097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

RONALD T. SPANN,

Respondent-Appellee.

Supreme Court Case Nos.
79,345; 81,631; and 83,455

RESPONDENT-APPELLEE INITIAL BRIEF

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Rules and Regulations Florida Bar 3-7.2(i)(3); 3-7.7(c)(5); 3-5.2(a)(b); 5-1.1; 4-1.6(c)(i);

Florida Standards for Lawyer Sanctions; Rule 9.22(b); Rule 5.11(b); Rule 9.32

RESPONDENT'S PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar" or "TFB". Ronald T. Spann, Respondent Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TR" (1993 or 1994) will be used to designate the transcript of the two final hearings from December 1993 and May 1994. Lastly, the symbol "PTS" will refer to the parties joint pretrial stipulation.

RESPONDENT'S STATEMENT OF CASE AND FACTS

The Referee's report of August 3, 1995 lacks support by clear and concerning evidence of Respondent's intent and is clearly erroneous as to the following paragraphs. In case #78,720 (Amburgey) disputed facts exist in paragraph #2 of Count III, paragraph 6 of Count IV, paragraph #9 of Count V, paragraph #8 of Count VII, paragraph #12 of Count VIII. As to the Champagne complaint, Respondent disputes referee determinations in paragraph's #15, 16, 17, 18 and 31. As to Reese Count IV, paragraph 35 is questioned. Clear and convincing evidence to support the referee's report and this recommendations is lacking in the transcripts and record below.

ARGUMENT

Point I. In sufficient evidence exists to show cumulative misconduct to warrant two suspensions.

A fair review of the record below shows a lack of clear and substantial evidence of the respondent's miscondict, particularilyas to any disbarment motive, deceit of fraud or misrepresentation. The Bar failed to prove, as it must, the necessary element of intent. CF. The Florida Bar v. Cramer, 643 So. 2d 1069 (1994) Respondent, in fact, did immediately reimburse the special trust account be established for all amounts withdrawn too early in Amburgey, including the $171.14 disputed as being due. See 1993 TR at 10 & 2-45. Thus, the Referee's recommendation may properly be that this is mitigation and inadvertent error and should not be punishable as intentional conduct. The Bar conceded that interpretation of the Judges two previous orders was the only issue. 93 TR at 28 and 94 TR at 15.

(A)

Respondent acted reasonably, although not as lead attorney, under the circumstances presented in Amburgey.

The record reflects also that Judge Seppi's order did precede any fee payment. Respondent contends that Steven Marks was the sole attorney of record for Amburgey who wrote a memo to Respondent on the fee contract and disbursal having been approved. Marks had respresented himself as an experienced workers compensation attorney. 93 TR at 5-9. Amburgey testified to Marks handling his case, 93 TR at 14,16 , 22 and 34. See also the grievance hearing

of June 6, 1990 where even the client Amburgey agreed that respondent was "not his attorney." Only when Steven Marks withdrew was respondent then forced to become attorney of record, 94 TR at 62-3. Note The Florida Bar v. Anderson, 538 So. 2d 852 (1989) where either a public reprimand or a 30 day suspension ordered where respondent played, as here, a lesser role and court misrepresentation were not fully corrected. This lasted for about one month until substitute counsel was located and was as Judge Seppi required: no withdrawal by respondent was permitted and only a substitution was acceptable so the Judge due to Amburgey being a "problem" claimant. 94 TR at 32-4.

Respondent contends that the $171.14 in question had been paid to Amburgey so that the referee's recommendation may properly be that this may not be punishable conduct since it was simply an arithmetic error. Other than a 5 week delay, the client was not harmed in any significant way, as Amburgey's testimony shows. 93 TR at 17. Compane another respondent's failure to properly supervise trust account staff so that a public reprimand, rather then consecutive suspensions as here, was ordered The Florida Bar v. Armas 518 So. 2d 919 (1988) and The Florida Bar v. Hartmen, 519 So 2d 606 (1988) on misuse of client funds.

Respondent contends that all funds were paid to the client Amburgey on a reasonably timely basis. 93 TR at 24 and 31. The record shows that the November 23, 1988 to January 1989 delay was due to mail and insurance carrier problems and the "holidays". Respondent wrote two checks in advance for Marks to handle while

respondent was out of state, yet Marks failed to do as instructed, 94 TR at 23. Amburgey phoned respondent only once and respondent spoke only once to him. Respondent later filed a motion to withdraw as soon as he learned of Amburgey's request; however new counsel had to be obtained first as the workers compensation Judge Seppi had requested. Based upon this record, then, a three year suspensionin unsupported. Thus, the referee's recommendation may properly be that this is, therefore, not even punishable conduct and a three year suspension should not be accepted by this Court. Compare he The Florida Bar v. Hall 521 So. 2d 1117 (1988) where a pbulic reprimand for neglect of a matter resulted.

Respondent stated that associate lawyer Steven Marks represented himself as having two years of workers compensenation experience. He was the sole attorney of record in Amburgey, 94 TR at 5-9, there is no contrary evidence of record and even Amburgey conceded in his testimony that this was true. 93 TR at 22 and 34. Respondent reasonably relied on these alleged facts and acted accordingly when supervising his staff. See Exhibits " 10 and 12 and compare The Florida Bar v. Witt 626 So. 2d 1358 (1993) another workers compensation case complaint where a 91 day suspension issued even though five clients complained.

The record reflects that respondent, who was on holiday vacation in Chicago when the five week delay in Amburgey's checks occurred and/or the questionable change-in-procedure letter was issued, clearly was not holding Amburgey's money "hostage," 94 TR at 23. He was only reasonably responding to associate attorney

Marks' written memo and acted only based upon the workers compensation division Judge instructions on the handling of insurance carrier disbursements, 94 TR at 21-26. The Florida Bar v. Greene, 515 So. 2d 1280 (1987) where a 91 day suspension for improper supervision of personnel with a past disciplinary record was ordered by this Court.

Checks that came to respondent's trust account originated from Amburgey's workers compensation carrier were mailed from the west coast directly to the respondent's law office in Fort Lauderdale, Florida; the law office sent the checks on to Amburgey in Ohio for his signature; then Amburgey returned the checks back to the law firm to be co-signed and deposited to trust. They were held until funds cleared, when the client's check would be mailed to Ohio. Mr. Marks tried to initiate the smoother process apparantly at the suggestion of Attorney Joseph Scott and having spoken for approval to the first compensation Judge Seppi, 94 TR at 36.

Respondent's fee payment was ultimately done with the client's full agreement, see Amburgey's notarized handwritten consent form discussed at 93 TR at 17. There is no evidence that anyone, other than Marks, signed and mailed Marks' questionable letter, however; respondent swore that this was not his signature and that he did not see same in advance of its transmittal, 94 TR at 36. Marks never testified, despite the referee request, 93 TR at 38, 43 and 45 and there is no contrary evidence anywhere in the record.

Respondent further suggests only that the evidence of record was that attorney Marks tendered his handwritten memo to respondent

and prepared the letter after researching and consulting with another workers compensation experienced attorney, one Joseph Scott. Respondent was at that time on out-of-area travel and learned of this letter only after the fact and after being told by Scott and Marks of Amburgey's agreement to the revised procedure. There is no contrary testimony so that respondent could properly rely on the associate attorney memo and research and the referee errs in reaching his unsupportable conclusion. Respondent lesser role, his lack of motive and his correction attempts should have been in fairness, considered by the referee as in The Florida Bar v. Anderson supra where a reprimand issued rather than a suspension. See also The Florida Bar v. Thomson, 271 So. 2d 758, 310 So. 2d 300 (1972) and Lambden v. State (1942) 150 Fla. 814.

Note also that three motions and orders were drafted and filed by Marks and obtained from the workers compensation judge (see Exhibit 11) all before the $76.00 bi-weekly fee was paid to respondent firm, 94 TR at 14. Respondent acted only after Marks "memo'd" him as to each step. The respondent wrote checks from the firm's general trust account for claiment and held up any fee payment to his operating account for some three monthe, awaiting Judge Seppi's "OK".

Amburgey was then under physical and emotional stress which caused him apparently to be impatient, however, phone calls and a letter were replied to in a timely fashion, i.e. when made to respondent. The workers' compensation judge would not allow Amburgey, 93 TR at 17, to proceed alone (See Keller testimony 94 TR

at 56 and 58. This Amburgey himself admitted in his testimony.

Thus, the evidence shows that respondent acted reasonably and did not fail to improperly supervise his staff. See written office procedure/manual, respondent, Exhibit "9". Again, the only testimony was that respondent did rely on his associate attorney, Steven Marks, who represented Amburgey until his withdrawal and the firm's substitution. The record evidence shows that the workers compensation judge knew of and approved the firm's fee and cost contract; when this occurred Marks wrote respondent that it was "OK to disburse," thereafter, 94 TR at 19. Respondent did so, both to claimant Amburgey and to the firm at $74.00 bi-weekley. Unfortunately, the referee erred in failing to allow respondent's records from 1988 and 1989 to be considered and would not receive same. Similarly, the respondent was unfairly harmed by the excessive delay in obtaining a decision here, as were more than six years has elapsed. The referee also erred when refusing to allow witnesses such as respondent's office manager and bookeeper to testify, 94 TR at 50 and 52. Note also that the referee seemingly ignored the evidence presented, 94 TR at 12 when reaching his unjustified, pre conceived conclusions.

Respondent, therefore, deems that he is being excessively punished for not only involving his 5th amendment privileges before the Grievence Committee but for preferring a written decision of the referee, rather than concluding a voluntary plea agreement with lesser punishment as the referee bypothocated both on and off the record. See Del Bock v. State 512 So. 2d 164 (1987). To conclude

that respondent was motivated by "greed" to obtain some $37.00 in fee per week is unsupported by the evidence of respondent efforts, 94 TR at 14-17.

(B)

Full disclosure and protection of Champagne's interests, not greed, motivated respondent and Bar; has not properly met its evidentiary burden.

As to Champagne, respondent contends that in the absence of that "lost" client, the Circuit Court allowed the firm to use it's contingent fee contract as limited power of attorney, 93 TR at 183-184 and 189. This was reflected or implied in the what respondent and staff believed was in Champagne's written Agreement for Legal Services. This was deemed sufficient grounds for authority to act for the absent client. The Bar does not contest respondent having obtained client authority, 94 TR at 34-35. Judge Ross's two orders are of record and regrettably they and the pleadings are not a model of clarity but they do clearly indicate his knowing approval of what respondent was to do before he did it. 94 TR at 59. Judge Ross certainly knew that all was signed off and negotiated through counsel. Under these facts of record no misrepresentation by ommission occurred under the record presented, 94 TR at 39 and 74-b.

The sole purpose for respondent requesting the Florida Bar Ethics Hotline opinion and then seeking Judicial Circuit Court guidance, the record shows, was to protect the client's fleeting offer by his former employer, Southern Bell, 94 TR at 183-184.

Research on the Florida missing property statute showed this was an appropriate procedure, 93 TR at 166. Respondent after researching further filed a petition to deposit into the Court Registry the entire sum received, this was done to preserve and to protect the lost/absent client, 93 TR at 125-128, 131-132, 138 and 151, Champagne's interests and to act in accord with his "OK" on the time set from Southern Bell settlement. Any misunderstanding by respondent in this scenario only shows lack of intent as in The Florida Bar v. Aaron 529 So. 2d 685 (1988) where a lesser sanction as a reprimand was discussed.

Respondent sought payment of fees and costs only as an alternative and ancillary consideration. Petitioner first sought to obtain court authority to act for Champagne and to settle. In the two evidentary hearings held by Judge Ross with respondent's two former staff members testifying, the firm sought to obtain instruction from the Circuit Court Judge.

The sole testimony was and is that Southern Bell's offer had a time-to-accept- or "sunset" proviso. See 94 TR at 69-71. The Court had also kept the firm's entire six inch thick case file for its review and deliberation. This file (correspondence and phone records) reflected Champagne's knowledge and involvment in the negotiations over the course of about six months. 93 TR at 156-157. See Keller, Ganz affidavits and testimony, 93 TR at 220-223 Note there that Judge Ross who after the completion of his review phoned respondent's office and instructed that an additional new order be prepared so that the case might be closed, due to "time

standards".

The firm's file was retrieved from Judge Ross' office, as instructed, by Ganz and Keller, 93 TR at 232-3. Only then did respondent act on the 40% fee agreement. He, thereafter, tendered to Southern Bell the two releases and accepted the funds to disburse to the client and to deposit to the Court Registry, and to the firm prepared a closing statement and wrote several letters to Champagne and his (ex) wife at their last known office and home address, 93 TR at 149-150.

No "excessive fee" is involved here, only the 40% contemplated in the written legal services agreement and for which law suit Champagne had deposited $250.00 into respondent cost account. The harshness of the referee's proposed sanctions in the case at bar may be unfair when compared to, for example, the one year suspension in The Florida Bar v. Rood 633 So. 2d 7 (1994). In Rood no written contract or closing statement existed and respondent was also in contempt of court and allowed time limitations to expire, while failing to pay a judgment.

It is also notable that even Champagne conceded he never has paid for respondent's services, in the unemployment compensation two day hearing in which respondent had fees awarded to him, 94 TR at 50 and 93 TR at 129, 154 and 227. How could there be an "excessive" fee finding when the client conceded he still owes respondent money?

(C)

Respondent's "nolo" plea to repealed F.S.c. 117.09 as to

acknowledgements does not justify referee's improper inference and recommendation given "friendly" Southern Bell law suit.

Respondent never "pled" guilty to a misdemeanor Notary violation and the referee errs in assuming this and going behind the "Nolo" plea. Such improper inferences as to a "nolo" plea are discussed in The Florida Bar v. Lancaster 448 So. 2d 1019 (1984) where, as here, respondent lacked adequate opportunity to contest same. See also, The Florida Bar v. Stoskopf where a misdemeanor conviction in federal case resulted in 90 day suspension, 513 So. 2d 141 (1987).

Notably, F.S. 117.09(1) had been repealed for almost 3 years by the date respondent's circuit court case was closed with the "nolo" plea accepted by Judge Carney. Doing so to a repealed statute may be a nullity, particularly as the evidence shows that respondent twice notorized Ganz's signature and not that of anyone else.

The referee should not properly be empowered to go behind the "nolo" plea and reach unwarranted assumptions therefrom, as in The Florida Bar v. O'Nett 504 So. 2d 388 (1986). The referee inferences in this case are not justifiable given the repealed statute and the proffer by respondent of witnesses to be considered. Compare The Florida Bar v. Marks 492 So. 2d 1327 (1986).

Furthermore, as to the "friendly" law suit by respondent, this is a KIN to a declaratory judgment proceeding wherein, Judge Ross approved of the proposed steps of tendering under Florida's missing

property statute, 93 TR at 173, 177 and 191-192, the release and signed "Norman Ganz for Leonard Champagne".

The record also shows and the testimony of Ganz, Keller and Respondent states that no one ever represented to anyone that Champagne had signed this himself. Why else would this be done other than to protect the missing client since the firm's fee was initially also proposed to also be kept in the court registry? The Circuit Court has been told by respondent in paragraph 5 and 6 of the Petition that Champagne could not be found despite diligent efforts and that this problem therefore required court instruction 93 TR at 174, 186-7, 198-9, 214 and 216. Also Tab J.

To conclude otherwise is to ignore the written record and the clear, competent and substantial evidence reflecting respondent's significant efforts to protect Champagne's interests. The record may indicate respondent's mistake(s) but clear and convincing evidence of his intent is lacking so that the proposed severe sanctions are not appropriate here, as was also suggested in The Florida Bar v. Cramer 643 So. 2d 1069 (1994).

This Honorable Court, given its broad discretion, need not defer to the referee, particularily given state of the the record below. The Florida Bar v. Moran 462 So. 2d 1089 (1985) and The Florida Bar v. Faglis 471 So. 2d 38 (1985). Respondent simply asked the Broward County Court to decide in Champagne whether or not the firm's authority and scope of representation could properly include settling by tendering the required notarized release knowingly signed by the firm's representative Ganz, 94 TR at 71-2,

80,84. Southern Bell agreed that this was acceptable to it so that respondent could thereafter sign and accept Southern Bell funds, deducting the 40% fee with the balance from the "gross" paid and the balance to be placed in the Court Registry, where such funds would remain until Champagne surfaced. See 93 TR at 207-8.

Southern Bell attorney Kochler was fully aware and noticed for all hearings, acting only to send the check after the Court decisions and orders were rendered. Again, Kohler did so only after receiving the corrected release (without the "typos" of the first release) signed as "Norman Ganz for Leonard Champagne." 93 TR at 207-8. There is no other contrary record evidence and the referee errs in stating that Southern Bell was "misled" so that "fraud" somehow occurred on the Court. Judge Ross knew what he was deciding and was fully informed. 93 TR at 194-5 and 199-200. Notably, the Bar counsel conceded that the check signing and the respondent fee arrangement with Champagne was not being "challenged" any longer. 93 TR at 169 and 94 TR at 90.

Full and complete disclosure of each step in Respondent's efforts for Champagne is clearly suggested and overwhelming evidence is in the record, 94 TR at 86. Therefore, this Court should consider whether pure speculation by Circuit Court Judge Ross is an inappropriate basis for the referee in which to base his conclusion.

There is no record support for the statement that Southern Bell could have been confused by the notarized release, and Kochler never so stated nor testified C.f., The Florida Bar v. Day 520 So.

2d 581 where in a violation of F.S. C. 117.09 numerous notarized and improper affidavits by respondent warranted only public reprimand. Wherein respondant will attestatopn respondent signed for another's name in The Florida Var v. Fatolitis 546 So. 2d 1054 (1989), a reprimand also resulted.

All pleadings were sent to attorney Kochler and no opposition was filed. Note also that the respondent's former partner Stephen Jerome later represented Champagne, 93 TR at 161-2 and despite a third evidentiary hearing, Judge Ross did not vacate any of his prior orders. See Keller testimony, 94 TR at 53-4 and 59 on his refussal overturn this action, 94 TR at 56-7. Consequently, Southern Bell could not be deemed as other-than-in-full support of the respondent's petition to accept the settlement and then to deposit Champagne's Southern Bell payment into the Court Registry.

(D)

Respondent properly complied with subpoena and involved privilege so that sanction is improper.

The transcript reflects that respondent did produce all records but the referee erred in refusing to admit and consider same. See 94 TR at 19-20 at 42-3 and 50. The record also shows that respondent did show up as requested and produce all subpoened records for the June, 1990 Grievance Committee hearing. See respondent Exhibit B & 93 TR at 55-65 and 66-67 and Spevach v. Klein 385 US 511 (1967) where the U.S. Supreme Court held that a lawyer could not be disciplined for invoking the 5th Amendment within disciplinary proceedings.

Respondent and Keller both testified that at the June 8, 1990 grievance proceeding respondent was instructed by his attorney to leave and then to come in again at the hearing's conclusion, who respondent did See 94 TR at 60-2 and 66. Compare to The Florida Bar v. Rosin 521 2d 1085 (1988) where a similar situation resulted in a reprimand. Respondent also fully complied with the document subpoena which he had received; the official Grievance Committee transcript clearly shows that respondent was indeed present with all records. 93 TR at 60-2 and 66.

(E)

Entry of Summary Judgment on unauthorized practice of law unjustified as respondent proferred relevant witnesses and material documents not considered by referee.

As to the Star Lite Pools, no testimony was taken and the referee erred when granting summary judgment. This was a material fact dispute as to two staff letters signed by law clerk or a legal assistant without their title being stated. The Bar agued that this constituted unauthorized practice of law yet the proffer was by respondent that the client acknowledged knowing that respondent had spoken with each to introduce staff and to convey the limitations of each, by title. The absence of the title in the letter - even one sent to the undersigned defense attorney by Medrano 93 TR at 51-2, - should not properly support summary judgment against respondent.

Considering that respondent suggested that each recipient knew that the law clerk/assistant was not a lawyer, summary judgment was unwarranted and costs should not be assessed against respondent, 93 TR at 148, 160-3. Compare, The Florida Bar v. Horvath 609 So 2d 1318, (1992) and The Florida Bar v. Allen, 537 So. 2d 1051 (1969) where, as here, the bar's auditor did not testify and costs were also at issue.

This cost assessment objected to also in Jenkins where as 94 TR 61-2 and 88 and 93 TR 7-8 and 46-9 a stipulation in the respondent's favor was made, yet this still resulted in the referee assessing costs. This is improper, where even Bar counsel concedes that two different 17th circuit grievance committee reached apparently divergent conclusions on respondent's use of the single work "immediately" in his written contingent labor contracts. Given the failure to use the Bar audit/investigative or as a witness, cost assessment is again not supportable. Respondent's exercise of professional judgment is challenged; respondent had advised Reese that as a whistleblower, a prior report to the authorities is required before any admit of protection for wrongful discharge could be obtained for this client.

(F)

In the circumstances presented in Reese, record does not support respondent as acting unreasonably when exercising professional judgment to file with authorities first before otherwise proceeding on client matter.

As to the Reese, matter Respondent's exercise of professional

judgment is challenged; respondent had advised Reese that as a whistleblower, a prior report to the authroities is required before any admit of protection for wrongful discharge could be obtained for this Client. Thus, the referee erroneously accepted Bar counsel's "cheat sheet" 93 TR at 60 and declined to allow respondent witnesses to testify 93 TR and 219 and 235.
He ignored respondent's proper exercise of professional judgment plus respondent's offer of certain witnesses, to wit, former legal staff and persons from the state Comptroller and the FBI offices who particiated in joint teleconferences with the client and the respondent,

The notarized, facsimile, factual statement which the respondent offered also is ignored by the referee, in error. The only evidence offered was that Reese claimed he had not signed an hourly contract with the respondent's firm. However, Reese later told the referee at 93 TR at 85 that respondent' "had me sign" two pages. This was in accordance with respondent's written office procedure. Reese's return to respondent's office was in dispute. 93 TR at 121 and 223-224. However, Reese acknowledged that he had spent at least two hours working with respondent. Reese is not credible testifying that respondent was not engaged as his respresentative, yet he allowed the firm to go forward for hours and after several letters, faxes and phone conferences were set up and/or completed during that time for him.

At the 1993 final hearing Reese achnowledged to the referee that he had to pay for those services, but that he had not done so.

Lastly, the referee noted that no "flagrant" violation or misconduct had occurred 93 TR at 111-116, and Respondent's efforts and consultation for Reese are of record, even if no signed contract was tendered (per respondent consistent written office procedures on the respondent's standard written hourly contract.) No evidence of harm to Reese is shown, and this matter did not result in any Bar complaint until some ten months and "17 unpaid bills" later. The findings should cause a reasonable inference to be drawn that Reese matter was only a non-sanctionable fee dispute over $416.00 for which respondent's contract mandates arbitration, this Reese declined.

The phone tapes in Reese show only that respondent's firm's made reasonable attempts to reduce or to eliminate the billing dispute and to thereby conclude what respondent perceived was the basis for the client's grievance/complaint, by mutual agreement. There is no evidence or showing that there was improper lawyer "threat", only that Richard Liss, Esq. of the Bar had discussed this avenue with respondent, 93 TR at 114,177 and respondent reacted as suggested. No coercion is of record and the referee errs in stating otherwise; again, the clear evidence shows only a reasonable attempt by respondent to reach satisfaction with this "deadbeat" client who "spirited" specified away his signed written two page legal services contract from respondent's office, 93 TR at 105-8 and 118.

As to non-lawyer letters to respondent's clients, (when, for example, closing or warehousing a file or declining to proceed),

the only testimony was that the writer's office procedure/manual controlled. 93 TR at 103, respondent Exhibit "9". Recipients of the two pieces of correspondence knew that the writer(s) were a law clerk or a legal assistant to the respondent, each client having met and spoken with that staff member when he or she (and the respondent) met with each client and introduced each to them.

This case's excessive delay here, approaching seven years now, has unfairly harmed respondent's ability to present his defense so that essential witnesses are simply not to be found any longer (Blackwell, Cain, Christian, Medronos, Scott, Seppi) 93 TR at 104 and 111. This should not be overlooked by this Honorable Court.

No great public harm occurred as to this respondent in the past almost seven years, otherwise the Bar would have invoked procedures under Rule Reg. Fl. Bar 3-5(i)(g) on temporary suspension and probation. Also, compare Devine v. DPR, a dentistry action barred by laches due to prejudice to one defense, 451 So. 2d 994 (1984, Fl. App.) and The Florida Bar v. Marks, supra, on excessive delay.

The unreasonable delay here when respondent desired an expeditious decision has been harmful to respondent where essential witnesses have become unavilable due to the passage of such a length of time. The Florida Bar v. Rubin 362 So. 2d 12 (1978) and The Florida Bar v. Micks 628 So. 2d 1104 (1993) and The Florida Bar v. Lipman 497 So. 2d 1165 (1986).

The referee's delay should be weighed against respondent evidentiary profferand any resulting prejudice to defense as in The

Florida Bar v. Guard 453 So. 2d 392 (1978). This Court should not defer to the referee and countinenance same and consistently penalize respondent with christian law excessive sanctions as are proposed. (Note respondent's proffer of approximately one and one half more hours for witness testimony rejected by the referee at 93 TR 235.) The clear and substantial evidence here shows only that respondent never knowingly allowed unauthorized practice of law regarded here as sending out two simple objectionable transmittal letters of the type to which the referee erroneously refers.

Finally, respondent's mitigating conduct should also have been considered by the referee under Standard Reg. Florida Bar3.0, which did not, apparently, take place. See, The Florida Bar v. Condon 632 So. 2d 70 (1994) The Florida Bar v. Miller So. 2d 215, 219 (1989) on respondent's mitigation and lack of intent.

POINT II

Respondent submits that he also seemingly was excessively charged with administrative costs for five items, even though three of the five items were found to be without merit and therefore not deemed as punishable. That is, $1,000.00 ($500.00) per case) but not $2,500.00 in adminsitrative costs may be justifiable but the added cost of $889.00 for the unused auditor is also inappropriate and should not be sustained.

CONCLUSION

Respondent, unfortunately, concludes that because he did not take a voluntary plea bargain when it was suggested in the referee hypothetical of a one year suspension, TR _____, he is now being

excessively punished for what the referee calls "technical and minor violations." See The Florida Bar v. Lipman, supra, on the propriety of respondent's refusal to admit misconduct. Under The Florida Bar v. Rayman 238 So. 2d 712 (1976), the record is clear and convincing evidence that only unintentional conduct by this respondent occurred, although seemingly "minor and technical violations", as the referee noted, may have taken place.

Given that the Bar's relatively high burden has not been met, severel sanctions as consecutive three year suspensions are not warranted and erroneous and should not be upheld. Compare, The Florida Bar v. Stalnaker 485 So. 2d 815 (1986) and Rules and Regulations of the Florida Bar 3-7.7(c)(5). Note also referee commentary on associate attorney and office supervision that respondent can be compared to)"seventy five percent (75% of other law firms". 93 TR at 67, who have "similar level" of procedures. This plus other mitigating factors respondent submitted were not even discussed or considered by the referee. Factors such as respondent's cooperation, immidiate repayment of the $171.00 at issue and correction of inadvertent error(s), nor respondent's reasonable supervisory conduct over staff were not discussed.

Under Rule 4.516 of the Rules Regulations of the Florida Bar, the respondent's lack of knowledge and his reasonable supervising efforts here as to subordinates should have been considered by the referee. Any neglect by this respondent may warrant only a reprimand as in The Florida Bar v. Hull 521 So. 2d 1308 (1983). Respondent's lack of intent to violate even the alleged "technical

and minor" rules should be a significant factor, however, for this Court to consider. This costly and lengthy process has been severe punishment to respondent and should fairly be sufficient to deter other and similar mistakes or misjudgments at least as to "minor and technical" violations. C.f., The Florida Bar v. Harper 518 So. 2d 262 (1988). In any event, respondent anticipates this Honorable Court's fair review of these unusual circumstances and awaits a final decision, with regret.

Respectfully submitted,

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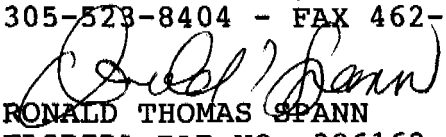

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing initial brief of the Respondent/Appellee has been furnished via regular U.S. mail to: Kevin P. Tynan, Bar Counsel, The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309; John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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