IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,226

THE **FLORIDA BAR,**

Complainant,

vs.

HARRY **WINDERMAN,**

Respondent.

_____/

RESPONDENT'S REPLY 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

The Respondent, HARRY WINDERMAN, incorporates in its entirety the Respondent's Statement of the Facts as contained in his Initial Brief in Support of Petition for Review. However, the Respondent takes exception to the Counterstatement of the Facts as contained in the Answer Brief of THE FLORIDA BAR. THE FLORIDA BAR's Counterstatement is punctuated with inappropriate argument and unsubstantiated assertions not contained in the record, which necessitate this Response.

On page 2 THE FLORIDA BAR asserts that, "Obviously frustrated at his inability to file a legally sufficient complaint," the Respondent attempted to withdraw. Such an assertion is not contained in the record and is pure speculation. On page 3 of the Answer Brief THE FLORIDA BAR asserts that "As though his clients had not been victimized sufficiently, Respondent continued the Odyssey." This assertion is blatant argument, and of course, cannot be cited in the record.

On page 4 of the Answer Brief THE FLORIDA BAR emphasizes the testimony of Mr. Joslyn by stating that "In stinging and forceful testimony, Mr. Joslyn explained . . ." Such editorial commentary is not appropriate for inclusion in THE FLORIDA BAR's Counterstatement of the Facts. Finally, on page 3, THE FLORIDA BAR again editorializes without reference to the record by stating that, "Gripped by a seeming inability to accept responsibility, respondent continued with his lack of candor even in the cold glare

of the bar disciplinary proceeding". Such a transparent attempt to color the facts is highly improper.

THE FLORIDA BAR's Counterstatement of the facts states that WINDERMAN'S first communication to his clients, Wells and Cooney, was by letters dated May 24, 1990. However, the record indicates otherwise. 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 by explaining the status and nature of the suit.. WINDERMAN further testified that he met with his clients at the bankruptcy court on four or five occasions (T-237). Mrs. 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 telephone conversations with WINDERMAN to discuss the status of the case (T-187-189, 211). Cooney received three or four complaints sent to her from WINDERMAN'S office (T-146). Vera Harrington testified that she understood that re-filings had to be done in the case periodically (T-86).

On page 3 of the Counterstatement of the Facts THE FLORIDA BAR **asserts** that WINDERMAN required that Wells withdraw his Bar complaint as a condition to settlement of the attorney's fee and cost judgment. However, again, the record belies that assertion. WINDERMAN testified that Wells owed him in excess of Thirteen Thousand Dollars ($13,000.00) for the bankruptcy action,

and that WINDERMAN firmly believed that the Twelve Thousand Dollar ($12,000,00) award of attorney's fees and costs against Wells was outrageous (R-246-247). Subsequent to Wells being taxed for costs by the Defendants, Wells came to a settlement with the Defendants which reduced his fee to Four Thousand Dollars ($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 Finding of Facts). Thereafter, 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 One Hundred Sixty Thousand Dollars ($160,000.00) (PLDS-Respondent's Finding of Fact). Ultimately, WINDERMAN settled with Wells and **paid** Wells' legal fees and costs. In consideration for settlement, Wells voluntarily agreed to file a letter with the Florida Bar withdrawing his complaint against WINDERMAN (T-206-207). Even though the Bar complaint was never withdrawn, WINDERMAN settled fully with Wells. Thus, WINDERMAN'S settlement with Wells **did** not require withdrawal of the Bar comp1aint.

Finally, on page 4 of THE FLORIDA BAR's Counterstatement of the Facts it is suggested that "It may be reasonably inferred therefrom that the trial judge considered that a **viable** cause of action could, in fact, be articulated". Such an inference is mere supposition at best and is inappropriately presented by THE FLORIDA BAR as factual without record citation.

SUMMARY OF THE ARGUMENT

The Referee's findings, as contained in the Report of the Referee dated April 9, 1992, that WINDERMAN violated rules of professional conduct, are inconsistent with the evidence and testimony presented at final hearing.

The Referee erred in finding that WINDERMAN violated rules of professional conduct where WINDERMAN provided competent, diligent representation to his clients where WINDERMAN kept his clients reasonably informed of the status of the action and where WINDERMAN did not intentionally misrepresent material facts to the tribunal or intentionally violate any of the rules of discipline.

The Referee's recommendation that WINDERMAN be suspended from the practice of law for two (2) years is unduly harsh and excessive wwhere 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 attempt to provide complete restitution; and his lack of any 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 Respondent, WINDERMAN, incorporates by reference the entirety of the argument contained in Point I of his Initial Brief in Support of Petition for Review. However, since THE FLORIDA BAR failed to address the specific arguments presented by WINDERMAN under this point in his Initial Brief, he is obliged to re-emphasize that 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). Review of the various pleadings filed by WINDERMAN manifestly evidences the complexity of the issues raised in the various complaints and the intricate nature of the causes of actions pled (pleadings - complaints).

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

decision involving the standard for "RICO" causes of action (T-8). Brian Joslyn, the attorney for Security, and the defendants testified that "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 openly rejected his numerous attempts to bring Security's accountant and attorney into the case. He maintained that he pled those matters as best he could on four separate occasionws, but the trial court would not accept the authority he cited. WINDERMAN maintained that he had correctly pled a requisite pattern of characterization for a cause of action under "RICO" (T-14). A review of the complaints filed by WINDERMAN and the myriad of case law supports his contention. More recent case law establishes that the pleadings filed by WINDERMAN included sustainable causes of action. In the case of In Re: Rospatch Securities Litigation, 760 F. Supp. 1239 (W.D. Mich. 1991) the United States District Court reviewed a case where stock buyers brought an action against corporation, chief executive officer, chief financial officer, chief operating officer, comptroller, outside directors, law firm attorney and independent auditor to recover for fraud and other theories in connection with sales of securities. Motions to Dismiss were filed and the District Court held that the complaints adequately alleged securities fraud and that the securities fraud claim was properly stated against the law firm and attorney.

The complaints WINDERMAN filed in the State Court were intended to gain judgments against the individual defendants who

were believed to have personally benefitted from the alleged transactions. The State Court action was not undertaken against the corporate entity security because of the pending bankruptcy. While a breach of contract or any other action against Security would have been redundant, it 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 attorney and the accountant were dismissed based on then established **case** law and not on any negligence or lack of thoroughness in preparation on the part of WINDERMAN,

Second, the record demonstrated that WINDERMAN kept his clients reasonably abreast of the status of the case. The testimony of Cooney, Harrington, Wells and WINDERMAN all indicate that he engaged in telephone conversations and meetings with his clients. At worst, WINDERMAN failed to create a paper trail, but certainly advised his clients of the difficulties in the case including the concept of "privity" concerning 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 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. Most importantly, the purported misrepresentation was not a false statement of material fact, as Wells was property noticed and enjoyed the right to attend the hearing.

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 as 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 voluntarily filed written notification withdrawing his Complaint to the Florida Bar against WINDERMAN. However, the settlement was not contingent on the bar complaint being withdrawn.

Finally, the Referee's findings that WINDERMAN purported to represent Phillips when, in fact, WINDERMAN had not been retained by Phillips, is incongruous with the circumstances, 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.

Based on the above, the Referee erred in finding that WINDERMAN violated rules of professional conduct, where he provided confident, 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 and reviewing the evidence presented, the Referee curiously did not take the time to fashion his own report or at least edit THE FLORIDA BAR's proposed report. Instead, the Referee accepted **verbatim** THE FLORIDA BAR's 20-page proposed report of the Referee. That acceptance, without the slightest deviation, clouds 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 Respondent, WINDERMAN, incorporates by reference, in its entirety, the argument contained under Point II of the Respondent's Initial Brief in Support of Petition for Review.

THE FLORIDA BAR's argument that WINDERMAN's misconduct was cumulative, thereby requiring a stiffer penalty is unsupportable based both on the record evidence and established case law precedent. THE FLORIDA BAR does not challenge any of the plethora of cases cited by WINDERMAN in his Initial Brief concerning the severity of the recommendation of discipline. In the majority of cases cited by WINDERMAN in his Initial Brief, conduct of the defendants involved multiple findings of misconduct. In all of those cases this Court upheld significantly less severe discipline than that received by WINDERMAN in the instant case. Furthermore, in the instant case, as opposed to cases previously cited, WINDERMAN had no prior disciplinary record.

To buttress the argument presented under Point II of WINDERMAN's Initial Brief, the additional citations of authority are presented. In The Florida Bar vs. Fertig, 551 So.2d 1213 (Fla.

1989) this Court suspended the defendant for only ninety (90) days from the practice of law, where he admittedly broke the law by helping his law partner and client launder money for a drug smuggling ring, and where he was at times compensated for this illegal activity. In the instant case, WINDERMAN'S misconduct, as found by the Referee, falls far short of that of Mr. Fertig but has resulted in a far greater suspension.

In The Florida Bar vs. Wilder, 543 So.2d 222 (Fla. 1989), this Court held that an appropriate sanction for an attorney's neglect of legal matters which have been entrusted to him and false representation to clients as to actions which have been taken in the case was a six (6) months suspension from the practice of law. In Wilder the record revealed that the defendant submitted false statements during the disciplinary process and refused to acknowledge the wrongful nature of his conduct. In the instant case, it is acknowledged WINDERMAN fully cooperated with the disciplinary process and that he acknowledged his mistakes.

In The Florida Bar vs. Siegle, 511 So.2d 995 (Fla. 1987) this Court held that engaging in a deliberate scheme to misrepresent facts to senior mortgagee in order to secure full financing of purchase of law office warranted only a ninety (90) day suspension from the practice of law. In The Florida Bar vs. Greer, 541 So. 2d 1149 (Fla. 1989) this Court held that neglecting legal matters, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, engaging in conduct prejudicial to the administration of justice, engaging in conduct that adversely

reflected on the fitness to practice law, and handling a legal matter without adequate preparation, after previous public reprimand for engaging in similar conduct, warranted suspension of practice of law for a period of only sixty (60) days. In the instant case, WINDERMAN had no prior disciplinary record but yet has received a penalty for similar violations twelve (12) times more severe.

In conclusion, it is apparent from the facts of the instant case and from review of the above cases and those previously cited that a two (2) ***yeas*** 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, the suspension of not more than three (3) 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 (2) 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 ninety (90) days.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U. S. mail on this 8th day of

October, 1992, *to* David Barnovitz, Esq., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florid 33409, and John A. Boggs, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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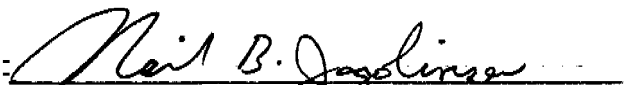
BY: 
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