L. Cooney ("Cooneys") and Vera Harrington ("Harrington") in connection with such clients' claims against Security and the Defendants (RR-8). At the time WINDERMAN undertook representation of these other clients, Wells owed WINDERMAN approximately $13,000.00 in attorney's fees for his representation of Wells which was billed on an hourly basis from February of 1989 (Plds-Respondent's Findings of Fact) (T-13). The basis of each client's claims was essentially the same as Wells. (RR- 9) WINDERMAN filed a complaint on behalf of the Cooneys against Security and the Defendants on August 17, 1989 venued in the Circuit Court, Fifteenth Judicial Circuit bearing case no, : 89-2394 AE. (RR-9). WINDERMAN filed a complaint on behalf of

Harrington in or about August of 1989 venued in the Circuit Court of the Fifteenth Judicial Circuit bearing case no.: 89-8341 AH (RR-9). WINDERMAN agreed with counsel for the Defendants that the Wells case would be used as a test case and that all of the consolidated cases would be determined by the Wells case in order to eliminate the necessity of multiple hearings and identical issues and provide for consistency in rulings (RR-9). By agreement of the parties and subsequent order filed May 2, 1990, the actions filed on behalf of Cooneys and Harrington were consolidated with the Wells action. (RR-9) (T-227).

Betty Phillips ("Phillips") inquired of WINDERMAN in or about June 1989, to ascertain whether or not WINDERMAN would represent Phillips in a claim against Security and the Defendants, the basis of her claim was essentially the same as that of Wells and the other Plaintiffs. (RR-12). WINDERMAN forwarded Phillips four separate proposed retainer agreements (RR-1,2). Although WINDERMAN never received an executed retainer agreement from Phillips, she did forward to WINDERMAN copies of her documents which were necessary only if she was interested in having a suit instituted on her behalf (Plds - Respondent's Finding of Fact). All of the other Plaintiffs in the group executed retainer agreements with WINDERMAN except for Phillips. Phillips paid no retainer and maintained that she did not retain WINDERMAN (RR-12). In or about August 1989, WINDERMAN filed a complaint on behalf of Phillips against Security and the Defendants venued in the Fifteenth Judicial Circuit Court case no.: 8-8339 AD. (RR-12).

WINDERMAN was told by all of the above individuals that they had no funds in which to prosecute the action other than their initial retainer and if significant additional costs were involved they would not be able to carry on the action. (T-86,237) (Plds-Respondent's Finding of Fact).

WINDERMAN testified that he communicated with Wells or Cooney in the belief that communicating to one was communicating to all of the group. WINDERMAN testified that he communicated to Wells extensively at the beginning of the suit telling him what was going on or the nature of what the suits were. WINDERMAN further testified that he met with his clients at the Bankruptcy court on four or five occasions (T-237). Both Cooney and Harrington acknowledged meeting with WINDERMAN on several occasions during the course of his representation. Even though the evidence was conflicting, the Referee found that WINDERMAN failed to adequately communicate with his clients (RR-5,6,11). Such finding was based on the demeanor of the witnesses, even though Harrington and WINDERMAN were the only witnesses who appeared for their complete testimony at the final hearing, and because WINDERMAN could not produce correspondence except for his May 1992 Notice of Withdraw (RR-5,6).

In response to the limited resources of his clients, WINDERMAN performed his own extensive analysis of Security's books and records, and determined that the principles of Security had not pocketed any significant assets and were not going to be able to pay any judgment to the parties if one was obtained (T-8,238). The

State of Florida was actively moving to revoke the Defendants mortgage licenses and to impose substantial penalties on themwhich in fact was done (T-9,232). The bankruptcy court's independent examiner also investigated the books and records of Security and found no evidence that the principles of Security had taken any money for their own benefit (T143-145,239). **WINDERMAN** testified that the state of Florida was moving to revoke the mortgage licenses of the principals of Security and that the State of Florida was seeking to impose substantial penalties on those individuals (T-9). In fact, ultimately, this **was** done by the State of Florida, which left **WINDERMAN's** attempt to bring Security's attorney and certified public accountant into the case as Defendants as the only viable opportunity for recovery (T-9). Cooney testified that the Florida State Controllers Office levied joint fines against the principals of Security and revoked all of their licenses (T-151).

At a meeting held at Mrs. Cooney's house in September 1989, in which **WINDERMAN** and his clients attended, the parties met with the independent bankruptcy examiner and reviewed the examiners report and evaluated their options against Security (T-79). Cooney testified that the creditors committee had requested an independent examiners assistance (T-114). Based upon the above referenced review, WINDERMAN expressed to his clients that in his opinion, the only realistic opportunity to recover anything from anyone in the case was an attempt to bring in, as parties, the professionals; the attorney and the certified public accountant who had done the work

for the company (T 239). WINDERMAN testified that he repeatedly made it clear to his clients that unless the accountant and the attorney could be held for their participation in the business transactions, their was very little hope of recovering a civil judgment and that whatever they would recover against the corporation would come from the bankruptcy court proceedings (T-239).

WINDERMAN testified that he made it clear to his clients that if either the attorney or the certified public accountant were dismissed from the case along with their malpractice insurance carriers that there would be very little opportunity to pursue any claims against any of the other individuals. It was his belief that his clients came to that same conclusion (T 240-241).

WINDERMAN testified that it was clear to him that his clients were in agreement that there was no use in pursuing the case because of the lack of assets worth pursuing (T-241).

At the meeting held at Mrs. Cooney's house, all of the parties were told that the only chance of significant recovery was to join the attorney and accountant but that Florida had a concept of "privity" which made it very difficult to reach those individuals (Plds-Respondent's finding of Fact) (T87,92).

WINDERMAN testified that the trial court eventually dismissed the "RICO" allegations because the trial court relied on case law that did not establish a requisite pattern of conduct (RR-8,9). At the time that WINDERMAN plead the "RICO" allegations, it was almost impossible to trace the rapidity of the Court's decisions

involving the standard for "RICO" causes of action (T-8). Brian Joslyn, the attorney for Security and the Defendants, testified that the "RICO" allegations involved an extremely intricate set of statutes with a tremendous amount of case law decided on all sides of the issues (T-230). WINDERMAN testified that the trial court ultimately rejected his numerous attempt to bring Security's accountant and attorney into the case. He maintained that he plead those matters as best he could on at least three separate occasions but the trial court would not accept the authority he cited.

At the disciplinary hearing WINDERMAN cited Dah Chong Hong Limited v. Silk Greenhouse Inc., 719 F. Supp 1072 (M.D. Fla. 1989) to demonstrate that the causes of action he had plead were now sustainable (T13-14). The Dow Chong Hong case denied Defendant's motion to dismiss in an action brought by the Plaintiff to recover for racketing fraud, unjust enrichment, tortious interference with the contractual relations, and theft of trade secrets. WINDERMAN maintained that he had correctly plead a requisite pattern in characterization for a cause of action under "RICO" (T-14). Brian Joslyn, described WINDERMAN's representation in unflattering terms and opined that WINDERMAN could have at least framed a sustainable cause of action for breach of contract (T229-230). Specifically, Joslyn recalled a specific motion to dismiss hearing on the "RICO" allegations where he came to court with $250 to $300 worth of copied cases as opposed to WINDERMAN attending with only authorities from Florida Jurisprudence (T-230).

On at least two separate occasions between his last meeting with the group and his office meeting in January of 1990, he had conference calls with Cooney and Wells to discuss the case

including Mrs. Cooney's extensive discussions with the State Office of the Comptroller and the matters in the Bankruptcy Court (Plds - Respondent's Findings of Fact). Cooney testified that on at least two occasions she had conference calls with WINDERMAN between August **1989** and January of **1990 (T-117).** Wells admitted that he was copied with the lawsuit by WINDERMAN and had phone conversations with WINDERMAN to discuss the status of the case (T-**187-189, 211).** Additionally, twice in January **1990,** WINDERMAN met with Cooney and Harrington, to discuss the Wells action and the difficulties involved in the pending case (Plds-Respondent's Findings of Fact). Harrington testified that she recalled that WINDERMAN explained to the group the concept of "privity" and the difficulties involved with their attempt to add Security's accountant and attorney to the case **(T-79,87).** Cooney received three or four complaints sent to her from WINDERMAN's office **(T-**146). Besides the meeting at Cooney's house, the group met at least one other time at the Bankruptcy Court at which time Wells and Cooney instructed Winderman not to represent them or to file any papers with the Bankruptcy Court on their behalf (Plds - Respondent's Findings of Fact) **(T-163-164).**

Vera Harrington testified at the final hearing that at the time she hired WINDERMAN, it was her perception that a class action suit would commence and that the investors had formed a committee (T-55). Harrington signed a written retainer agreement and paid $500.00 to WINDERMAN **(T-57).** Harrington did not recall being advised the Wells case would be a test case and that her case would

follow Wells case (T-71). During cross-examination, Harrington stated that Cooney as the acknowledged head of the committee should have reported back to the others and that this usually was done (T-84). Cooney became chairperson of the creditors committee in the Bankruptcy Court (T-140). Harrington testified that she understood that refilings had to be done in the case periodically (T-86). She testified that she was not surprised by the dismissal of the causes of action against the accountant and the attorney because of the prior discussions of the difficulties concerning "privity" (T-87). Harrington conceded that at the June 12, 1991 meeting at WINDERMAN'S office, WINDERMAN, had indicated that there was no one left to go after and that the parties really did not have a case (T-92). Harrington testified that upon taking her file from WINDERMAN's office, she took no other action in the case other than defending against the claim for attorney's fees (T-92). Harrington further testified that she recalled WINDERMAN discussing with her that he did not believe that there was any chance of recovery against the other Defendants in the case and he did not feel it was worth the parties investment of additional costs to try to pursue the matter (T-95). She conceded that prior to the last meeting with WINDERMAN, that the group and Harrington individually discussed the fact that if it appeared that there was not much chance at success that the case would stop (T-98).

By motion filed August 10, 1989, Security and the Defendants sought an order dismissing the second amended complaint (RR-3). An order dismissing the second amended complaint was duly entered in

August 31, 1989 (RR-3). WINDERMAN filed a seven count third amended complaint on September 7, 1989 (RR-3). By order entered November 6, 1989, counts three four and five of the third amended complaint were dismissed with prejudice and counts two, four and six were dismissed without prejudice. (RR-3) WINDERMAN filed a five count fourth amended complaint on November 21, 1989 (RR-4). By motions dated November 29, 1989 and January 8, 1990, Security and the Defendants sought an order dismissing fourth amended complaint (RR-4). By order entered May 3, 1990, counts three, four, and five of the forth amended complaint were dismissed with prejudice with Wells, Cooney and Harrington afforded an opportunity to file an amended complaint provided that they do so on or before May 26, 1990 (RR-4,9). WINDERMAN did not file an amended complaint on behalf of the Cooneys or on behalf of Harrington or Wells (RR-4,9).

On or about June 12, 1990, Cooney, Harrington and Wells, came to WINDERMAN's office to review their respective files. Wells was given his complete file on that occasion but he would not allow copies to be made for Cooney and Harrington (T91,170,208). Cooney and Harrington were given their files. WINDERMAN testified that Mrs. Cooney and Mrs. Harrington came on two separate occasions to his office where he explained both times that there were no assets that he felt worth pursuing and that if they wanted to pursue an action against the individuals that they had the ability to take it in the bankruptcy court to an adversarial proceeding where they could continue the pending action (T-242). WINDERMAN waited a couple of days before he filed his motion to withdraw because he

assumed that his clients would be obtaining new counsel and he did not want to provide any strategic advantage to the other party (T-15).

WINDERMAN testified that the major concern of his clients at the June 12, 1992 meeting in his office concerned their exposure for attorney fees (T-243). Wells and Cooney both testified that their discussion with WINDERMAN at that meeting centered on the issues of attorney fees (T-168, 200-201). Additionally, WINDERMAN explained that the State was going to file an administrative complaint against the individual principals of Security and that the State action, together with the completion of the Bankruptcy action would provide his clients with whatever rights they might have against any state funds. (Plds - Respondent's Findings of Facts).

On June 18, 1990, WINDERMAN filed his motion to withdraw (Ex.-2). Paragraph 1 of the motion to withdraw recited that the Plaintiff has requested counsel to withdraw (Ex.-2). Wells testified that he never requested WINDERMAN to withdraw (T-214). WINDERMAN testified that Wells never expressly stated a request for him to withdraw. However, WINDERMAN testified that he sincerely believed that Wells wanted him to withdraw based upon Wells taking his file on June 12, 1992 from WINDERMAN's office. Wells did not respond to the May 24th letter when he came to the meeting on June 12th, 1992 at WINDERMAN's office. There was no testimony from Mr. Wells that he had objected to the May 24th letter. Additionally, Wells was copied with the notice and did not dispute the notice or

contest the motion to withdraw. None of WINDERMAN's clients took any specific action to contest his motion to withdraw. WINDERMAN waited five or six days after the meeting with his clients in his office on June 12 before he filed his motion in hopes that a stipulation for substitution of counsel could be entered as opposed to a motion to withdraw. Wells testified that he was not surprised WINDERMAN was withdrawing as attorney of record (T-202). He realized that WINDERMAN would not remain as attorney of record after he removed his file on June 12, 1992 (T-209). WINDERMAN admitted that he should not have relied on Wells promise that he was getting separate counsel (T-16).

WINDERMAN did not file a fifth amended complaint or take any other action to pursue Wells claims (RR-4). By motion filed June 22, 1990, the Defendants filed a motion seeking an Order dismissing Wells action due to the lack of filing a fifth amended complaint (RR-4). By Order dated June 26, 1990, all claims by Wells against Defendants were dismissed, with prejudice, and judgment was rendered in favor of the Defendants accordingly (RR-4,5). By motion filed June 14, 1990, the Defendants moved for an order taxing attorneys fees and costs against Wells. WINDERMAN did not address such application and did not appear at the hearing. By Order filed June 26, 1990, an Order was entered taxing attorneys fees and costs against Wells in the amount of $12,080.50 (RR-5).

WINDERMAN testified that he made a mistake in relying on what he believed to be the representation from Attorney Joslyn that Security and defendants would not pursue an action to tax costs

once the case was dismissed (T- 16). WINDERMAN testified that the reason he did not notice Mr. Wells with a copy of the Motion to Tax Costs was because he assumed that by adding Wells to the Certificate on the Motion to Withdraw that Mr. Joslyn would be obligated to send Wells a copy of his Motion (T-16). Subsequent to Wells being taxed for attorney's fee and costs by the Defendants, Wells came to a settlement with the defendants which reduced his judgment to $4000 (T-205). WINDERMAN cooperated fully with Wells new attorney in supplying affidavits and other information to help set aside the judgment for fees and costs (Plds-Respondent's Findings of Fact).

Wells thereafter brought suit against WINDERMAN which resulted in WINDERMAN reimbursing Wells for this loss (T-206). Wells new counsel attempted to recover not just the judgment for costs from WINDERMAN but the entire amount of Wells investment in Security, approximately $160,000.00 (Plds-Respondent's Findings of Fact). In response to this demand, WINDERMAN maintained that Wells owed him approximately $13,000.00 in pre-group legal fees and that the two amounts should be set off against each other (Plds-Respondent's Findings of Fact). Subsequent to Wells filing his lawsuit for malpractice against WINDERMAN, that suit was settled based upon WINDERMAN paying the full amount of Wells legal fees which were $3,000.00 and the judgment for costs which had been reduced to $4,000.00 (Plds-Respondent's Findings of Fact). In consideration for settlement, Wells voluntarily agreed to file a letter with The FLORIDA BAR withdrawing his complaint against WINDERMAN (T206-207).

WINDERMAN agreed to pay for expenses that Cooney and Harrington incurred in defense of the defendants claim for fees for which they ultimately and successfully defended against (T-247). The Referee acknowledged during the final hearing that **WINDERMAN** was "not trying to hide anything here" (T-176). The record amply evidences that WINDERMAN fully cooperated with all aspects of the FLORIDA BAR proceedings.

The referee recommended that as a ***result of*** the violations contained in his report that WINDERMAN **be** suspended from **the** practice of law for a period of two years and pursuant to F.R.C.P 3-5.1 (e) thereafter until WINDERMAN shall establish his rehabilitation and fitness to resume the practice of law in accordance with rule 3-7.10 rules of discipline. The Referee accepted the Florida Bar's praposed report of Referee in its entirety. **The** Referee did not deviate by one word from the Florida Bar's proposed report (Plds - Bar's Post Hearing Memorandum and Proposed Report of Referee). **WINDERMAN is** forty four years of age and has been a member of the Florida Bar since February **2,** 1976. **WINDERMAN** has no disciplinary record (RR-19).

SUMMARY OF THE ARGUMENT

The Referee's Findings, as contained in the report of Referee dated April 9, 1992, that WINDERMAN violated Rules of Professional Conduct, are not consistent with the evidence or testimony presented at final hearing.

First, WINDERMAN provided competent, diligent representation to his clients. A review of the various complaints filed by WINDERMAN in the action demonstrate that he had the requisite knowledge and skill to represent his clients. The various causes of action which WINDERMAN attempted to plead in the four complaints which were filed, illustrate the complexity of the claims. The pleadings included counts for Federal and Florida Security's Violations and "RICO actions", civil fraud, and misrepresentation. WINDERMAN made repeated attempts to convince the trial court that his causes of action were sustainable. Even opposing counsel in the underlying action conceded at the disciplinary hearing that the "RICO" allegations were not sustainable.

The complaints WINDERMAN filed in the State court were intended to gain judgments against the individual Defendant's who were believed to have personally benefited from the alleged transactions. The State court action was not undertaken against the corporate entity Security because of the pending bankruptcy. Thus, a breach of contract or any other action against Security would have been redundant and provided WINDERMAN's clients with no greater opportunity for relief. Because of the revocation by the

State of Florida over the individual Defendants mortgage licenses and lack of assets, WINDERMAN attempted to bring Security's attorney and certified public accountant into the case as Defendants. WINDERMAN vigorously and repeatedly attempted to defend against the Motions to Dismiss which were filed against each complaint. Ultimately, the actions against the accountant and the attorney were dismissed based on the then established case law and not on any negligence or lack of thoroughness and preparation of the part of WINDERMAN.

Second, the evidence and testimony demonstrates that WINDERMAN kept his clients abreast of the status of the case. The testimony of Cooney, Harrington, Wells and WINDERMAN all indicate that he engaged in phone conversations and meetings with his clients. At worst, WINDERMAN failed to create a paper trail but certainly advised his clients as of the difficulties in the case including the concept of "privity" concerning adding additional Defendants to the case. Subsequent to the Fourth Amended Complaint being dismissed, WINDERMAN had reasonably inferred that his clients did not wish him to pursue the matter further and that they understood that he was withdrawing because of the lack of assets recoverable.

Third, on or about May 24, 1990, WINDERMAN provided his clients with written notification that he was interested in withdrawing as attorney in the case. On or about June 12, 1990, WINDERMAN met with his clients in his office and his clients retrieved their respective files. Thus, WINDERMAN sincerely had every reason to believe that Wells wanted him to withdraw from the

case because Wells never challenged his written notification and Wells took his file from WINDERMAN's office. Therefore, on June 18, 1990, WINDERMAN filed his Motion to Withdraw in which he stated that his client Wells had requested him to withdraw. The Referee's findings that WINDERMAN's representation was made knowingly and that it was a false statement of material fact to a tribunal is erroneous. WINDERMAN sincerely believed that his client wanted him to withdraw. That belief is buttressed by Wells testimony that he was not surprised that WINDERMAN was withdrawing as counsel and that he realized that WINDERMAN would not remain as attorney of record after he removed his file on June 12, 1990. Furthermore, Wells, along with WINDERMAN's other clients had represented to him that they were seeking other counsel to represent them. Clearly no falsehood was ever intended, and WINDERMAN took no action which was hidden.

Fourth, WINDERMAN testified that he made a mistake in relying on what he believed to be the representation from attorney Brian Joslyn that Security and defendants would not pursue an action to tax costs once the case was dismissed. WINDERMAN did not notice Wells with a copy of the Motion to Tax Costs because he assumed that by adding Wells to the Certificate of Service on the Motion to Withdraw that Mr. Joslyn would be obligated to send Wells a copy of his Motion for Dismissal. Ultimately, WINDERMAN made complete restitution for Wells legal fees expended in his defense of the attorney's fee award and WINDERMAN reimbursed Wells' attorney's fee award which had been reduced to $4,000.00.

Fifth, the Referee's findings that WINDERMAN insisted upon the withdrawal of Wells' Complaint to the Bar is a quid pro quo for reimbursement was inconsistent with the evidence. Wells initial suit against WINDERMAN was for the entire amount of loss to Security; namely, $160,000.00. Obviously, WINDERMAN could not settle with Wells until that issue was resolved. Ultimately, WINDERMAN did settle with Wells for payment of all of Wells out-of-pocket expenses. Wells was voluntarily agreeable to file written notification withdrawing his Complaint to the Florida Bar against WINDERMAN.

Finally, the Referee's findings that WINDERMAN purported represent Phillips when in fact, WINDERMAN had not been retained by Phillips and that he failed to notify the court is incongrous with situation. is not supportable. Phillips sent supporting documents to WINDERMAN but did not return a number of retainer agreements. Had WINDERMAN not filed suit on behalf of Phillips along with his other clients, then conceivably Phillips may have brought charges against WINDERMAN for failure to institute an action on her behalf. Ultimately, Phillips has suffered no harm, but merely had her rights protected during the litigation.

The Referee's recommendation that WINDERMAN be suspended from the practice of law for two (2) years is unduly harsh and excessive where the violations which the Referee found WINDERMAN to have committed do not warrant such a suspension especially in light of WINDERMAN's acknowledged cooperation during the proceedings; his agreement to provide complete restitution; and his lack of any

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disciplinary history whatsoever.

ARGUMENT

POINT I

THE REFEREE ERRED IN FINDING THAT THE RESPONDENT VIOLATED RULES OF PROFESSIONAL CONDUCT WHERE THE RESPONDENT PROVIDED COMPETENT, DILIGENT REPRESENTATION TO HIS CLIENTS WHERE RESPONDENT KEPT HIS CLIENTS REASONABLY INFORMED OF THE STATUS OF THE ACTION AND WHERE RESPONDENT DID NOT INTENTIONALLY MISREPRESENT MATERIAL FACTS TO A TRIBUNAL OR INTENTIONALLY VIOLATE ANY OF THE RULES OF DISCIPLINE.

The Referee's report dated April 9, 1992, contains recommendations by the Referee that WINDERMAN committed various violations of the Rules of Professional Conduct. However, the Referee's findings failed to take into account the circumstances that supported the reasonableness of WINDERMAN's actions.

First, the Referee found that WINDERMAN undertook representation of his clients without the requisite skill to file a legally sufficient complaint (RR-16). A review of the various pleadings filed by WINDERMAN manifestly evidenced the complexity of the issues raised in the various complaints and the intricate nature of the causes of action (Pleadings - Complaints). WINDERMAN became engaged to represent Wells in connection with the claim by Wells against Security and its principals (RR-2). The basis of Wells claim was that he invested money with Security and that Security and the other Defendants had improperly induced such investment and in property dealt with it after the investment was made, thereby causing Wells to lose his investment (RR-2). Security commenced a reorganization in the bankruptcy court (T-7). Thus, WINDERMAN reasonably assumed that based an the pending

bankruptcy action, that the only manner for Wells to recover anything was to be able to sue the principals of Security which would present them from being able to discharge those liabilities in bankruptcy themselves (T-7,8). The only practical solution available was to institute an action under "RICO" or Florida Security Laws, which might prevent the discharge of judgment against the principals of Security. Even though Security was included as an indispensable party in the suit, Security had already listed Wells and WINDERMAN's other clients as creditors for the entire amount of their investments (T-13).

At all times in the underlying action, each of the parties claims to retain their principal sum investments had already been acknowledged by Security and United States Bankruptcy Court and those claims continue to be unaffected by the State court action. The State court action was intended to gain additional judgments against the individual Defendants who were believed to have personally benefited from the alleged transaction (Plds-Respondent's Findings of fact) (T-13). Thus, WINDERMAN's assertion that a breach of contract or any other action against Security would have been redundant and provided Wells or his other clients with no greater standing in the bankruptcy court was certainly supportable (Plds-Respondent's Findings of Fact).

The initial complaint filed by WINDERMAN was brought on behalf of Wells only but subsequent to that filing, WINDERMAN was retained and undertook representation of the Cooneys and Harrington in connection with their claims against Security and the Defendants

(RR-8). The **basis** of each clients claims was essentially the same as Wells (RR-9). WINDERMAN thereafter filed a complaint on behalf of the Cooneys against Security and Defendants an August 17, 1989 (RR-9). WINDERMAN filed a complaint on behalf of Harrington also **(RR-9).** WINDERMAN agreed with counsel for the Defendants that the Wells case would be used as a test case and all the consolidated cases would be determined by the Wells case in order to eliminate the necessity of multiple hearings and identical issues and provide for consistency in rulings **(RR-9).** By agreement of the parties in subsequent order filed May 2, 1990, the actions filed on behalf of the Cooneys and Harrington were consolidated with the Wells action **(RR-9)** (T-227).

It is uncontroverted that WINDERMAN was told by all of his clients that they had no funds in which to prosecute the action other than their initial retainer and that if significant additional costs would have to be incurred they would not be able to carry on the action (T-86,237) (Plds-Respondent's Findings of Fact). In response to the limited resources of the clients, WINDERMAN performed his own extensive analysis of Security's **books** and records and determined that the principals of Security had not pocketed any significant assets and were not going to be able to **pay** any judgment to the parties if one was obtained (T-8,238). The State of Florida was actively moving to revoke the Defendant's mortgage licenses and to impose substantial penalties on themwhich in fact was done **(T-9,232).** The bankruptcy court's independent examiner also investigated the books and records of Security and

found no evidence that the principals of Security had taken any monies for their own benefit (T-239). Ultimately, **WINDERMAN** was left with the only viable opportunity for recovery was to try to bring Security's attorney and certified public accountant into the **case** as Defendants (T-9).

WINDERMAN testified that the trial court eventually dismissed the **"RICO"** allegations because the trial court relied on case law that did not establish a requisite pattern of conduct (RR-8,9). At the time that **WINDERMAN** plead the "RICO" allegations, it was almost impossible to trace the rapidity of the Court's decisions involving the standard for **"RICO"** causes of action (T-8). Brian Joslyn, **the** attorney for Security and the Defendants, testified that the "RICO" allegations involved an extremely intricate set of statutes with a tremendous amount of case law decided on all sides of the issues (T-230). **WINDERMAN** testified that the trial court ultimately rejected his numerous attempt to bring Security's accountant and attorney into the case. He maintained that he plead those matters as best he could on four (4) separate occasions but the trial court would not accept the authority he cited. **WINDERMAN** maintained that he had correctly plead a requisite pattern in characterization for a cause of action under **"RICO"** (T-14). Brian Joslyn, described **WINDERMAN's** representation in unflattering terms and opined that **WINDERMAN** could have at least framed a sustainable cause of action for breach of contract (T 229-230). Specifically, Joslyn recalled a specific motion to dismiss hearing on the "RICO" allegations where he came to court with **$250** to $300 worth of

copied cases as opposed to WINDERMAN attending with only authorities from Florida Jurisprudence (T-230). However, it is without incongruous that WINDERMAN did not have the same luxury to run up costs as did Joslyn on behalf of his clients.

It is apparent that the causes of action raised by WINDERMAN would have been difficult to have sustained by any trial court judge. Even Brian Joslyn conceded that in his opinion the "RICO" allegations could not have been plead as a viable cause of action and he did not concede with certainty that the Security fraud action could pass mustard **(T-230,233)**. Thus, other than opposing counsel's testimony, the **record** is devoid of any evidence that WINDERMAN did not possess the requisite knowledge of skill to represent his clients competently. Therefore, the Referee's finding that WINDERMAN did not have the knowledge, skill, thoroughness or preparation to permit him to file a legally sufficient complaint **is** not supported by clear and convincing evidence.

Second, the Referee made a number of findings based on WINDERMAN's purported lack of failing to file a fifth amended complaint, his failure to appear at the motion to tax attorneys fees and costs and lack of communication with his clients. However, again, the circumstances involving WINDERMAN and his clients leading **up** to that period illustrates why it was reasonable for WINDERMAN to believe that his clients did not want to pursue the matter any further. By order entered **May** 3, 1990, counts three, four and five of the fourth amended complaint were dismissed

with prejudice with Wells, Cooney and Harrington afforded an opportunity to file an amended complaint provided that they do so on ox before May 26, 1990 (RR-4,9). Thus, any subsequent dismissal of the action because of a failure to refile as to the counts dismissed without prejudice should have resulted in a dismissal without prejudice of the action. The only reason a dismissal with prejudice was entered was because counsel for the defendant by motion filed June 2, 1992, sought an order dismissing the Wells action due to a lack of filing a fifth amended complaint (RR-4). By order dated June 26, 1990, all claims by Wells against Defendants were dismissed, with prejudice and judgment was rendered in favor of the Defendants accordingly (RR-4,5). There was no adjudication on the merits but rather the trial court dismissed with prejudice those other counts because of its concern that WINDERMAN failed to appear for that hearing (Ex: 5).

WINDERMAN sincerely believed that the filing of a fifth amended complaint would have been a futile effort. He had explained to his clients the difficulties involved and the lack of any assets which could be ultimately collected against the Defendants. Thus, he was of a genuine belief that the parties were not interested in proceeding further.

WINDERMAN made it clear to his clients that if either the attorney or the certified public accountant were dismissed fromthe case, along with the malpractice insurance carriers there would be very little opportunity to pursue any claims against any of the other individuals. WINDERMAN believed his clients came to that

same conclusion (T-40-241). "According to WINDERMAN he and his clients were in agreement that there was no use in pursuing the case because of lack of assets worth pursuing (T-241)." At the meeting held at Mrs. Cooney's house, all of the parties were told that the only chance of significant recovery was to join the attorney and accountant, but that Florida had a concept of "privity" which made it very difficult to reach those individuals (Plds - Respondent's Findings of Fact) (T-87, 92)."

On at least two separate occasions between his last meeting with the group and his office meeting in January, 1990, WINDERMAN had conference calls with Cooney and Wells to discuss the case (Plds - Respondent's Findings of Fact.) Cooney testified that on at least two occasions she had conference calls with WINDERMAN between August, 1989 and January, 1990 (T-117). Wells admitted that he was copied with the lawsuit by WINDERMAN and had phone conferences with WINDERMAN to discuss the status of the case (T-187-189, 211). Additionally, twice in January, 1990, WINDERMAN met with Caoney and Harrington, to discuss the Wells action and the difficulties involved in the pending case (Plds - Respondent's Findings of Fact). Harrington testified that she recalled explained to the group the concept of privity and the difficulties involved with their attempt to add Security's accountant and attorney to the case (T-79, 87). Besides the meetings at Cooney's house and WINDERMAN's office, the group met at least one time at the bankruptcy court hearings (T-163-164). Vera Harrington testified that she understood that refilings had to be done in the

case periodically (T-86). She testified that she was not surprised by the dismissal by the causes of **action** against the accountant and attorney because of the prior discussions of difficulties concerning "privity" (T-87). Harrington conceded that at the June 12, 1991 meeting at WINDERMAN's office, WINDERMAN, had indicated that there was no one left to go after and the parties really did not have a case (T-92). Vera Harrington conceded that prior to the last meeting with WINDERMAN, that the group and Barrington individually discussed **the fact** that if **it** appeared that there was not much chance of success that the case would stop (T-98).

Prior to the fourth amended complaint being dismissed, WINDERMAN testified that he advised Mrs. Cooney and the rest of the members of **the** group that the judge is not being responsive to him and if they wanted to pursue the case they should find another counsel Z(T-12). At a meeting at WINDERMAN'S office, each party stated that they had met with or discussed the case with Russell Forkney, Esq., of Ft. Lauderdale, and after speaking with Mr. **Forkney,** they had no desire to pursue the claims against the individual Defendants and it was WINDERMAN'S belief that no further action would be **taken** because no recovery was probable. **Even** prior to that date, Attorney Joslyn had informed WINDERMAN that the state controllers office was revoking the license of his clients and **that** the State would more likely end **up** with all of their assets, thus leaving **them** with no ability to **pay** any judgment (T-232). In fact, Mrs. Cooney and Mrs. Harrington attempted to hire new counsel in April of 1990. They met **with Attorney** Forkney **and** he requested a

$5,000.00 retainer if he became involved in the matter (T-64, 65). Ultimately, Mr. Forkney declined to undertake representation. Thereafter, Cooney and Harrington went to another attorney, John Steston, to see if he would take over the case, but because they did not have any money he declined (T-126, 139). Then in June, Wells, Harrington and Cooney went to attorney Adam Donner, but he also declined to accept representation **(T-125, 139)**.

By letters dated May **24**, 1990, WINDERMAN informed Wells, Cooney, Harrington and Phillips that he was going to withdraw and that it had become apparent that there would not be any assets of the individual defendants remaining after the State took its share. In those letters, he notified the clients that he would not be looking towards them for any further legal fees **(Ex.-1, 3, 6)**.

On or about April **25, 1990**, WINDERMAN testified that he had a discussion with Brian Joslyn, **Esq.**, attorney for Security and Defendants wherein he stated that he and Joslyn agreed at that point that if the action did not go forward there would be no taxing of **costs** (T-16). Joslyn testified that no such representation or conversation ever took place and that it had always been his clients intent to seek recovery of attorneys fees and costs (RR-6) **(T-225)**. During cross-examination, Joslyn conceded that it was his belief that no "RICO" violation could be successfully plead. Additionally, he did not testify that a securities fraud claim could be pled against the individuals as a certainty, but rather that it was only probable **(T233)**.

Thus, based on his client's directives as to financing the case, his communication with his clients, and lack of a realistic possibility of recovery, it is apparent why WINDERMAN believed that his clients did not wish him to proceed further, Furthermore, all of his clients, were at the time, seeking new counsel. The Florida Bar argued that WINDERMAN should have filed a voluntary dismissal of the action. However, the voluntary dismissal would have placed his clients up against a statutes of limitations problem. Therefore, especially after his clients removed their respective files from his office on June 12, 1990, it would have made little sense for WINDERMAN to have filed a Fifth Amended Complaint or taken a voluntary dismissal.

WINDERMAN's position is buttressed even further by the testimony of Wells and Cooney that their discussion with WINDERMAN at a June 12th meeting in his office centered on the issue of attorney's fees rather than any additional pursuit of the underlying action **(T-168,200-201)**. Finally, WINDERMAN explained to his clients the State was going to file an Administrative Complaint against the individual principals of Security and that the State action, together with the completion of the bankruptcy action, he would provide his clients with whatever rights they might have against any State funds (Plds - Respondent's Findings of Fact). The record is devoid of any specific evidence that any of WINDERMAN's clients ever had any realistic hope of obtaining any financial recovery in the Circuit Court action.

Third, the Referee's findings that WINDERMAN knowingly made a

false statement of material fact of law to a tribunal is erroneous. By letter dated May 24, 1990, WINDERMAN informed Wells, Cooney, Harrington and Phillips that he was going to withdraw and that it had become apparent that there would not be any assets of the individual defendants after the State took its share. On or about June 12, 1990, Wells came to WINDERMAN's office and was given his complete file on that occasion. On June 18, 1990, WINDERMAN filed his Motion to Withdraw (Ex: -2). Paragraph 1 of the Motion to Withdraw it was cited that the plaintiff had requested counsel to withdraw and WINDERMAN conceded that Wells never expressly stated a request for him to withdraw. However, Wells own actions manifested his implicit consent that WINDERMAN withdraw, Wells did not respond to the May 24th letter when he came to the meeting on June 12, 1990 meeting at WINDERMAN's office. There was no testimony from Mr. Wells that he objected to the May 24th letter. On June 12, 1992 Wells removed his entire file from WINDERMAN's office. Prior to his removal of the file, Wells was actively seeking new counsel. Additionally, Wells was copied with notice and did not dispute the notice or contest WINDERMAN's Motion to Withdraw. Wells testified that he was not surprised at WINDERMAN withdrawing as attorney of record (T-202). Wells realized that WINDERMAN would not remain as attorney of record after he removed his file on June 12, 1990 (T-209). Clearly, no falsehood was ever intended and WINDERMAN took no action which was hidden. WINDERMAN did not knowingly make a false statement of material fact to the tribunal. In his mind, WINDERMAN had every reason to believe that

Wells wanted him to withdraw. Furthermore, the purported misrepresentation cannot be defined as a material fact because Wells could have contested the Motion to Withdraw, but instead chose to take no action. At most the purported misrepresentation was nothing more than a misunderstanding. Based on the entirety of the record, the Referee's findings that WINDERMAN was engaged in conduct prejudicial to the administration of justice is unfounded.

Fourth, the Referee's findings that WINDERMAN misrepresented to the Referee that he was informed by Brian **Joslyn that** no costs for attorney's fees would be sought against his clients was in direct contradiction of WINDERMAN's testimony. On or about April 25, 1990, WINDERMAN testified that he had a discussion with Brian Joslyn, Esq., attorney for Security and the defendants wherein it was agreed between the attorneys that if the action did not go forward from that point that there would be no taxing of costs of fees against WINDERMAN's clients (T-16). Joslyn testified that no such misrepresentation or conversation ever took place and that it had always been his client's intent to seek recovery of attorney's fees and costs (T-225). WINDERMAN testified that he made a mistake in relying on what he believed to be the representation from attorney Joslyn that Security and the defendants would not pursue an action to tax costs and fees once the case was dismissed. Placed on his belief as to the representation by attorney Joslyn, WINDERMAN told his clients that the defendants would not pursue any action for attorney's fees and costs. WINDERMAN testified that the reason he did not notice Wells with a copy of the Motion to Tax

Costs because he assumed that by adding Wells to the Certificate of Service on the Motion that Joslyn would be obligated to send Wells a copy of his Motion (T-16). WINDERMAN did not attend the hearing on the Motion to Tax Costs because he relied on Wells' promise that Wells was getting separate counsel (T-16). Subsequent to Wells being taxed for attorney's fees and costs by the defendants, Wells came to a settlement with the defendants which reduced his fee to $4,000.00 (T-205). WINDERMAN cooperated fully with Wells new attorney in supplying affidavits and other information to help set aside the Judgment for Fees and Costs (Plds - Respondent's Findings of Fact).

Fifth, the Referee's findings that WINDERMAN insisted upon the withdrawal of Wells Complaint to the Bar as a **quid** pro quo for reimbursement to Wells is in contradiction to the evidence. The record is devoid of any testimony that WINDERMAN coerced Wells in anyway. Wells brought suit against WINDERMAN not just for the Judgment for Costs, but for the entire amount of Wells investment in Security which was approximately $160,000.00 (Plds - Respondent's Findings of Fact). In response to this demand, WINDERMAN maintained that Wells owed him approximately $13,000.00 in legal fees and that the two amounts should be set off against each other (Plds - Respondent's Findings of Fact). Subsequent to Wells filing his lawsuit against WINDERMAN that suit was settled based on WINDERMAN paying the full amount of Wells legal fees which was $3,000.00 and the Judgment for Costs which had been reduced to $4,000.00 (Plds - Respondent's Findings of Fact). In consideration

for settlement, Wells voluntarily agreed to file a letter with the Florida Bar withdrawing his complaint against WINDERMAN (T-206-207). Thus, the Referee's finding of a quid pro quo is not borne out by the testimony at final hearing.

Finally, Referee's findings that WINDERMAN purported to represent Phillips, when in fact, WINDERMAN had not been retained by Phillips and that he failed to notify the Court incongruous with the situation. Phillips inquired of WINDERMAN on or about June 1989 to ascertain whether or not WINDERMAN would represent Phillips in a claim against Security and defendants (RR-12). WINDERMAN forward Phillips four (4) separate proposed retainer agreements (RR-1,2). Although WINDERMAN never received an executed retainer agreement from Phillips, he did forward to WINDERMAN copies of her documents which were necessary only if she was interested in having a suit instituted on her behalf (Plds - Respondent's Findings of Fact). Had WINDERMAN not filed suit on behalf of Phillips along with his other clients, then conceivably Phillips may have brought charges against WINDERMAN for failure to institute an action on her behalf. By filing suit on Phillips behalf, WINDERMAN erred on the side of caution. Ultimately, Phillips has suffered no harm, but merely had her rights protected during the course of the litigation.

Based on the above, the Referee erred in finding that WINDERMAN violated rules of professional conduct, where he provided competent and diligent representation to his clients, kept them reasonably informed as to the status of the action and where he did

not intentionally misrepresent material facts to a tribunal or intentionally violate any rules of discipline. After hearing this matter for several days in reviewing the extensive evidence, the Referee did not take the time to fashion his own report. Instead, the Referee accepted word for word the Florida Bar's twenty (20) page proposed report of Referee. That acceptance alone cloud's both the Referee's findings and recommendation as to discipline.

POINT II

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS UNDULY HARSH AND EXCESSIVE WHERE THE VIOLATIONS WHICH THE REFEREE FOUND THE RESPONDENT TO HAVE COMMITTED DO NOT WARRANT A SUSPENSION FROM THE PRACTICE OF LAW FOR A PERIOD OF TWO YEARS; ESPECIALLY IN LIGHT OF THE RESPONDENT'S ACKNOWLEDGED COOPERATION DURING THE FLORIDA BAR PROCEEDINGS; THE RESPONDENT'S AGREEMENT TO PROVIDE COMPLETE RESTITUTION; AND THE RESPONDENT'S LACK OF ANY DISCIPLINARY RECORD

The Referee's report dated April 9, 1992, recommends that WINDERMAN be found to have committed certain violations (RR-16, 19). However, none of the violations which the Referee found WINDERMAN to have committed warrant a suspension from the practice of law for a period of two (2) years (RR-16,19).

When deciding what punishment is proper in a bar discipline case, a number of interests are to be balanced. As stated in The FLORIDA BAR v. Pahules, 233 So. 2d 132 (Fla. 1970);

> 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 and 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 others who might be prone or tempted to become involved in like violations.

Measured by this criteria and prior case law, the totality of WINDERMAN's violations of the Rules Professional Conduct are not great enough to warrant a two year suspension. WINDERMAN's imposed penalty should be limited to a public reprimand or at the worst a

suspension of not more than 90 days.

A cas analogous to the instant matter is THE FLORIDA BAR v. Kaplan, 576 So. 2d 1318 (Fla. 1991), where this Court held that violation of Bar rules relating to neglect, communication, and improper withdrawal warrants public reprimand, notwithstanding mitigating factors, in light of prior reprimands. In Kaplan, the respondent was retained for the purposes of representing his client in connection with a claim for recovery of damages for personal injuries sustained in a motor vehicle accident. The respondent having ascertained that the proper recourse was to pursue remedies under an uninsured motor's provision of his client's policy failed to take actions to file, perfect or collect such proceeds as were available under his client's policy. Furthermore, the respondent failed to communicate with his client upon repeated attempts. Additionally, the respondent failed to give any notice to his client regarding the termination of his representation and he failed and refused to turn over any papers or documents to the successor counsel. Significantly, the respondent in Kaplan had previously received three (3) prior private reprimands. Even in light of the above violations and the numerous reprimands this Court in Kaplan only asserted the penalty of public reprimand. In the instant case, WINDERMAN communicated with his clients, did not attempt to withhold his files, took appropriate action on their behalf by filing multiple complaints, and gave notice of his intention to withdraw (RR-3, 9),(T- 79, 86, 87, 92, 95, 98,117, 187-189, 211,227, 228, 237, 239, 242, 243) (Ex: 1, 2, 3, 6) (Plds-

Respondent's Findings of fact). As significantly, WINDERMAN has no prior disciplinary history as opposed to the respondent in Kaplan.

This court in THE FLORIDA BAR v. Gray, 380 So. 2d 1291 (Fla. 1980), held that neglect of legal matter entrusted to attorney and intentional failure to carry out contract of employment for professional services, or accompanied by failure to take reasonable steps to avoid foreseeable prejudice to clients rights warrants a public reprimand. In the instant case, WINDERMAN did not neglect any legal matter entrusted to him or intentionally fail to carry out his contract of employment. WINDERMAN vigorously attempted to prosecute the rights of his clients. It was not until he sincerely believed that there was no use pursuing the matter further that he advised his clients that he was going to withdraw (Ex: 3,6,12). In THE FLORIDA BAR v. Graves, 153 So. 2d 297 (Fla. 1963), this court held that the suspension from the practice of law for one year would be too severe a penalty for attorney's failure promptly to press client's claim, carelessness and unintention to duty, failure to properly keep client informed, neglect of trusteeship or sense of responsibility to client where such acts involved no moral turpitude or corrupt motive: suspension of three months would be imposed instead. The record in the instant matter manifestly reveals that the violations found by the Referee did not involve acts of moral turpitude or corrupt motives.

This court in THE FLORIDA BAR v. Glick, 397 So.2d 1140, (Fla. 1981), held that the handling of a legal which he knows or should know that he is not competent to handle, neglecting a legal matter,

failing to carry out a contract of employment entered into with a client for professional services and prejudice or damage to a client during the course of a professional relationship warrants suspension for three months and one day. WINDERMAN's purported violations certainly do not warrant a suspension for any greater period of time than that dispensed in Glick.

In The FLORIDA BAR v. THOMAS, 582 So. 2d 1177, Mr. Thomas filed several frivolous lawsuits against another attorney solely to coerce settlement of another matter and in retaliation for the other attorney doing his job properly. If Mr. Thomas had not been an attorney and made similar threats and taken similar actions he would have been charged with a felony, Mr. Thomas was given a public reprimand.

In The **FLORIDA BAR v. PERLMUTTER**, 582 So. 2d 616, Mr. Perlmutter admitted to threatening citizens with lawsuits, threatened retaliation for the filing of **FLORIDA BAR** complaints and entered into agreements for excessive fees and fee splitting with non-lawyers. Mr. Perlmutter received a public reprimand.

Tn The **FLORIDA** BAR v. **MORSE**, 587 So. 2d 1120 (Fla. 1991), Mr. Morse, knowing that a case for a client had not been filed and the statute of limitations had expired told the client that the Defendant has made an offer of settlement. Mr. Morse deliberately lied to the client to hide the malpractice of his partner and participated in a fraud upon the client. Mr. Morse received a 90 day suspension. The Court pointed out that Mr. Morse had a "selfish, deceitful motive." No such evil notice was or can be attributed to WINDERMAN in regard to any of his actions.

The Referee in the instant case found that WINDERMAN made certain misrepresentations. Assuming arguendo, that WINDERMAN's conduct involved misrepresentations, the severity of a two year suspension is unwarranted. In THE FLORIDA BAR v. Carlton, 366 So. 2d 406 (Fla. 1978), this court held that engaging in conduct involving misrepresentation, failing to represent clients zealously, failing to handle clients funds properly, failing to maintain documents properly warrants a suspension fromthe practice of law for a period of twelve months. In Carlton, the attorney told his clients on numerous occasions that he had filed suit when he had never filed any action. Additionally, the attorney failed to distribute settlement monies to his clients. Furthermore, he failed to keep track of his clients personal property. In the instant case, WINDERMAN's misrepresentations were at worst an honest difference of opinion based on his reasonable beliefs and the circumstances. In THE FLORIDA BAR v. Litman, 417 So. 2d 948 (Fla. 1982), this Court held that engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, neglecting legal matters, failure to properly notify client of receipt of clients securities and properties and failure to maintain complete records of clients funds warranted a three month suspension. Again, WINDERMAN's purported misrepresentation did not involve a false statement of material fact and his conduct was not prejudicial to the administration of justice.

In THE FLORIDA BAR v. Graves, 541 So. 2d 608 (Fla. 1989), this Court held that withdrawal of counsel without prior notice or

permission of Court, failure to file timely pleadings and briefs, failure to attend scheduled appointments, filing of frivolous pleadings and prior disciplinary record would warrant six (6) months suspension, three (3) year probation and completion of Ethics portion of State Board Exam. In Graves, the respondent had two (2) private reprimands and had previously been suspended for ten (10) days. Why should WINDERMAN, who has no prior disciplinary record during his sixteen (16) years as a member of the FLORIDA BAR, and did not attempt to withdraw without notice any greater discipline than Graves? The record is devoid of justification for the severity of the disciplinary measure applied to WINDERMAN.

In THE FLORIDA BAR v. Fath, 368 So. 2d 57 (Fla. 1979), this Court held that where a respondent failed to represent clients despite acceptance of fee would in the absence of prior record of disciplinary action, warrant a suspension from practice of law for only three (3) months. In THE FLORIDA BAR v. Lee, 403 So. 2d 1336 (Fla. 1981), this Court held that failing to complete representation of a client without advising the client or the court of such fact warrants suspension from practice of law for three (3) months and one (1) day.

In THE FLORIDA BAR v. Coutant, 569 So. 2d 442 (Fla. 1990), this Court held that failing to act with reasonable diligence and promptness in representing a client, failing to keep client informed about the status of the matter or to comply promptly with reasonable requests for information, and failing to make reasonable efforts to expedite litigation consistent with interest of the

client, warranted a thirty (30) day suspension in view of a prior disciplinary history. In Coutant, the respondent had an "extensive disciplinary history". Such an extensive disciplinary history in Coutant opposite to that of WINDERMAN's record of no disciplinary history whatsoever.

In a similar case to the instant matter, this Court in The FLORIDA BAR v. Price, 569 So. 2d 1261 (Fla. 1990), ordered a public reprimand where the Respondent failed to consult with his clients about dismissing a bankruptcy action, the action was dismissed without their knowledge or consent and he failed to tell his clients about the dismissal. In the instant case, the Rules of Professional Conduct which WINDERMAN was found to have violated are similar but yet his punishment is much more severe. In The FLORIDA BAR v. Riskin, 549 So. 2d 178 (Fla. 1989), this Court held that where the Respondent failed to file a cause of action until expiration of statute of limitations, failed to recognize worker's compensation implications that may effect clients recovery from his employer and the Respondent's failure to oppose employers summary judgment motion warranted public, rather than a private reprimand after issuance of previous, private reprimands for neglect of duty. Again, in the instant case, WINDERMAN did not fail to file a cause of action until after expiration of statute of limitations, rather, he filed multiple complaints but did not file a fifth amended complaint. Additionally, WINDERMAN, unlike the Respondent in Riskin, lacked any disciplinary record.

This Court in The FLORIDA BAR v. Netzer, 462 So. 2d 1103 (Fla.

1985), held that where the Respondent failed to file a response or answer to a complaint filed against his client, which resulted in a default being entered against his client and thereafter, Respondent assured client that things had been taken care of in response to periodic inquiries warranted a one year suspension. In The **FLORIDA BAR** v. Palmer, **504** So. 2d 752 **(Fla. 1987),** this Court held that by neglecting a legal matter, lying to his client and allowing a clients action to be foreclosed by running of statute of limitation warranted suspension for the Respondent for a period of eight months. This Court in The FLORIDA BAR **v.** Jones, **543** So. 2d 751 (Fla. **1989),** held that neglect of legal matter and failure to cooperate with the bar in disciplinary proceedings warranted a ninety-one day suspension. In Jones, the referee specifically noted the Respondents total lack of cooperation with the FLORIDA BAR during the proceedings. The Referee felt this was the same callous disregard for the proceedings for the FLORIDA BAR as the Respondent had shown towards his clients legal matters in the case. In the instant matter, WINDERMAN fully cooperated with the FLORIDA BAR and the disciplinary proceedings. (T 176)

In The FLORIDA BAR v. Jones, 457 So. 2d 1384 (Fla. 1984), this Court held that an attorney who engaged in conduct involving misrepresentation and neglect of a legal matter entrusted to him which, cumulative to previous misconduct, was subject to suspension from the practice of law for six months. In the instant case, the purported violations found by the Referee **was** not cumulative to any previous misconduct. This Court in The FLORIDA BAR v. Greer, 541

So. 2d **1149** (Fla. 1989), held that the Respondent had neglected legal matters, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, who had engaged in conduct prejudicial to the administrative justice and engaging conduct that adversely reflected on the fitness to practice law and who handled a legal matter without adequate preparation after previous public reprimand for engagement of similar conduct warranted a suspension from the practice of law for sixty days. In the instant case, WINDERMAN had not been previously reprimanded for any similar conduct. A review of Greer vividly illustrates the inconsistencies and disproportionate penalty applied to WINDERMAN by the Referee.

In FLORIDA **BAR** v. Grant, **514** So. 2d **1075** (Fla. 1987), this Court held that a suspension from the practice of law for four **(4)** months was warranted where the respondent neglected **a** legal matter in light of two prior public reprimands for the same disciplinary violation. In FLORIDA **BAR** v. Maas, **510** So. 2d 291 (Fla. 1987), this Court held that the handling of a legal matter which an attorney knows or should know that he is incompetent to handle, a neglect of a legal matter warrants a public reprimand. In Maas, the Referee found that the respondent "was incompetent to handle that matter" and failed to take any action to represent the estate though repeatedly contacted by the interested parties, resulting in a long delay in closing the estate. In the instant case, the evidence is circumspect at best as to whether WINDERMAN was not competent to handle the action. Finally, in The FLORIDA BAR v. Harper, **518** So. 2d **262** (Fla. 1988), this Court held that an

attorney engaging in conduct involving deceit and misrepresentation and neglecting a legal matter warranted a suspension for 3 months.

A complete review of the record and the testimony at final hearing manifestly demonstrates that WINDERMAN fully cooperated with all aspects of the FLORIDA BAR investigation and related disciplinary proceedings. Even the Referee commented during final hearing that WINDERMAN was "not trying to hide anything here" (T-176).

WINDERMAN settled with Wells and paid his legal fees and the attorney fee cost judgment (Plds-Respondent's Findings of Fact). Furthermore, WINDERMAN agreed to pay for any expenses that Cooney and Harrington incurred in defense of the Defendant's claim for fees for which they ultimately and successfully defended against (T-247). Additionally, WINDERMAN waived his rights for any contingency fee recovery from the bankruptcy proceeding from his clients (Plds-Respondent's Findings of Fact).

WINDERMAN is 44 years of age and has been a member of the FLORIDA BAR since February 2, 1976 and has no prior disciplinary record (RR-19).

In conclusion, it is apparent from the facts of the instant case and from a review of the above cases that a two year suspension from the practice of law is unduly harsh where the normal discipline received for violations similar to those that WINDERMAN was found to have committed would be a public reprimand or at worst a suspension of not more than three months from the practice of law.

CONCLUSION

Based on the above, the Respondent, HARRY A. WINDERMAN, respectfully prays that this Court reverse the Referee's findings and his recommendations for a two year suspension from the practice of law. If this Court deems that discipline is required then the Respondent's penalty ought to be reduced to public reprimand, or in the alternative, a period of suspension of not more than 90 days.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail delivery on this 10th day of August, 1992 to: David Barnovitz, Esq., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309 and John A. Boggs, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

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