IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 79,347
[TFB No. 92-30,657 (09D)]

v.

T. MICHAEL PRICE,

Respondent.
_____/

ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 217395

and

JOHN B. ROOT, JR.
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
Attorney No. 068153

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be known as the bar.

The report of referee dated December 9, 1992, will be referred to as RR.

The amended report of referee dated January 4, 1993, will be referred to as ARR.

The transcript of the final hearing will be referred to as T.

The bar's exhibits will be referred to as B-Ex.
The respondent's exhibits will be referred to as R-Ex.

STATEMENT OF THE CASE

Because the respondent did not provide a statement of the case in his initial brief, the bar is presenting one here in its answer brief.

This matter was initially brought to the bar's attention by the Honorable C. Timothy Corcoran, III, United States Bankruptcy Judge, on or around November 15, 1990. The matter was referred to the Ninth Judicial Circuit Grievance Committee "D" which voted to find probable cause on September 16, 1991. The bar filed its complaint on February 11, 1992. This court appointed the Honorable Susan W. Roberts, Circuit Judge, on February 24, 1992, to act as referee.

The final hearing was held on August 14, 1992, and October 5, 1993. The referee issued her report on December 14, 1992, which was amended on January 4, 1993, to correct a minor typographical error. The referee recommended that the respondent be found guilty of violating Rules of Professional Conduct 4-1.3 for failing to act with reasonable diligence and promptness in representing a client, and 4-3.5(c) for engaging in conduct intended to disrupt a tribunal. She recommended he be found not guilty of violating rules 4-1.16 for failing to take steps reasonably necessary to protect the client's interests upon the termination of representation, and 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

The Board of Governors of The Florida Bar considered this case at its February, 1993, meeting and voted not to seek an appeal. The respondent served his petition for review on February 25, 1993. His initial brief was due on or before April 1, 1993. On April 2, 1993, he moved for an extension of time until April 28, 1993, to file his brief. On April 14, 1993, this court granted the respondent's motion and gave him until April 28, 1993, to serve it. He did not serve his brief until June 15, 1993.

STATEMENT OF THE FACTS

Because the respondent did not include a statement of the facts in his brief, the following facts are set forth by the bar and, unless otherwise noted, are contained in the report of referee and amended report of referee.

The respondent practiced bankruptcy law before the Honorable C. Timothy Corcoran, III, in the Middle District of Florida, Orlando Division. On December 11, 1990, the respondent failed to appear at two scheduled order to show cause hearings regarding two different bankruptcy clients, Clayton L. Zindars and Darrell Spees. As a result, the court rescheduled the hearings for January 22, 1991. The respondent again failed to appear at the January 22, 1991, hearings. According to the respondent, he did appear at the courthouse for the December 11, 1990, hearings in the Zindars' and Spees' cases but left after another attorney advised him that due to a caseload backlog the judge had cancelled all hearings regarding executory contract issues for that day. The respondent made no attempt to verify this information and simply left the courthouse despite the fact that the hearings in the Spees' and Zindars' cases involved orders to show cause for failing to file executory contracts. As for the notices of the January 22, 1991, hearings in the two cases, the respondent insisted he never received them and suspected the clerk's office had mailed them to his former address and they had been lost.

In the case of Gene A. and Donna W. Argentine, the court scheduled a hearing for January 29, 1991, in response to a motion to dismiss filed by the bankruptcy trustee and the respondent's motion for emergency hearing. The respondent failed to appear at this hearing.

Due to the respondent's failure to appear at the January 22 and January 29, 1991, hearings, the court rescheduled the hearings in all three cases for February 7, 1991. The respondent did appear at these hearings. When questioned by the court as to why he had missed the previous hearing in the Argentine case, the respondent replied that the notice for the January 22, 1991, hearing arrived only a few days before the hearing date. The hearing was set for a Tuesday and the respondent believed the notice arrived at his present office address, which was also his home address, on either the preceeding Saturday or Monday. He did not open his mail from those two days until Tuesday, January 29, 1991, after the hearing had already occurred. He considered calling the bankruptcy trustee to inquire as to the outcome but decided to "wait and see what happened" instead. The respondent further stated to the court he did not believe he should be held responsible for processing Saturday's mail on that day even though he was practicing law out of his home and received the mail on that day. The court deemed it unacceptable that the respondent knew his motion for emergency hearing was pending yet failed to promptly open and read his mail. Furthermore, during the January 29, 1991, hearing in the Argentine case, an employee

of the judge's office attempted to call the respondent to ensure he knew of the hearing because he had not appeared. The respondent could not be reached and had a recorded message that his office was closed and no messages could be left.

According to Judge Corcoran, the respondent routinely blamed his clients for problems which arose in cases, and in the process, revealed to the court facts which were affirmatively harmful to the clients even when these facts were irrelevant to explain the problem at hand. During the February 7, 1991, hearing in the Argentine case, the respondent engaged in just that behavior. He stated the reason the clients' tax return copies were not timely filed with the trustee was due entirely to Mr. Argentine's failure to maintain contact with him and Mr. Argentine's assurances to him that he had filed a copy of the required tax form before the deadline as the respondent had advised. The respondent further stated to the court that "[t]his case should be dismissed for what the client did" (B-Ex. 2, p.8). Further, in both the Spees' and Zindars' cases, the respondent filed identical debtor's motions to vacate orders to show cause wherein he alleged the clients were responsible for the failure to file the statements of executory contracts before the deadline because both clients had procrastinated in returning the signed statements by mail to the respondent.

The respondent advised Mr. Zindars and Mr. Spees not to attend the December 11, 1991, order to show cause hearings

despite the fact the court had ordered their attendance.

SUMMARY OF THE ARGUMENT

Although the respondent did not include a summary of the argument in his initial brief, it appears that he raises four main issues on appeal: the referee erred in allowing the respondent's counsel to submit into evidence the deposition of Judge Corcoran rather than requiring his appearance to give live testimony; the referee's findings of fact were not supported by clear and convincing evidence; the recommended discipline is excessive and/or erroneous and, if the respondent is guilty of any misconduct, only a public reprimand would be warranted; and the bar's costs, namely its investigative costs, are excessive because they include investigation of issues where the respondent was found not guilty of misconduct.

Although the bar made repeated efforts to serve a subpoena on Judge Corcoran, it was not successful. The judge was, however, deposed prior to the final hearing and at that time was subject to cross-examination by respondent's counsel. It was respondent's counsel, not the bar who submitted the judge's deposition into evidence. Now that the respondent is representing himself, he apparently wishes to retract this evidentiary item. The bar submits this would not be appropriate. The referee considered the deposition and gave it whatever weight she deemed appropriate.

The referee sits as a fact finder and determines the

credibility of evidence and witnesses. The party seeking to overturn those findings carries the heavy burden of showing the findings are clearly erroneous and not supported by the record. The bar submits the respondent has failed to carry this burden. In fact, the respondent admitted he failed to attend hearings and neglected to open his mail. The referee supports her findings in her report with numerous references to the record. Apparently she did not find the respondent's excuses to be sufficient to mitigate his misconduct. Given the cumulative nature of the respondent's misconduct, the pattern of misconduct he exhibited, his refusal to cooperate with Florida Lawyers Assistance, Inc. or seek treatment for his alleged alcoholism, and his inability to appreciate the wrongful nature of his misconduct warrants a suspension with proof of rehabilitation prior to reinstatement. Throughout these proceedings the respondent has repeatedly attacked the judicial integrity of Judge Corcoran and Chief Judge Susan H. Black and has made disparaging remarks about the clerk's office in the Middle District of Florida and now the Southern District of Florida. According to the respondent, gross incompetence is running rampant in the Federal Court Clerk's offices. Given the nature of the violations and his accusations, the respondent's fitness to practice law is in grave doubt.

With respect to the bar's costs, the nature of the allegations necessitated that the bar's investigation be conducted in such a manner as to make it impossible to divide most of the investigative costs between the rules of which the

respondent was found guilty and those of which he was found not guilty. The bar did investigate whether or not the respondent was maintaining a law office in Texas and no charges of misconduct were ever brought regarding that issue. Therefore, the bar does not object to subtracting the time spent investigating that matter, a total of 2.6 hours, from the costs for a total reduction of $39.00.

ARGUMENT

ISSUE I

THE REFEREE DID NOT ERR IN ALLOWING THE SUBMISSION INTO EVIDENCE OF A WITNESS' DEPOSITION

The bar submits the referee did not err in accepting into evidence either Judge Corcoran's deposition or the excerpt from the grievance committee transcript containing his testimony. Even if it was an error, it was harmless because the referee found the bar failed to prove by clear and convincing evidence the respondent had appeared in court while under the influence of a mind altering substance. The respondent's alleged intoxication was the main issue in Judge Corcoran's testimony. The respondent's failure to attend court hearings, for which the referee recommended he be found guilty, was amply supported by the respondent's own admissions, testimony and the transcript of the bankruptcy hearing itself entered as bar exhibit 2. (ARR p. 1).

The use of depositions in civil proceedings is governed by Fla. Stat. section 90.804 and Fla. R. Civ. P. 1.330. The statute provides that such a use constitutes an exception to the hearsay doctrine. It should be noted that in bar proceedings referees are not bound by the technical rules of evidence, hearsay is admissible, and the respondent has no right to confront a witness face to face. See State v. Dawson, 111 So. 2d 427 (Fla. 1959);

The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986); The Florida Bar v. Weed, 559 So. 2d 1094 (Fla. 1990); and The Florida Bar v. Rendina, 583 So. 3d 314 (Fla. 1991). Of particular interest is the Vannier case. The bar submitted into evidence documents which were obtained from the FBI and which had been seized by that agency during the course of a criminal prosecution not directly related to the bar's charges against Mr. Vannier. The bar also submitted into evidence at the final hearing documents and depositions which had been generated by discovery in unrelated civil litigation. Although Mr. Vannier appealed the admissibility of such hearsay evidence, this court found the hearsay had been properly authenticated and its reliability established and thus was admissible even though Mr. Vannier was not able to confront the witnesses whose depositions were used. The court made no mention as to whether or not the requirements of Fla. R. Civ. P. 1.330 had been met. It should be noted that the Florida Rules of Civil Procedure apply except as otherwise provided by the rules regulating The Florida Bar. Rule of Discipline 3-7.6(e)(1). Bearing in mind the treatment of hearsay evidence in bar proceedings, this discussion will now turn to its treatment by the civil and criminal courts, with a caveat that the more restrictive Florida Rules of Criminal Procedure apply in criminal cases rather the Florida Rules of Civil Procedure which serves to greatly limit the use of hearsay evidence.

The Florida Evidence Code became effective on July 1, 1977. It and either the Florida Rules of Civil Procedure or the Florida

Rules of Criminal Procedure, whichever would be applicable, must be read in conjunction when considering evidence. Section 90.804(1)(e) defines "unavailability as a witness" to mean that the declarant is exempted from testifying due to absence from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance or testimony by process or by other reasonable means. The bar attempted to procure Judge Corcoran's attendance at the final hearing by repeatedly trying to serve him with a subpoena. The bar was not successful in its efforts. The attempts were made at his place of employment because his home address was not listed in the telephone directory and could not be discovered.

The statute provides, under 90.804(2)(a), that former testimony is admissible provided that the declarant is unavailable as a witness. Therefore, if it has first been established that the declarant meets the definition of unavailability, the testimony given as a witness in another hearing of the same or a different proceeding, or in a deposition, is admissible as evidence so long as the opposing party had an opportunity and similar motive to develop testimony by direct, cross or re-direct examination.

Florida Rule of Civil Procedure 1.330(a)(3) provides that the deposition of a witness may be used by any party for any purpose if the court finds that the party offering the deposition has been unable to procure the attendance of the witness by

subpoena. The bar submits that it has satisfied this requirement in that it attempted to procure the attendance of Judge Corcoran by subpoena but was not successful.

The use of depositions at trial under the circumstances involved in this case does not appear to have been addressed directly by this court.

In 1977, this court issued its landmark decision in State v. Basiliere, 353 So. 2d 820 (Fla. 1977). Even though this case was criminal in nature, some of the findings are applicable in civil cases. The defendant was charged with aggravated battery upon Edward Daly. Mr. Daly was deposed, under oath and in the presence of an official court reporter, by defense counsel. Sometime following the deposition, Mr. Daly died and thus clearly became unavailable as a witness. The deposition testimony was material to the state's case and it could not proceed without the testimony. The state filed a motion to use the deposition testimony as evidence in the trial. The defendant argued that he did not waive his constitutional right of confrontation because at the time of the deposition he had no idea that the deponent would die and his only opportunity to confront the witness was at the deposition. The deposition was conducted only to ascertain facts upon which the charges were based and not to fully cross-examine the witness or challenge the accuracy of his statements. The defendant argued that he could not have been expected to conduct any adequate cross-examination as to matters

of which he first gained knowledge at the taking of the deposition. The court upheld his argument but it should be cautioned that in criminal proceedings a defendant does have a constitutional right to confront an adverse witness at trial. Further, Fla. R. Crim. P. 3.190(j) is more restrictive than the comparable Florida Rule of Civil Procedure in that it does not provide for the use of a deposition as evidence at trial upon the finding of unavailability of a witness. The rule merely provides that a deposition may be used for the purposes of impeaching the testimony of a deponent as a witness.

In Johns-Manville Sales, Corp. v. Janssens, 463 So. 2d 242 (Fla. 1st DCA 1984), petition for review denied 467 So. 2d 999 (Fla. 1985), the First District Court of Appeals considered, among other things, the use of a deposition taken in a different case where the appellant, Johns-Manville Sales Corp., had been a defendant. The deposition was of a doctor and concerned the same subject matter as the pending litigation, namely exposure to asbestos products. Since being deposed, the doctor had died and thus clearly became unavailable as a witness. Johns-Manville objected to the use of the depositions because the corporation had been deprived of a full and fair opportunity to cross-examine the doctor for the purposes of the instant case. The company also argued that the testimony was irrelevant and inadmissible hearsay. The district court found that none of these arguments had merit. Florida Rule of Civil Procedure 1.330 permitted the use at trial of any part or all of the deposition, so far as

admissible under the Rules of Evidence, against any party who was present or represented at the taking of the deposition or had reasonable notice of it. At the time the depositions had been taken, the company had been known as Johns-Manville Products Corporation. This company then merged with Johns-Manville Sales Corporation. The court found that the first company had been represented at the deposition by its then counsel who cross-examined the doctor at length. Therefore, the court concluded that the requirement of the rule was satisfied to the extent that Johns-Manville was represented by counsel at the deposition.

In considering whether or not the deposition could be used under Rule 1.330 unless offered in the same judicial proceeding in which it was originally taken, the court discussed at some length the interaction between the Rules of Civil Procedure and the Evidentiary Code. The two must be considered in conjunction with each other and when the offered deposition testimony meets the requirements of either, it is admissible. As support for their position the court cited a case from the Third District Court of Appeals, Dinter v. Brewer, 420 So. 2d 932 (Fla. 3d DCA 1982). The court declined to determine whether or not the doctor's deposition would be admissible under the Florida Rules of Civil Procedure because it held it admissible under the former testimony rules contained in the Evidence Code. The court went on to explain that the former testimony rule applies if the following requirements are met: the former testimony was taken

in the course of a judicial proceeding in a competent tribunal; the party against whom the evidence is offered, or his privy, was a party to a former trial; the issues are substantially the same in both cases; a substantial reason is shown why the original witness is not available; and the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness. The court found that the rationale underlying the former testimony exception was best described in Putnal v. State, 46 Fla. 86, 47 So. 864 (1908). In Putnal, the court stated that the chief reasons for excluding hearsay evidence was its unsworn nature and the lack of opportunity to cross-examine the witness. But where the testimony was given under oath in a judicial proceeding in which the adverse litigant had the power to cross-examine and was legally called upon to do so, the testimony so given is admissible if the witness should decease prior to the bringing of any subsequent suits between the same parties.

Johns-Manville argued that had the doctor been available for the current proceeding, it would have cross-examined him differently than it did in the prior litigation. The court rejected this argument and stated that the test for admissibility did not depend on any factors affecting the motives for cross-examination other than the existence of a substantial similarly of issues giving rise to a similar motive to develop the testimony through cross-examination. Johns-Manville's inability to foresee the various uses for which the deposition might be put in future cases was found not to be a valid

objection to the use of the former testimony so long as the issues involved were similar.

In Dinter, supra, the appellant, Heinz Dinter, was the president of a computer management corporation. The appellee, James T. Brewer, had recovered a money judgment against the corporation in 1978. Pursuant to the judgment, Mr. Brewer then deposed Mr. Dinter, as president of the corporation, in aid of execution. During the deposition, Mr. Dinter admitted that he and his wife were the principal officers, directors and shareholders of the corporation, that the corporation could not pay the judgment and that the assets had been transferred to a new corporation. Thereafter, Mr. Brewer brought an action for fraud on a judgment creditor against Mr. and Mrs. Dinter. Mr. Dinter did not appear at the trial despite Mr. Brewer's efforts to procure his attendance. Mr. Dinter's deposition taken in aid of execution was offered into evidence to show that the Dinters wrongfully drained corporate assets with the intent to defraud the corporation's creditors. The trial court admitted the deposition against Mr. Dinter but excluded its use against his wife. The court entered a money judgment against Mr. Dinter. Mr. Dinter then appealed and challenged the trial court's admission of his deposition. The Third District Court of Appeals, considering this issue, discussed the interplay of the Rules of Civil Procedure and the Evidence Code. The court noted that when considering the admissibility of a deposition, the legal community has been conditioned to look to Fla. R. Civ. P.

1.330. The rule, according to the court, merely supplies certain exceptions to the rule excluding hearsay, that is, when the deposition is to be used in the action for which it was taken, or in a proceeding supplemental to, or retrial of that action. When a deposition does not come within the exception provided in the Civil Procedure Rule, the court stated that it is necessary to turn to the Rules of Evidence in the search for an exception. The evidentiary code expands the admissibility of depositions taken in pending and prior actions but does not limit admissibility as provided for in the Rules of Civil Procedure. As a practical matter, the primary impact of the Rules of Evidence, with respect to depositions, is only in those cases where the depositions were taken in a proceeding different from the one in which it was being offered as evidence. Thus, it cannot be said that the admissibility of deposition testimony depends solely on the Rules of Civil Procedure.

With respect to Judge Corcoran's deposition, Fla. R. Civ. P. 1.330(a)(3)(D) is applicable. The bar attempted without success, to procure Judge Corcoran's attendance at the final hearing through subpoena. The bar did not offer the judge's deposition into evidence but instead proffered it to the respondent's counsel who then entered it into evidence (T. Vol. I pp. 16-17). Respondent's counsel attended the deposition and cross-examined the witness. Therefore, it cannot be stated that the respondent suffered any prejudice by the use of the deposition.

With respect to the excerpt of the grievance committee hearing transcript containing Judge Corcoran's testimony which was submitted into evidence as bar exhibit 1, again, the respondent suffered no prejudice. In fact, the respondent attended the grievance committee hearing and declined to cross-examine Judge Corcoran (B-Ex. 1 p. 32). The referee allowed the submission of this transcript excerpt because she found that the witness' availability was not an applicable issue in placing such a transcript into evidence (T. Vol. I p. 15). Under Vannier, supra, the referee is not bound by the technical rules of evidence. The closest bar case to being on point with the instant situation is Weed, supra. In Weed, the attorney failed to attend the grievance committee hearing where the witness was examined by the committee. Prior to the final hearing, the witness, who was elderly and infirm, became unable to give meaningful testimony due to illness and loss of memory. Although the witness appeared at the final hearing, because of his inability to recall past events and facts to which he had previously testified, he could not respond to the bar's questions. The referee, therefore, allowed the bar to introduce his previous testimony and continue the hearing so that Mr. Weed could review that testimony and prepare to cross-examine the witness. Presumably, Mr. Weed's cross-examination of the witness would be greatly limited due to the witness' inability to recall the facts. After the referee recommended he be found guilty, Mr. Weed appealed. He argued that the referee erred in allowing the bar to present a witness' testimony before the grievance

committee when that witness was present at the referee hearing. This court disagreed, citing that the referee was not bound by the technical rules of evidence and there was no right to confront a witness face to face. This court specifically found that Mr. Weed had the opportunity to cross-examine the witness at the grievance committee level and simply because he chose not to do so did not mean the testimony could not be used at the referee level when the witness became unavailable due to memory loss. The opinion makes no reference as to the applicability of either the Evidence Code or the Rules of Civil Procedure governing the use of former testimony.

Florida Statutes section 90.804(2)(a) provides that former testimony given by a witness at another hearing of the same or different proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, or re-direct examination, is an exception to the hearsay rule if the declarant is unavailable as a witness. Again, the requirements of Section 90.804(1) must be satisfied. The bar submits that it has satisfied the requirements of Section 90.804(1) because it was unable to procure the attendance or testimony of Judge Corcoran by process or other reasonable means. The bar also submits that the grievance committee testimony is admissible pursuant to Weed, supra.

This court considered the former testimony exception to the hearsay rule in the context of a criminal case in Richardson v. State, 247 So. 2d 296 (Fla. 1971). The defendant was charged with poisoning a member of his family. The testimony of Ernell Washington was taken at a preliminary hearing. Sometime after giving this testimony and before the trial, Mr. Washington was murdered. No court reporter had been present and no official record had been made of Mr. Washington's testimony at the preliminary hearing. There were three witnesses to this testimony and the defendant was present and represented by counsel at that time. Furthermore, the defendant's attorney cross-examined Mr. Washington. The trial court allowed three state witnesses who had been present during the preliminary hearing to testify as to their recollection of Mr. Washington's testimony. The defendant appealed the use of this hearsay evidence. During the time of this case, the Florida Evidence Code had not come into existence. The former testimony exception to the hearsay rule existed merely in common law. Under the former testimony rule, evidence by third parties as to a deceased witness' testimony given under oath in a preliminary hearing or other judicial proceeding where the defendant was represented by counsel, and had an opportunity to confront and cross-examine the witness, was admissible in a subsequent trial. Such third party evidence as to former testimony was admissible not because it was an exception to the hearsay rule but rather due to the fact that the requirements of the rule had been satisfied because the statement had already been subjected to cross-examination. The

issue of whether the former testimony was given at a preliminary hearing or at a former trial was inconsequential so long as there was a full and adequate opportunity to confront and cross-examine the witness.

The burden of demonstrating the unavailability of a witness for trial rests on the party seeking to use the missing witness' previous testimony. The responsibility for evaluating the adequacy of the showing of non-availability rests with the trial court. The judge's determination of this issue will not be disturbed unless an abuse of discretion clearly appears. Outlaw v. State, 269 So. 2d 403 (Fla. 4th DCA 1972).

In Stano v. State, 473 So. 2d 1282 (Fla. 1985), the defendant was indicted for first degree murder and his first trial ended in a mistrial. The victim's parents testified at the first trial but refused to testify at the second trial. The state filed a motion to compel their testimony but the witnesses stated that they would not testify regardless of fines or imprisonment. The state then filed a motion of unavailability. After holding a hearing on the matter, the trial court declared them unavailable and allowed the state to read the transcripts of their testimony at the first trial into evidence. The defendant appealed and claimed that the trial court erred in declaring these witnesses unavailable and allowing their former testimony into evidence. This court found that the requirements of subsection 90.804(1)(b) had been met because the witnesses had persisted in refusing to testify concerning the subject matter

of their statements despite an order of the court to do so. The state made an adequate showing of unavailability and the appellate court found no abuse of discretion in the trial court's rulings.

ARGUMENT

ISSUE II

THE REFEREE'S FINDINGS OF FACT WERE SUPPORTED BY THE EVIDENCE.

In bar proceedings, a referee's findings of fact are presumed to be correct and will not be disturbed absent a clear showing they were not supported by the evidence. Therefore, the party seeking review of a referee's findings carries a heavy burden of proving the findings were clearly without support in the record. The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993). The bar submits the respondent has failed to carry this burden.

The referee's responsibility, as trier of fact, is to evaluate the credibility of witnesses and resolve conflicts in the evidence. The Florida Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990). The respondent's arguments contained in his initial brief are more in the nature of mitigation and were made previously to the referee and thus considered by her in making her recommendations. The respondent also makes repeated and extensive references to matters not before this court and in his appendix includes numerous documents which were not submitted into evidence before the referee and therefore are not a part of the record on appeal. Rule of Discipline 3-7.7(f) provides that to the extent necessary to implement the Rules of Discipline and

if not inconsistent herewith, the Florida Rules of Appellate Procedure shall be applicable to petitions for review in disciplinary proceedings. Florida Rule of Appellate Procedure 9.200(a)(1) provides that the record shall consist of the original documents, exhibits and transcripts of proceedings filed in the lower tribunal. Rule 9.220 provides that the appendix should be utilized only to transmit copies of such portions of the record deemed necessary to an understanding of the issues presented. The respondent's appendix includes many items which, if admissible at all, should have been entered into evidence during the final hearing before the referee and are not now properly admissible. The respondent apparently made no effort to familiarize himself with the procedural rules and instead is asking this court to indulge him. The review of the referee's findings of fact is not intended to be a trial de novo. The Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987).

Throughout these proceedings, the respondent has made repeated disparaging remarks concerning Judge Corcoran and has accused Susan H. Black, Chief Judge of the United States District Court, of back-dating a document. These remarks have been made without credible evidence. They show the respondent's continuing lack of respect for the judiciary and the judicial system and his attitude, coupled with his alleged misconduct, shows a disturbing trend where the respondent apparently believes that certain judges are "out to get him" and therefore not deserving of his respect. It appears that the respondent believes he does not

need to attend court hearings despite orders that he do so if he does not receive notices of the hearings within what he believes to be a sufficient time period before the hearing date. He also does not believe it is necessary to promptly review his mail because he is a sole practitioner and not a law firm. It appears the respondent may not be able to adequately deal with the rigors of practice as a sole practitioner at this time.

Although in his brief the respondent argues that all notices of hearings should be served at least five days prior to the scheduled hearing date, excluding weekends and holidays, the rules cited and included as number fourteen in his appendix seem to refer to notices of motion hearings only. In Mr. Zindars' and Mr. Spees' cases, the hearings were set not to consider a motion but rather as a result of an order to show cause due to the respondent's failure to file statements of executory contracts. Therefore, it does not appear that the time period outlined in Rule 9006 of the Rules of Bankruptcy Procedure applied. Regardless of whether or not the clerk's office mailed the notices in a timely manner, it was incumbent upon the respondent to diligently protect his clients' interests.

In Mr. Argentine's case, the respondent filed the motion for emergency hearing (T. Vol. II p. 95). He received the hearing notice setting the matter for January 29, 1991 (T. Vol. II pp. 96-97). He admitted to the referee during the final hearing that he did not attend this January, 1991, hearing (T. Vol. II p.97).

Apparently the clerk's office attempted to call the respondent about the hearing on January 29, 1991, but could not reach him. The respondent had no explanation as to why the clerk's office was only able to reach his answering machine, which did not allow the caller to leave a message (T. Vol. II pp. 102-103). According to the respondent, he missed this hearing because he did not open the mail, which contained the notice of the hearing, until it was too late (T. Vol. II p. 99). The respondent testified that he often learned of hearings through clients and in this instance Mr. Argentine did not call him to tell him about the hearing (T. Vol. II p. 99). The respondent further testified that he sometimes does not open Saturday's mail until Monday (T. Vol. II pp. 98-99). In this instance, Monday's mail did not arrive until 4:00 p.m. and he merely combined it with Saturday's mail and did not open any of the mail until either morning or early afternoon on Tuesday (T. Vol. II pp. 99-100). Apparently, the respondent did not sort through the mail to determine if he had received anything requiring immediate attention. All mail from the court comes in an envelope with the court's name and return address printed on it (T. Vol. II pp. 100-101). According to the respondent, he did not believe his emergency motion had been set yet for hearing because the clerk would normally call him first prior to sending the notice (T. Vol. II p. 101). Presumably, the clerk would be able to reach the respondent rather than his answering machine which does not allow the caller to leave a message (T. Vol. II p. 102).

Mr. Argentine's case was reset for February 7, 1991. This hearing the respondent attended (T. Vol. II p. 97). When asked by Judge Corcoran to explain why he believed the hearing notice for January 29, 1991, was inadequate, the respondent replied "I don't think I can truly be held responsible for reading and processing Saturday's mail. I can be held responsible reading and processing Sunday's [sic] mail when it is delivered at 4:00 o'clock but I think that is too short a notice" (B-Ex. 2, p. 10). The respondent further stated that he did not open either Saturday's or Monday's mail until about noon or one o'clock on Tuesday. After realizing he had missed the hearing, he considered calling the bankruptcy trustee to find out what happened during the hearing. The respondent then apparently changed his mind and decided to "just wait and see what develops" (B-Ex. 2, p. 11). At the time, the respondent was practicing out of his home (B-Ex. 2, p. 11).

Although the respondent now states he meant to tell the court that although dismissal of Mr. Argentine's case was appropriate pursuant to the terms of the court's previous order, he was actually seeking the court's discretion in relieving Mr. Argentine from the terms of said order and not dismiss the case. Regardless of what the respondent now argues in his brief, this is not what he stated during the actual bankruptcy hearing nor can it be given to mean this after reading the entire transcript. (B-ex 2 pp. 7-8). The respondent explained to the court that his client told him he had filed the tax return the bankruptcy

trustee had been seeking. The respondent advised that his client was difficult to contact by telephone and did not keep him informed. Despite the client's assurances that he mailed the copy of the tax return before the certification deadline, the bankruptcy trustee refused to sign the certification and filed a motion to dismiss. The respondent characterized the trustee's motion as stating "that the attorney for the Debtor has totally screwed up this case, messed it up, had not submitted the certification. That's fine. This case should be dismissed for what the client did" (B-Ex. 2, p. 8).

With respect to the cases concerning Mr. Zindars and Mr. Spees, the respondent missed two hearings concerning orders to show cause. The initial hearing had been set for December 11, 1990, and the respondent did arrive at the courthouse. The hearing had been set for 4:00 p.m. but it was apparent there was a serious backlog of pending cases (T. Vol. II p. 103). Sometime after arriving, the respondent spoke to another attorney who told him that Judge Corcoran had effectively cancelled all the executory contract hearings set for that day (T. Vol. II p. 104). The hearing concerned the court's order to show cause due to the respondent's failure to file executory contracts in the two cases. The respondent had since filed the executory contracts as requested and therefore he felt it unreasonable to wait several hours to find out if his hearings had been cancelled (T. Vol. II p. 104). For this reason, the respondent decided to leave. Needless to say, the hearings had not been cancelled. The

respondent made no effort to check with the court administrator because the courtroom was very crowded and he believed it would be improper to disturb the administrator between hearings (T. Vol. II pp. 104-105). According to the respondent, he did not receive a copy of the second hearing notice set for January 22, 1991, and therefore did not appear (T. Vol. II p. 109). The matters were reset for February 7, 1991, and at that time the respondent did appear (B-Ex. 2). He filed motions to vacate the orders to show cause, and in both cases stated that the delay in filing the statements of executory contracts was due to the debtors who procrastinated in returning to him the signed statements (B-Ex. 3; T. Vol. II pp. 106-107). According to the respondent, he believed he was justified in making this statement despite the fact that it was prejudicial to his clients (T. Vol. II pp. 106-107).

The bar submits the foregoing statements, testimony and exhibits support the referee's findings of fact by clear and convincing evidence. Although the respondent argues in his brief that another bankruptcy judge who no longer presides over the Orlando division of the Middle District Court would have granted a rehearing if an attorney claimed to have missed a hearing due to a failure to receive notice from the clerk's office, that conclusion is immaterial. As the evidence clearly shows, the respondent's failure to attend a hearing was not an isolated incident but rather an on-going problem.

Although the respondent asserts that the delay in processing this bar case prejudiced him because a witness became unavailable, nothing prevented the respondent from calling David Biebel as a witness before the grievance committee nor deposing him either prior to the final hearing or his move out of state. To what Mr. Biebel would have testified is merely speculative at this point. Further, it more than likely would have gone toward mitigation. The respondent also makes reference to a case involving a client named Salesky which is neither at issue in this matter or in evidence. It is interesting that respondent's appendix exhibit #19 indicates he may have neglected Mr. Salesky's case as well.

Although the respondent believes he should have been allowed to present character evidence, nothing prevented him from doing so and, in fact, Robert Roth, Victor Alicea and Gene Argentine appeared on his behalf (T. Vol. I). Although evidence as to good character may serve to mitigate, it has little relevancy in arriving at a recommendation as to guilt or innocence. The Florida Bar v. Whitney, 237 So. 2d 745 (Fla. 1970).

ARGUMENT

ISSUE III

THE RECOMMENDED DISCIPLINE OF A NINETY-ONE DAY SUSPENSION IS NOT EXCESSIVE AND/OR ERRONEOUS

At the outset, the bar submits the respondent's reliance on The Florida Bar v. Martin, 598 So. 2d 79 (Fla. 1992), is misplaced. Because this case was issued without a written opinion, a copy of the report of referee is included in the bar's appendix. The bar is at a loss to respond to the respondent's statement that he has no access to bar disciplinary cases because they appear in West's Southern Reporter which is widely available in community law libraries. Mr. Martin, who had no prior disciplinary history, altered the division number portion of a case number so as to have the matter considered by a judge other than the one assigned. The attorney was found guilty of perpetrating a fraud on the court and received a thirty day suspension. The respondent, on the other hand, neglected multiple cases by failing to attend hearings and has a prior disciplinary history.

More on point is The Florida Bar v. Graves, 541 So. 2d 608 (Fla. 1989), where an attorney improperly withdrew from representing one client on criminal charges and two other clients in civil matters. He failed to answer a complaint in a civil case on behalf of a client resulting in the entry of a default; failed to timely file a brief after filing a notice of appeal;

failed to appear in a timely manner for a scheduled hearing or give his client adequate notice of said hearing; failed to keep scheduled appointments; failed to comply with a client's request that a court reporter be hired for a hearing; and filed frivolous pleadings and unreasonably delayed a foreclosure sale. The attorney had a prior disciplinary history of two private reprimands and a ten day suspension. Due to the prior history and the cumulative nature of the misconduct, this court ordered the attorney be suspended for six months and be placed on a three year period of conditional probation following reinstatement.

An attorney received a public reprimand and a six month period of suspension in The Florida Bar v. Schilling, 486 So. 2d 551 (Fla. 1986), for neglecting two legal matters. The attorney had a prior disciplinary history and for that reason the suspension was recommended. As this court aptly stated, "confidence in, and proper utilization of, the legal system is adversely affected when a lawyer fails to diligently pursue a legal matter entrusted to that lawyer's care. A failure to do so is a direct violation of the oath a lawyer takes upon his admission to the bar".

In The Florida Bar v. Larkin, 420 So. 2d 1080 (Fla. 1982), an attorney was suspended for ninety-one days after neglecting various legal matters, failing to appear at the continuation of a trial and failing to carry out contracts entered into with clients for legal services. In mitigation, the attorney's

misconduct was the direct result of his alcoholism for which he had since sought treatment. The attorney failed to appear at the continuation of a trial without the prior permission of the trial judge. He never requested permission to be absent nor did he request a continuance of the trial. He also failed to comply with the judge's request that he submit evidence to support his excuses for the absence. In another matter, the attorney was paid $700.00 by a client and thereafter failed to take any significant action to secure the client's release from prison and failed to communicate with either the client or the client's family. In another case, the attorney was paid $3,000.00 to secure the restoration of a client's civil rights. The client completed the required application and gave it to the attorney for filing with the clemency board. The attorney, however, failed to file the application nor did he advise the client to prepare a replacement form because the original application had been lost. In proving rehabilitation for reinstatement, the attorney was required to show that he had established full control over his alcohol abuse and had made full restitution of the fees collected from his clients. Upon reinstatement, he was to be placed on a two year period of supervised probation. This court was concerned with the attorney's alcoholism and stated "a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole... If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal

profession. This Court has responsibility to assure that the public is fully protected from attorney misconduct".

An attorney was suspended for one year in The Florida Bar v. Pincus, 327 So. 2d 29 (Fla. 1975), for neglecting three separate cases resulting in prejudice to the clients involved. The attorney represented certain clients who were seeking discharge in bankruptcy and due to the attorney's neglect the bankruptcy court entered an order to show cause why the clients should not be deemed to have waived discharge. The attorney failed to appear at the hearing set for the order to show cause or otherwise respond to the order. As a result, the judge entered an order disallowing the clients' discharge in bankruptcy. In another case, the attorney negligently represented a defendant in a civil suit which resulted in a default judgment being entered against the client. In a third matter, a client retained the attorney to collect on a promissory note which was in default. Four years passed without the attorney filing suit. The client's request for the return of the note and other papers met with a refusal. During the attorney's one year period of suspension, he was required to take a course in legal ethics.

The bar submits that the referee's recommendation of ninety-one day suspension is also supported by the Florida Standards for Imposing Lawyers Sanctions, primarily Standards 4.42, 9.22 and 6.22.

Standard 4.42(a) calls for a suspension when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client. The respondent knew a hearing had been set for December 11, 1990, for two orders to show cause, yet elected not to remain at the courthouse because he believed the hearings would be cancelled due to the court's backlog of cases that day. Even after learning that he had missed yet another hearing on January 29, 1991, the respondent elected to do nothing. He did not even attempt to determine what had occurred at the hearing.

Standard 4.42(b) calls for a suspension when a lawyer engages in a pattern of neglect and causes injury or potential injury to a client. Here, the respondent neglected the cases of three separate clients. Further, he has been equally inattentive to his own disciplinary case by failing to file his initial brief in a timely manner. In fact, it was forty-eight days late. Were the respondent representing a client, his negligence would be grounds for yet another disciplinary action.

Standard 6.22 calls for a suspension when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. In the cases involving Mr. Zindars and Mr. Spees, the respondent was aware that the motion was set for an order to show cause due to his failure to have filed executory contracts. Even though the

respondent had since filed the contracts, the court had not cancelled its hearings on the two orders. Further, even though the respondent was told by another attorney that the court had cancelled all of its hearings that day for executory contract issues, the bar submits it was not reasonable for him to assume that his hearings had been cancelled because they involved orders to show cause and not an executory contract issues. The respondent was not entitled to merely ignore a valid court order simply because of a rumor that the hearings might be cancelled and waiting at the courthouse for several hours would be an inconvenience.

Standard 9.22 outlines factors which may be considered in aggravation and thus indicate that the harsher level of discipline would be appropriate. The applicable subsections are as follows: a) prior disciplinary offenses; b) pattern of misconduct; d) multiple offenses; g) refusal to acknowledge wrongful nature of conduct; and i) substantial experience in the practice of law. Although in his brief the respondent argues that his prior disciplinary offense should be considered in mitigation because it occurred a long time ago, the bar submits that the respondent's characterization is incorrect. The respondent was publicly reprimanded in The Florida Bar v. Price, 569 So. 2d 1261 (Fla. 1990). Although the misconduct occurred in 1985, the disciplinary order was issued in 1990. Even if the discipline had been imposed in 1985, it still cannot be considered as being remote in time. The respondent engaged in

similar misconduct by dismissing a client's bankruptcy action without first consulting with the clients. He then neglected to tell the clients what steps he had taken. The respondent did not attempt to advise his clients about the upcoming hearing where he dismissed their case because he assumed the clerk's office had sent a notice to them. Apparently the clients did not receive any notification until after the hearing had been held and their case dismissed.

A ninety-one day suspension would best suit the three primary purposes of attorney discipline. It would be fair to the public by protecting it from unethical conduct while not denying it the services of a qualified attorney. With bar membership currently in excess of 40,000 attorneys, it is doubtful that there is any shortage of qualified bankruptcy lawyers. The discipline would be fair to the respondent by being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Prior to being reinstated, the respondent would be required to prove rehabilitation by showing he has successfully completed a treatment program for alcohol addiction. The discipline imposed would also be severe enough to deter others who might be prone or tempted to become involved in similar violations. Indeed, the respondent's misconduct and attitude border on disrespect for the judiciary and the judicial system. Apparently the respondent believes he should not be inconvenienced by the court docket.

ARGUMENT

ISSUE IV

THE BAR'S COSTS ARE NOT EXCESSIVE AND SHOULD NOT BE REDUCED IN AMOUNT.

The respondent argues in his initial brief that the bar's costs outlined in its affidavit of costs, namely its investigative costs, are excessive. A review of the costs indicates that with the exception of two items, all were properly incurred by the bar in investigating the charges pending against the respondent in this matter. Because at one point during the pendency of this case the respondent directed the clerk's office to send his mail to a Texas address, a question arose as to whether or not the respondent was practicing law in the state of Texas. The respondent is correct in that no disciplinary charges arose in connection with this one matter. Therefore, 1.2 hours incurred on December 20, 1990, and 1.4 hours incurred on December 26, 1990, for a total of 2.6 hours, could be deleted from the investigative costs. The bar's investigative costs are charged at a rate of $15.00 per hour. The total deducted therefore would be $39.00.

CONCLUSION

Wherefore, The Florida Bar prays this honorable court will review the report of referee and enter an order upholding the findings of fact, recommendation as to guilt, and recommendation as to discipline and enter an order assessing costs against the respondent in the amount of $4,456.54.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
TFB Attorney No. 217395

and

JOHN B. ROOT, JR.
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
TFB Attorney No. 068153

BY: _____
JOHN B. ROOT, JR.
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by ordinary mail to respondent, T. Michael Price at 3511 West Commercial Boulevard, Suite 218, Fort Lauderdale, Florida 33309-3322; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 2nd day of July, 1993.

JOHN B. ROOT, JR.
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 79,347
(TFB No. 92-30,657 (09D)

v.

T. MICHAEL PRICE,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney No. 217395

and

JOHN B. ROOT, JR.
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801
(407) 425-5424
Attorney No. 068153

INDEX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

T.MICHAEL PRICE,

Respondent.

REFEREE'S REPORT

I. Summary of Proceedings: The undersigned was duly appointed as referee to conduct disciplinary proceedings according to the Rules of Discipline and hearings were held on the following dates: March 20, 1992, March 25, 1992, April 16, 1992, August 14, 1992 and October 5, 1992.

The following attorneys appeared as counsel for the parties:
For the Florida Bar John B.Root, Jr.
For the Respondent Scott K. Tozian

The Respondent waived venue in Orange County and agreed to conduct the hearing in Osceola County.

II. Findings of Fact as to Each Item of Misconduct with which the Respondent is charged: After considering the pleadings, memoranda and evidence before me, pertinent portions of which are commented upon below, I find:

As to the Bar's allegation that the Respondent is guilty of violation of Rule of Professional Conduct 4-1.3 for failing to act with reasonable diligence and promptness in representing a client see Complaint Paragraph 20, Respondent's admission in his Anwser and Record p 103 et seq; Complaint Paragraph 21 and Respondent's admission in his Answer; Complaint Paragraph 22, Respondent's admission in his Answer and Bar's Exhibit #2, p 20; Complaint paragraph 24 and Bar's Exhibit #2, p 20; Complaint paragraph 26, Record page 106, line 11 through page 108, line 3; Complaint paragraph 27 and Record p.95 - p.96 and Respondent's Exhibit #1, page 25, line 5 - 22 and Complaint paragraph 28 and Bar's Exhibit # 3 and Record page 106, line 11 to page 108, line 3 and Complaint paragraph 29 and Bar's Exhibit #2, page 21, line 15; Complaint paragraphs 32-36 which were admitted except for the part that the Bar failed to prove; namely that someone detected an alcohol odor on the Respondent's breath as alleged in paragraph 34 and Respondent's current practice as alleged in paragraph 37.

As to assertions that the Respondent violated Rule 4-1.6, the Bar abandoned them.

As to assertions that the Respondent violated Rule 4-3.5(c) by engaging in conduct intended to disrupt the Court by his failure to appear for scheduled hearings requiring rescheduling see Complaint Paragraph 13 and Bar's Exhibit #3; Complaint Paragraph 14, Respondent's admission in his Answer and Respondent's Exhibit #1, p 21 et.seq.; Complaint Paragraph 15, Respondent's admission in his Answer and Record page 42, line 19-page 43, line 3 and Record page 43, line 11-19; Complaint paragraph 17, Respondent's Admission in his Answer and Bar's Exhibit #2, pp. 10-11; Complaint paragraph 18, Bar's Exhibit #2, page 10, line 16-page 11, line 20.

As to the Bar's complaint that the Respondent violated Rule 4-8.4 (d),the Referee finds no proof.

The Referee further finds as follows:

1. The Respondent is and was a member of the Florida Bar subject to the jurisdiction of the Supreme Court of Florida and the Rules regulating the Florida Bar.

2. The Respondent resided in Seminole County and practiced law in Orange and Seminole Counties, Florida.

III. RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY: I recommend that the Respondent be found guilty as alleged of violating 4-1.3 and 4-3.5(c) of the Rules of Professional Conduct for the reasons stated above. I further recommend that the Respondent be found not guilty of violating Rule 4-8.4(d) and Rule 4-1.6 for the reasons stated above.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED: I recommend that the Respondent receive a public reprimand and that he be suspended for ninety-one days and until he shall show that he has completed an appropriate evaluation and any recommended treatment program for any problem he may have with any drug(s) including alcohol and until he has paid the costs of these proceedings.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD: After finding the Respondent to be guilty and prior to recommending discipline, I considered the following personal history and disciplinary record of the Respondent:

Age and maturity of the Respondent
Prior disciplinary convictions and disciplinary measures imposed therein: Florida Bar v. Price 569 So2d 1261.
Other personal data: The testimony of Charles Hagan, Jr., former Executive Director of the Florida Lawyers' Assistance Program, indicating that he recommends that Respondent be evaluated for treatment for alcohol/drug abuse (Pages 13, 14 of the October 5,1992 hearing). Respondent was offered an opportunity to produce the results of an evaluation recommended by Mr. Hagan in return for which the Referree would consider a lesser recommendation and he failed to do so. Recently Respondent furnished an evaluation indicating that he suffers from a difficulty with the use of alcohol and has perhaps agreed to undergo the treatment recommended.

VI. STATEMENT OF COSTS AND TO WHOM THEY SHOULD BE TAXED: I find that the following costs were reasonably incurred by the Florida Bar:

Costs incurred at the Grievance Committee Level as reported by Bar Counsel	$ 388.75
Administrative costs	$ 500.00
Witness fees	$ 18.05
Investigator Expenses	$ 1,957.06
Court Reporter/Transcript costs	$ 1,511.40
Bar Counsel travel costs	$ 120.28
TOTAL:	$ 4,495.54

Other costs may have reasonably been incurred and I recommend that all reasonably incurred costs and expenses together with those itemized herein be charged to the Respondent.

Dated this 9 day of December, 1992.

Susan Roberts

Referee

Certificate of Service

I hereby certify that the above report of the Referee has been mailed by Regular U.S. Mail to John Root, Esq., at The Florida Bar, 880 N. Orange Ave., Ste 200, Orlando, FL 32801-1085, bar counsel, and Scott K. Tozian, Esq., 109 North Brush Street, Ste 150, Tampa, FL 33602, Respondent's counsel, and Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 14 day of December, 1992.

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

T.MICHAEL PRICE,

Respondent.

REFEREE'S AMMENDED REPORT

I. Summary of Proceedings: The undersigned was duly appointed as referee to conduct disciplinary proceedings according to the Rules of Discipline and hearings were held on the following dates: March 20, 1992, March 25, 1992, April 16, 1992, August 14, 1992 and October 5, 1992.

The following attorneys appeared as counsel for the parties:
For the Florida Bar John B.Root, Jr.
For the Respondent Scott K. Tozian

The Respondent waived venue in Orange County and agreed to conduct the hearing in Osceola County.

II. Findings of Fact as to Each Item of Misconduct with which the Respondent is charged: After considering the pleadings, memoranda and evidence before me, pertinent portions of which are commented upon below, I find:

As to the Bar's allegation that the Respondent is guilty of violation of Rule of Professional Conduct 4-1.3 for failing to act with reasonable diligence and promptness in representing a client see Complaint Paragraph 20, Respondent's admission in his Anwser and Record p 103 et seq; Complaint Paragraph 21 and Respondent's admission in his Answer; Complaint Paragraph 22, Respondent's admission in his Answer and Bar's Exhibit #2, p 20; Complaint paragraph 24 and Bar's Exhibit #2, p 20; Complaint paragraph 26, Record page 106, line 11 through page 108, line 3; Complaint paragraph 27 and Record p.95 - p.96 and Respondent's Exhibit #1, page 25, line 5 - 22 and Complaint paragraph 28 and Bar's Exhibit # 3 and Record page 106, line 11 to page 108, line 3 and Complaint paragraph 29 and Bar's Exhibit #2, page 21, line 15; Complaint paragraphs 32-36 which were admitted except for the part that the Bar failed to prove; namely that someone detected an alcohol odor on the Respondent's breath as alleged in paragraph 34 and Respondent's current practice as alleged in paragraph 37.

As to assertions that the Respondent violated Rule 4-1.16, the Bar abandoned them.

As to assertions that the Respondent violated Rule 4-3.5(c) by engaging in conduct intended to disrupt the Court by his failure to appear for scheduled hearings requiring rescheduling see Complaint Paragraph 13 and Bar's Exhibit #3; Complaint Paragraph 14, Respondent's admission in his Answer and Respondent's Exhibit #1, p 21 et.seq.; Complaint Paragraph 15, Respondent's admission in his Answer and Record page 42, line 19-page 43, line 3 and Record page 43, line 11-19; Complaint paragraph 17, Respondent's Admission in his Answer and Bar's Exhibit #2, pp. 10-11; Complaint paragraph 18, Bar's Exhibit #2, page 10, line 16-page 11, line 20.

As to the Bar's complaint that the Respondent violated Rule 4-8.4 (d),the Referee finds no proof.

The Referee further finds as follows:

1. The Respondent is and was a member of the Florida Bar subject to the jurisdiction of the Supreme Court of Florida and the Rules regulating the Florida Bar.

2. The Respondent resided in Seminole County and practiced law in Orange and Seminole Counties, Florida.

III. RECOMMENDATION AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY: I recommend that the Respondent be found guilty as alleged of violating 4-1.3 and 4-3.5(c) of the Rules of Professional Conduct for the reasons stated above. I further recommend that the Respondent be found not guilty of violating Rule 4-8.4(d) and Rule 4-1.16 for the reasons stated above.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED: I recommend that the Respondent receive a public reprimand and that he be suspended for ninety-one days and until he shall show that he has completed an appropriate evaluation and any recommended treatment program for any problem he may have with any drug(s) including alcohol and until he has paid the costs of these proceedings.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD: After finding the Respondent to be guilty and prior to recommending discipline, I considered the following personal history and disciplinary record of the Respondent:

Age and maturity of the Respondent
Prior disciplinary convictions and disciplinary measures imposed therein: Florida Bar v. Price 569 So2d 1261.
Other personal data: The testimony of Charles Hagan, Jr., former Executive Director of the Florida Lawyers' Assistance Program, indicating that he recommends that Respondent be evaluated for treatment for alcohol/drug abuse (Pages 13, 14 of the October 5,1992 hearing). Respondent was offered an opportunity to produce the results of an evaluation recommended by Mr. Hagan in return for which the Referree would consider a lesser recommendation and he failed to do so. Recently Respondent furnished an evaluation indicating that he suffers from a difficulty with the use of alcohol and has perhaps agreed to undergo the treatment recommended.

VI. STATEMENT OF COSTS AND TO WHOM THEY SHOULD BE TAXED: I find that the following costs were reasonably incurred by the Florida Bar:

Costs incurred at the Grievance Committee Level as reported by Bar Counsel	$ 388.75
Administrative costs	$ 500.00
Witness fees	$ 18.05
Investigator Expenses	$ 1,957.06
Court Reporter/Transcript costs	$ 1,511.40
Bar Counsel travel costs	$ 120.28
TOTAL:	$ 4,495.54

Other costs may have reasonably been incurred and I recommend that all reasonably incurred costs and expenses together with those itemized herein be charged to the Respondent.

Dated this 4 day of ~~December~~ January 1993.

Referee

Certificate of Service

I hereby certify that the above report of the Referee has been mailed by Regular U.S. Mail to John Root, Esq., at The Florida Bar, 880 N. Orange Ave., Ste 200, Orlando, FL 32801-1085, bar counsel, and Scott K. Tozian, Esq., 109 North Brush Street, Ste 150, Tampa, FL 33602, Respondent's counsel, and Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 4 day of ~~December, 1992.~~ Jan 1993

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,
Complainant,

v.

CASE NO. 77,966
[TFB No. 91-31,041 (09C)]

Cecil C. Martin,
Respondent.

REPORT OF REFEREE

1. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held on October 24, 1991.

The following attorneys appeared as counsel for the parties:
For The Florida Bar: Larry Carpenter
For The Respondent: F. Hartselle Baker

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: After considering all the pleadings and evidence before me, including the stipulations included within the Stipulation And Pre-Trial Memorandum of October 22, 1991, pertinent portions of which are commented upon below, I find:

1. While admitted to The Florida Bar since 1967, for the past two to three years the Respondent has limited his practice to uncontested dissolutions of marriage and bankruptcies.

2. Under Section XIII of the Domestic Relations Division Ninth Judicial Circuit 1988 Procedures Manual (Respondent's Exhibit B), final hearings on uncontested dissolutions of marriage are heard by the four circuit judges assigned to the Domestic Relation Division on Tuesday, Wednesday and Thursday mornings from 8:30 a.m. to 9:30 a.m. While it is unnecessary to call the judicial assistant for the assigned judge to set a definite hearing time, a notice of hearing must be provided to the adverse party four days in advance of the hearing. Presumably, however, this notice of hearing may be waived. Upon arrival at the courthouse, counsel calling for a hearing checks out the court file from the clerk's office on the main floor and carries it to the assigned judge's office on the third or fourth floor, where the hearing is held on a first-come-first-served basis. On a given morning, counsel with multiple hearings before more than one judge may have to deal with the problem of queing up before different judges, perhaps on different floors.

3. Because these hearings are not formally scheduled in

advance, and because of differences in the efficiency with which the four judges handle these hearings, on occasion the assigned judge will be unable to complete all requested hearings by the 9:30 a.m. cutoff. By custom and informal practice in the circuit, counsel desirous of avoiding another trip to the courthouse may inquire as to whether one of the other three Domestic Relation Division judges might be willing to hold the hearing. While an unassigned judge is not required to hold another judge's hearings, by mutual agreement it would not be unusual for one judge to assist another in this manner.

4. At approximately 8:05 a.m. on December 11, 1990 the Respondent arrived at the Clerk's file room on the main floor to request two files for uncontested final hearings. Upon learning that the two files were assigned to separate judges (Kaney and Powell), and without first determining either how many other attorneys might be ahead of him, or whether Judge Kaney was running behind schedule, the Respondent altered the division number on Judge Kaney's court file jacket, Petition for Dissolution and Civil Cover Sheet from "30" to "38", i.e. from Kaney to Powell (The Florida Bar's Exhibit B). The Respondent then took both files to Judge Powell's chambers and, without advising Judge Powell or his staff of the alterations made, accomplished both final hearings before Judge Powell.

5. While the Respondent recalls altering the file documents only <u>after</u> ascertaining that Judge Kaney was running behind, the Affidavit of Sabrina Kipfinger attached to Florida Bar Exhibit A contradicts this.

6. The Respondent candidly admits to having similarly altered other court files in the past. The Respondent contends, however, that these alterations, while wrong, were only made so as to avoid embarrassment to himself and his client should the unassigned judge notice another judge's division number in the court file and decline to hold the final hearing. Respondent concedes, however, that he had never before been so refused by an unassigned judge. Given this, and the fact that, by custom and practice, unassigned judges often hear another's uncontested dissolutions, the alterations were both unwarranted and unnecessary. While it is difficult to ascribe a particular motive to the Respondent, the fear of embarrassment seems less likely than the desire of a high-volume uncontested divorce practitioner to accomplish the maximum number of hearings in the minimum time period.

III. <u>Recommendation as to Whether or Not the Respondent Should Be Found Guilty</u>:

1. I recommend that the Respondent be found guilty of violating Rule of Discipline 3-4.3 for engaging in conduct that is contrary to honesty and justice, by altering the division number on three documents in a court file.

2. I recommend that the Respondent be found guilty of violating Rule of Professional Conduct 4-3.3(a)(1) for making a false statement of material fact to a tribunal by altering the division number on three documents in a court file.

3. I recommend that the Respondent be found guilty of violation of Rule of Professional Conduct 4-3.4(a) by unlawfully altering a document that the Respondent knew or reasonably should have known was relevant to a pending proceeding, by altering the division number on three documents in a court file.

4. I recommend that the Respondent be found not guilty of violation of Rule of Professional Conduct 4-3.5(a).

5. I recommend that the Respondent be found guilty of violation of Rule of Professional Conduct 4-8.4(a) for violation of the Rules of Professional Conduct, for the reasons set forth above and below.

6. I recommend that the Respondent be found guilty of violation of Rule of Professional Conduct 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit and misrepresentation, by altering the division number on three documents in a court file.

7. I recommend that the Respondent be found guilty of violation of Rule of Professional Conduct 4-8.4(d) for engaging in conduct prejudicial to the administration of justice, by altering the division number in three documents in a court file.

VI. Recommendation as to Disciplinary Measures to be Applied: This recommendation is based, in part, on the fact that the Respondent knowingly and intentionally violated the Rules of Discipline and Rules of Professional Conduct set forth in paragraph III above.

Moreover, while Respondent contends that neither his client nor anyone else was injured by his alteration of documents in a court file, his actions potentially or actually injured several parties. At the outset, his arbitrary alteration of a division number would obviously make it very difficult for an adverse party to locate the correct hearing room should he or she wish to attend to uncontested final hearing for any reason. Further, by assigning himself a single judge for multiple hearings, the Respondent placed some of his hearings ahead of those of other attorneys legitimately assigned to the preferred judge, to the detriment of those attorneys. Also, by altering the division number, the Respondent deprived the unassigned judge of the opportunity to decline to do the hearings of the assigned judge. Last, and certainly not least, the Respondent injured the legal system in general by deceitfully altering documents in a court file, thereby betraying the trust reposed in him as an officer of the court.

Under Florida's Standards for Imposing Lawyer Sanctions, Violations of Duties Owed the Public: Failure to maintain personal

integrity, Paragraph 5.13, a public reprimand is appropriate when a lawyer knowingly engages in conduct that involves dishonesty, fraud, deceit or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. On the other hand, under Violation of duties Owed the Legal System: False statements, fraud and misrepresentation, Paragraph 6.11 , disbarment is appropriate when a lawyer, with the intent to deceive the court, knowingly makes a false statement or submits a false document.

Under Abuse of the Legal Process, Paragraph 6.22, suspension is appropriate when a lawyer knows that he is violating a court order or rule, and causes injury or potential injury to a party, or causes interference or potential interference with a legal proceeding. Finally, under Violations of Other Duties Owed as a Professional, Paragraph 7.2, a suspension is deemed appropriate when a lawyer knowingly engages in conduct that is in violation of a duty owed as a professional and causes injury or potential injury to the public or the legal system.

Aggravating factors would include the Respondent's dishonest or selfish motive, and his substantial experience in the practice of law.

Mitigating factors would include the Respondent's absence of a prior disciplinary record, his full and free disclosure to the referee, his cooperative attitude towards the proceedings, his good character and reputation, and his remorse.

Based upon the findings and factors set forth above, I recommend that the Respondent be suspended from the practice of law for the minimum period of 30 days, with automatic reinstatement at the end of the period of suspension as provided in Rule 3.5.1(e) Rules of Discipline.

V. Personal History and Past Disciplinary Record: After finding the Respondent guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 55
Date admitted to Bar: 1967
Prior disciplinary convictions and disciplinary measures imposed therein: None
Other personal data: Respondent is married with 2 children, one still in college. Respondent suffered a heart attack in 1984 and underwent coronary bypass surgery. Respondent suffers from borderline emphysema.

VI. Statement of Costs and Manner in Which Cost Should be Taxed: I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs:	
	1. Transcript Costs	$ -0-
	2. Bar Counsel/Branch Staff Counsel Travel Costs	$ -0-
B.	Referee Level Costs:	
	1. Transcript Costs	$ 412.90
	2. Bar Counsel/Branch Staff Counsel Travel Costs	$ -0-
C.	Administrative Costs:	$ 500.00
D.	Miscellaneous Costs:	
	1. Investigative Expenses	$ 127.45
	2. Telephone Charges	$ -0-
	3. Witness Fees	$ -0-
	TOTAL ITEMIZED COSTS:	$1,040.35

It is recommended that all said costs and expenses be charged to the Respondent.

Dated this 13th day of December, 1991.

William T. McCluan

WILLIAM T. McCLUAN
Brevard County Judge
Referee

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on Larry Carpenter, Bar Counsel, The Florida Bar, 80 North Orange Avenue, Suite 200, Orlando, Florida 32801, F. Hartselle Baker, 1407 East Robinson Street, Orlando, Florida, 32801, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300 this 13 day of December, 1991.

Nancy L. Clay

Nancy L. Clay, Judicial Assistant