FILED
SID J. WHITE
SEP 10 1993
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

BARRY D. SCHREIBER,

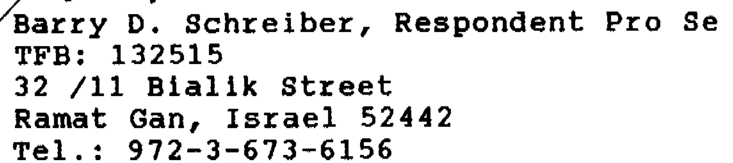
Respondent.

The Florida Bar Case
No. 92-70,352 (11B)

Supreme Court Case
No. 80,857

RESPONDENT'S INITIAL BRIEF

Respectfully Submitted,



Barry D. Schreiber, Respondent Pro Se
TFB: 132515
32 /11 Bialik Street
Ramat Gan, Israel 52442
Tel.: 972-3-673-6156

TABLE OF CONTENTS

(Issues Presented for Review)

		Page
1	Introductory Statement	i
2	Table of Citations	ii
3	Statement of the case and Facts	1
4	Summary of the argument	5
5	Argument	
	No. 1	9
	No. 2	15
	No. 3	18
	No. 4	25
6	Conclusion	30
7	Appendix	31
8	Certificate of Service	34

INTRODUCTORY STATEMENT

This introductory statement is respectfully included in Respondent's initial brief even though no provision for same is set forth in the rules. Respondent desires this Honorable Court to know, that although Respondent presently is located in Israel, every effort has been made to comply with the technical requirements for submitting this brief. Despite not having available a legal library for reference, or a legal secretary for typing, knowledgeable in compiling appellate briefs, every attempt has been made to conform to this Court's requirements. Any errors are unintentional. It is prayed that this Honorable Court will accept this brief as properly submitted with whatever technical transgressions may exist.

TABLE OF CITATIONS

	Page
Ralph A. Martin, Supreme Court Case no. 88-50, 402	13

STATEMENT OF THE CASE AND FACTS

PREAMBLE

> "As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into a gigantic insect... What has happened to me? ...he thought. It was no dream".
>
> The metamorphosis
> Franz Kafka

It is hard to believe that in 1993, in the U.S.A., in the state of Florida, such a nightmare, such a miscarriage and travesty of justice could occur. Is not the principle "innocent until proven guilty" still part of the U.S. and Florida constitutions? Has double jeopardy been dispensed with? Is the Florida Bar above the law? Above judges who determine innocence or guilt? Is the Florida Bar "Big Brother" watching lawyers live their personal lives? Has the Florida Bar become a prosecutor, judge and jury rather than a seeker of the truth? Are the rights of lawyers any less than the rights of doctors, accountants, judges, teachers etc...?!

Respondent was engaged to a certain Rose Wolowitz (transcript of March 31, 1993 p.12 1.7). They had been seeing each other for approximately 7 months. On February 13, 1991 an argument ensued between them at the home of Ms. Wolowitz, where Respondent had been a frequent overnight guest for over 5 months.

Each party felt that they had been emotionally <u>and</u> physically harmed and abused. Ms. Wolowitz was first however, to file a complaint with the Broward County State Attorney's office. Shortly thereafter she also filed a civil suit against Respondent and shortly after that the civil suit was dismissed with prejudice (see appendix 1). The misdemeanor charge was resolved by Respondent pleading "no contest", the presiding judge <u>withholding adjudication</u>, imposing a 6 month probation (later suspended) and <u>on January 8, 1992 entering an order sealing and expunging the record (see appendix 2)</u>.

Nevertheless, despite the resolution of the altercation between the parties themselves, despite the legal fact that Respondents record was sealed and expunged, after adjudication was withheld, the Florida Bar relentlessly pursued Respondent, charging him with committing a criminal act in violation of Rule 4-8.4(b) of the Rules of Professional Conduct.

The fact that a court of competent jurisdiction did not find Respondent guilty of having committed any criminal act, meant nothing to the Florida Bar or to Assistant Staff Counsel Randi Klayman Lazarus. And although Respondent had agreed to a 30 day suspension just to resolve the matter - a sort of "no contest plea" (as before the Broward County Court), the Florida Bar refused to accept Respondent's offer without Respondent admitting quilt of having committed a criminal act. The Florida Bar stood steadfast in its belief that a lawyer is guilty even though the judicial process found him innocent.

The Florida Bar proceeded before a grievance committee and prevailed upon them to accept the Bar's theory of guilt even though Respondent had no record of ever committing a criminal act. Respondent could not be present since he was living outside of the U.S. and did not have the financial resources to travel to Florida for the hearing. A formal complaint was filed and ultimately a hearing held before the appointed referee. (Record of hearing of March 31, 1993).

Respondent was not present for the hearing on March 31, 1993 since he was still living outside the U.S. Respondent had so informed the referee and the Florida Bar. Further and most important, Respondent clearly notified the referee that Respondent was in severe financial distress and unable to afford to travel to Florida for the hearing.

The hearing was held, a copy of the transcript prepared and mailed to Respondent - at the Florida Bar's expense. Respondent had been ordered by the referee (order dated April 12, 1993) to place a long distance telephone call to the referee's chambers at Respondent's expense at 9 am on April 29, 1993 so as to allow Respondent to make a telephonic statement in response to the Florida Bar's case. Respondent filed a Motion for Directed Verdict and in the alternative, a Motion for Continuance, indicating that Respondent could not afford the cost of such a call (peak time in Israel) and further indicating that Respondent wanted to exercise his constitutional right to cross examine the witnesses against him. The facts of the record had to be balanced. The referee refused by denying the motions for a

Directed Verdict and for Continuance. The referee further determined, without due notice (or any notice) to Respondent, that Respondent was to be punished for not having placed the long distance call at Respondent's expense. Accordingly, the referee entered the report on May 26, 1993 finding that Respondent had committed a criminal act in violation of Rule 4-8.4(b), and that such criminal act reflected on Respondent's fitness as a lawyer. The referee recommended a 120 day suspension plus numerous other harsh and vindictive disciplinary measures, including retaking the Florida Bar examination.

Respondent filed a petition for review of the referee's order of May 26, 1993.

SUMMARY OF THE ARGUMENT

1. ALLEGATIONS OF THE COMPLAINT NOT PROVED

The Florida Bar did not prove the allegations of the complaint filed against Respondent. Since the referee's findings of fact and guilt were based on the allegations of the complaint, the referee's report is erroneous, unlawful and unjustified.

The theory of the complaint dated December 4, 1992 is that Respondent committed a criminal act, which criminal act resulted in a violation of Rule 4-8.4(b) of the Rules of Professional Conduct, which reflected adversely on Respondent's honesty, trustworthiness or fitness as a lawyer. In paragraph 7 of the complaint, the Florida Bar admits that adjudication of guilt was withheld. But the Florida Bar refused to admit or <u>even introduce into evidence</u>, the order dated January 8, 1992 sealing and expunging the record (intentional omission or mere oversight?), (appendix 2) by virtue of adjudication being withheld and by legal effect of the order sealing and expunging the record, Respondent was not guilty of having committed a criminal act, did not commit a criminal act and had no criminal record. Therefore, despite what the Florida Bar states on p.46 l.20-25 of the transcript, the Florida Bar did not prove (nor could prove) that Respondent committed a criminal act "actually on two occasions". Hence the allegations of the complaint must fall and the referee's report rejected and Respondent found not guilty.

2. VIOLATION OF RULE 4-8.4(b) OF THE RULES OF PROFESSIONAL CONDUCT NOT PROVED

The Florida Bar did not prove that Respondent committed any criminal act of misconduct or any other act, in violation of Rule 4-8.4(b) that reflected on Respondent's fitness as a lawyer.

For purposes of argument only (it is not stipulated that Respondent could be found guilty of any act not alleged in the complaint) assuming the complaint filed against Respondent included action by Respondent not resulting in the commitment of a criminal act (in its legal definition), the record still does not substantiate any conduct by Respondent which violated Rule 4-8.4(b). Whatever conduct complained of was not conduct related to "law practice offenses which severely adversely reflect on (Respondent's) fitness to practice law". Although the contrary maybe the Florida Bar's position, there is no testimony or any proof whatsoever in this regard. No testimony shows any connection to Respondent's fitness as a lawyer.

3. RESPONDENT WAS DENIED DUE PROCESS, THE RIGHT TO CROSS EXAMINE HIS ACCUSERS...

Respondent was denied his civil rights, due process of law, the right to confront and cross examine his accusers and the right to be heard. Respondent was punished for being financially unable to travel to the hearings of March 31, 1993 and April 29, 1993. Respondent was punished for being financially unable to pay for an expensive long distance telephone call to the referee as ordered by the referee for the April 29, 1993 telephonic hearing. The referee abused her discretion in ordering Respondent to pay for the long distance call, for punishing Respondent beyond the initial requests made by the Florida Bar, of a 30 day suspension without any notice to Respondent and for not granting Respondent's motion for continuance.

4. RECOMMENDED DISCIPLINARY MEASURES ARE ERRONEOUS, UNLAWFUL, UNJUSTIFIED AND PREJUDICED

The referee' report of May 26, 1993 recommending the harsh disciplinary measures against Respondent are erroneous, unlawful, unjustified and prejudiced. Since Respondent did not commit a criminal act, nor engage in any conduct in violation of Rule 4-8.4(b), no disciplinary measures at all are in order. But if, for purposes of argument only, Respondent was guilty of committing a criminal act in violation of Rule 4-8.4(b), as alleged in the complaint, the recommended disciplinary measures are still too harsh, too cruel, out of proportion with and no relationship to the alleged conduct. They are unjustified. They are tantamount to disbarment! What relationship is there between Respondent's alleged conduct (or committed conduct) and retaking the Florida Bar examination including the ethic's portion? Does the ethic's portion include conduct between lovers? There is no precedent for such disciplinary measures meted out under such allegations of misconduct.

ARGUMENT

1. It is clear that the theory (cause of action) of the complaint filed against Respondent by the Florida Bar dated December 4, 1992 is that Respondent violated Rule 4-8.4(b) of the Rules of Professional Conduct by (a) committing a criminal act which (b) criminal act reflected adversely on Respondent's honesty, trustworthiness or fitness as a lawyer. If the Florida Bar did not prove, or could not prove both (a) the commission of a criminal act and (b) which reflected adversely on Respondent's honesty, trustworthiness or fitness as a lawyer, then the complaint must fail, the referee's report rejected and Respondent found not guilty. Neither the Florida Bar, nor the referee can now allege or find that other acts committed by respondent, such as described by the witness in the record, (transcript March 31, 1993 p.11-24), which did not result in Respondent having committed a criminal act (in the legal sense) could be the basis of finding Respondent guilty of Rule 4-8.4(b). The Florida Bar did not plead "in the alternative". The complaint describes in paragraph 2 a January 25, 1991 incident which resulted in "a glass being knocked from the witness's hand". Such action is certainly not a criminal act. Nor did this incident result in any criminal proceedings.

[It must be stated now, that Respondent's argument in this section is based upon the alleged acts described by the complaint and testified to by the witness in the record (transcript of March 31, 1993 p.11-24) being accepted by Respondent <u>only</u> for purposes of this argument. It is Respondent's position that <u>these acts did not occur as described by the complaint or by the witness</u>. Nor was Respondent afforded due process to cross examine the witnesses or give testimony as to his version of the facts (see argument 3 infra)].

In paragraph 3 of the complaint the incident of February 13, 1993 is described. In paragraph 5 the next element of the complaint is stated, "criminal proceedings against Respondent were instituted for violation of F.S. 784.03(1)". In paragraph 6, it is admitted by the Florida Bar that Respondent pleaded "no contest". In Paragraph 7, the Florida Bar admits that the judge withheld adjudication. Thereafter in Paragraph 8, the complaint unequivocally states, "by reason of the forgoing Respondent has violated Rule 4-8.4(b)".

It is an accepted legal principle that at this point Respondent had not committed (had not been found guilty of) a criminal act. Adjudication was withheld. Respondent was not found guilty by a court of competent jurisdiction. As such the complaint must fail. But Respondent's position is strengthened and supported even further. The Broward County

Court, Judge Backman, entered an order dated January 8, 1992. sealing and expunging the record (see appendix 2). Respondent was restored to the status occupied by Respondent prior to the misdemeanor charges being filed and "shall not be held henceforth guilty...". The order is clear. Pursuant to §943.051 and Fl.R.Cr.P. 3.692, "any and all records relating or referring in any way to the arrest or prosecution of (Respondent) shall be expunged or sealed (appendix 2).

<u>Respondent requested to have this order placed into evidence and into the record in Respondent's Motion for Directed Verdict filed by Respondent April 21, 1993</u>.

There can be no question or doubt: Respondent has no criminal record and has committed no criminal act. Something may have happened on February 13, 1993 between Respondent and the witness. But it never resulted in Respondent being found guilty by a court of competent jurisdiction of having committed a criminal act.

Is Respondent being subjected to double jeopardy? Respondent had his day in court and was <u>not</u> found guilty. Can the Florida Bar come now and claim that Respondent did commit a criminal act, was guilty of violating F.S. 784.03(1)? Can the Florida Bar redefine "criminal act" any way it wants? Is the Florida Bar claiming that even though Respondent was not found guilty of having committed a criminal act by a court of competent jurisdiction, that as

far as the Florida Bar is concerned that decision does not matter, Query? Why did the Florida Bar omit in the complaint, and fail to place into evidence the order of January 8, 1992 sealing and expunging the record? Were they afraid that it clearly exonerated Respondent? Did they not know how to deal with it? Did the Florida Bar <u>intentionally</u> overlook this important document? And clearly the Florida Bar relied on the criminal proceedings, and the plea of "NOLO". The Florida Bar made a special effort, a motion and hearing before Judge Backman, to unseal the record and have the documents submitted into evidence (transcript of March 31, 1993 p.7 l.4-25).

Now let's examine the record of the hearing of March 31, 1993 in light of the allegation of the complaint. On p.46 l.20, the Florida Bar through Assistant Staff Council Ms. Randi Klayman Lazarus, states that

> "the Florida Bar has presented its case and proved that (Respondent) did commit a crime, actually on two occasions...on January 25, 1991 as well as February 13, 1991".

Firstly, what crime was committed on January 25, 1991? No criminal complaint was ever filed nor was Respondent ever charged for "knocking a glass out of the witness's hand". As to the February 13, 1991 incident, it's possible that Respondent did commit some act on that date (although the actual facts and truth have yet to be learned) but it was not a crime, or at least it was not a crime in the legal sense.

The Florida Bar goes on to argue to the referee the Ralph H. Martin Case, (Supreme Court Case #88-50,402), (p.50 1.8 et seq., transcript of March 31, 1993). Only one major problem: Martin was convicted of a felony! The Florida Bar was correct in prosecuting Martin. He had his day in court and was found guilty. Adjudication was not withheld, nor was the record sealed or expunged.

The nerve of the Florida Bar to compare Respondent to the Martin Case. Martin was found guilty of a felony. Respondent was not found guilty of even a misdemeanor! The Supreme Court in the Martin Case was correct in upholding a 3 year suspension (although Martin never had to retake the Florida Bar examination). But here the referee is erroneous and unjustified in recommending a 120 day suspension (or any suspension).

> "In this case the Florida Bar is only asking for a 30 day suspension, which is certainly entirely reasonable, given the criminal conviction..."

(transcript of March 31, 1993, p.51 1.3-10). Agreed! Respondent accedes, that if there had been a criminal conviction a 30 day suspension would have been entirely reasonable. But where is the criminal conviction? There was none and is none! And no matter how hard the Florida Bar tries they cannot create one.

The referee's report cannot go beyond the theory of the case or the literal meaning of the complaint. Either Respondent committed a criminal act or did not! Nor can the

referee set up her own standard of guilt. If there was no criminal conviction the referee can't create one. If the Florida Bar did not prove a criminal conviction the referee cannot create another cause of action based on the witness's testimony and the referee's own standards and prejudice as to Respondent's conduct and guilt of the acts complained of.

The referee's report (findings of fact) uses and traces the exact same language of the Florida Bar's complaint, (which, by the way, is the exact same language used by the witness in the civil complaint filed by the witness against Respondent - and then voluntarily dismissed with prejudice). How interesting?! In paragraph 5 of the referee's finding of fact, the referee adopts the causation fact that

> "as a result of the February 13, 1991 incident criminal proceedings were instituted against Respondent for violation of F.S. 784.03(1)...".

In paragraph 7, the referee accepts the fact that adjudication was withheld. But again - no reference is made by the referee to the January 8, 1992 order sealing and expunging the record! Does it not matter to the referee that Respondent was not found guilty and indeed has no criminal record and did not commit a criminal act? May the referee go beyond the legal realities and find Respondent guilty nevertheless?

As such, the referee's order of May 26, 1993 is erroneous, unlawful, unjustified and indeed prejudiced. The recommendation of guilt should be rejected by this Honorable Court.

2. The Florida Bar did not prove and could not prove that Respondent committed a criminal act and/or was found guilty of a criminal act by a court of competent jurisdiction. Therefore Respondent's act(s), whatever act(s) may have been committed, could not have been a criminal act in violation of Rule 4-8.4(b) of the Rules of Professional Conduct that "reflected adversely on Respondent's honesty, trustworthiness or fitness as a lawyer in other respects".

For purposes of argument only, let's say the complaint was drafted by the Florida Bar in the alternative; it included a cause of action based upon conduct by Respondent which did not result in the commission of a criminal act, or even where no charges were filed. Simply an act, any act, "criminal in nature" (whatever that means?). Even under this broad interpretation the record does not support any conduct by Respondent, as a lawyer, which violated Rule 4-8.4(b). Whatever conduct complained of, was not conduct by Respondent as a lawyer directed against anyone as a client. Nor, was the conduct proved to have been committed knowingly or unprovoked. Nor does the record substantiate such conduct as "severely adversely reflecting on Respondent's fitness to practice law".

On p.23 1.25 of the transcript of March 31, 1993,

> "Q. Ms Wolowitz, are you aware that (Respondent) is an attorney?
> A. Yes".

O.K., so what? Did Ms Wolowitz complain that she was a client and was mistreated as such? Did the witness testify that the relationship initially started out as client/lawyer

The Florida Bar, groping to make some sort of tie-in between Respondent's act(s) and his status as a lawyer questions witness Marcos Rojas (transcript p.37 1.8)

> "I don't think the way he was acting that day was normal for any attorney, because normally an attorney has more standing and so forth...".

Now what does that mean? Sounds as if the witness was coaxed to make some sort of linkage to Respondent's being a lawyer. We may ask, what is normal for a lawyer? How should Respondent have acted had he not been a lawyer? How would have the witness reacted?

Can it really be argued that Respondent's conduct involved law practice offenses involving violence? Can it be argued and does the record support the Florida Bar's position on p.47 1.17 of the transcript of March 31, 1993 that,

> "suspension is appropriate when a lawyer knowingly engages in criminal conduct that seriously adversely reflects on a lawyer's fitness to practice law?"

Where is even a scintilla of evidence to show that Respondent's act(s) was done "knowingly" or that Respondent's fitness to practice law was seriously adversely reflected? There indeed must be some evidence, even minimal to connect a lawyer's action to his fitness, actual or perceived, to practice law. The record is totally devoid of any such testimony.

Nevertheless, is the Florida Bar going so far as to say that if any lawyer has an argument with his spouse or lover and strikes them, that he/she should be subject to discipline by the Florida Bar? - simply because that person is a member of the Florida Bar? Is the Florida Bar claiming that if any member of the Florida Bar engages in an extra-marital affair (adultery is certainly a criminal act), but is not charged or convicted, (say the Florida Bar learns about it through a publicized divorce hearing) that he or she is subject to disciplinary action by the Florida Bar? Does the Florida Bar's jurisdiction extend to their member's bedroom too? Does the Florida Bar have a higher standard of justice, a different legal system than the courts of the State of Florida?

It is noted at this time that the only testimony of record of the hearing of March 31, 1993 concerning Respondent's act(s) and ramifications therefrom, was placed in the record by the Florida Bar. Respondent was not given an opportunity to rebut the testimony, to cross examine the witnesses or proffer his own version of the facts. (See argument 3 infra). Nevertheless, accepting the record as is, the facts as in the record, the Florida Bar did not prove and could not prove that Respondent committed a criminal act <u>or any other act</u> in violation of Rule 4-8.4(b). The referee's report, based on such a premise is therefore erroneous, unlawful, unjustified and prejudiced and should be rejected.

3. Respondent was denied his civil rights, due process of the law, the right to confront his accusers and the right to be heard. Respondent was punished for being financially unable to pay for the expensive long distance telephone call to the referee, as ordered by the referee for the April 29, 1993 telephonic hearing. The referee abused her discretion in ordering Respondent to pay for the long distance phone call as a precondition of making a telephonic appearance and as a precondition to be heard. The referee also abused her discretion in not granting Respondent's motion for a continuance.

This argument goes to Respondent's basic inalienable right to defend himself. It does not supersede arguments 1 and 2 supra as they stand on their own merits. Had Respondent been present at the hearing of March 31, 1993 and the hearing of April 29, 1993, certainly the record and the testimony would have been different. Respondent would have had the ability and opportunity to cross examine the witnesses against him, call his own witnesses, personally testify as well as make a statement on his own behalf. But he could not due to financial reasons, as Respondent clearly stated in his "motion for directed verdict and motion for continuance" served April 21, 1993.

IT IS INTERESTING AND NOTEWORTHY THAT NEITHER THE TRANSCRIPTS NOR THE REFEREE'S REPORT CONTAIN ANY REFERENCE TO RESPONDENT'S INABILITY TO BE PRESENT OR PLACE THE LONG DISTANCE TELEPHONE CALL DUE TO EXTREME FINANCIAL HARDSHIP.

The Florida Bar argues ("in the interest of justice?") that Respondent waved his right. The Florida Bar opines that since Respondent filed the "request for telephonic appearance" Respondent waved his right to cross examine the witnesses against Respondent. Question? Would the interest of justice, would the search for the truth have been thwarted had Respondent been given the right to cross examine the witnesses and testify? Even if Respondent had inadvertently waved such a right? Certainly the record would have been different.

In examining the sequence of events and the record we find: Respondent served the "motion for directed verdict and motion for continuance" on April 21, 1993. In the alternative Respondent moved that should the motion for directed verdict be denied a continuance, to allow Respondent an opportunity to cross examine all the witnesses who's testimony was of record, be granted. A new date and time for the telephonic hearing was requested. Respondent made it clear that Respondent was in serious financial difficulty and "on the verge of bankruptcy". Respondent stated he could not afford the cost of the long distance call. Respondent indicated to the referee that he would be standing by the phone at the designated time to receive a call on April 29, 1993 from the court or an agent of the court. At the very least Respondent felt the court would by phone or by mail notify him of another date and time to either place the call at Respondent's expense

or receive a call paid for by the court. This did not happen. What did happen is clearly found in the transcript of the hearing of April 29, 1993.

On p.4 l.1 of the transcript of April 29, 1993 the referee erroneously states that Respondent had agreed to place the call to the referee on April 29, 1993 at Respondent's expense. This is not so. The referee ordered Respondent to place the call at Respondent's expense. The referee then denied the "motion for direct verdict" by stating "it has no merit or substance at this time. I am denying the motion for directed verdict" (l.20-22). On the motion for continuance the referee stated that Respondent believed that

> "Rose Wolowitz is a pathological liar and also that he contests the matters as set forth by the other witnesses" (l.3-9).

The referee goes on to state that

> "this was the time for (Respondent) to respond by placing a telephone call <u>at his expense</u> (emphasis supplied)..." (l.10-13).

The motion for continuance was denied, the referee stating,

> "there is no legal or factual reason why this court should continue these proceedings any further" (l.14-16).

(No other continuance was requested prior). Granted, on any request for a continuance there is rarely a hard and

fast legal or factual basis for granting or denying. But what was to have been lost? What harm would have ensued? Why did the referee not give Respondent the benefit of the doubt and why did the Florida Bar not only object to respondent's motion but took advantage of Respondent not being present? What was the Florida Bar afraid of? The other side of the story? The truth?

The Florida Bar claimed "abuse of process". The Florida Bar on p.8 1.3-6 transcript of April 29, 1993 states,

> "in this pleading (the motion for direct verdict) he has made statements about Mrs. Wolowitz... that are simply outrageous! The statements that are made in this particular pleading would not give the Florida Bar any opportunity to rehabilitate this particular witness. So again, he has abused the proceedings by making these statements" (1.2-12).

Is the Florida Bar really saying that respondent's his version of the incident of February 13, 1991 is "outrageous"? Could the truth be outrageous? Was the Florida Bar taken by surprise by the possible truth of Respondent's assertion? The Florida Bar then went on to request a 120 day suspension rather than the original 30 day request, without even giving Respondent the right to respond to the new and additional requested disciplinary measures.

What would Respondent's testimony have been had Respondent been afforded an opportunity to cross examine

and to testify? What would Respondent have elicited from the witnesses? Certainly there would have been another side, a balance in the facts. Another version for the referee to ponder. (Although no matter what Respondent had been able to elicit or testify to, it would appear that the referee was determined to find Respondent guilty and impose a draconian penalty).

Reviewing the testimony of Rose Wolowitz (p.11-37, hearing of March 31, 1993) Respondent stands steadfast on his ability to break this witness's testimony. As Respondent stated in his motion for continuance p.5

> "Mrs. Wolowitz has to protect herself and her family for a second time from the shame she caused herself, she is a drunk, a "coke user", a conspirator to defraud. She slept with her ex-boyfriend while engaged to a certain well known doctor, and while later engaged to respondent, the witness was beaten up by her ex-boyfriend on the night of February 13, 1991, the witness Rose Wolowitz pleaded with Respondent not to leave her, that she blocked Respondent's ability to leave her room and that the witness came back to Respondent's apartment after February 13, 1991 - specifically on March 2, 1991 (see attached parking permit from Delvista apartments, where Respondent lived, appendix-3) and that Rose Wolowitz is a pathological liar".

These "outrageous" statements could have been proved at the civil trial and the misdemeanor trial. Rose Wolowitz told the same lies to the referee as she told to the State Attorney and as her lawyer drafted in the civil complaint. (Also it should be noted that as the witness testified to on p.30 l.20 of the March 31, 1993 transcript, January 25, 1991 was not the first time Respondent was at the witness's home. Indeed Respondent had been sleeping there for the previous 5 months).

Regarding the witness Marcos Rojas, Respondent could easily have shown his bias, his desire to protect his sister-in-law, his changing the facts when he met respondent and his inability to tell the difference between the behavior of a lawyer and a non-lawyer.

As to Patricia Small, p.42 1.21 of the transcript of March 31, 1993, the referee asks:

> "at the time that Judge Backman took the plea, did he do a full plea colloquia with the defendant?".

The witness:

> "Yes, your honor.

P.43 1.22 et seq. The referee:

> "Were there any comments regarding the factual basis at that time or any comments that he made to the court about this particular event that you can recall?".

The witness:

> "To the best of my recollection the plea I have practiced in Judge Backman's courtroom for over a year. I believe in this case because of the circumstances involved the defense stipulated to the factual basis predicated upon the documents provided and the affidavit signed by the victim. At that point I believe they did not want me to put an actual verbal factual basis on the record, but they did so stipulate".

This is an outright lie! First of all, the witness admits p.41,42 1.1 that she started with Judge Backman in September, but Respondent was sentenced in October. When did the stipulation referred to on p.44 1.6-14 take place? Before the witness started to work in Judge Backman's courtroom. She was not there. She doesn't know, she only "believed". To the contrary. Respondent and his lawyer knew exactly what happened. There was indeed no stipulation to the facts. It was on this basis that all

matters, civil and criminal were resolved. Respondent pleaded "no contest" as a "plea of convenience", to get all this litigation behind him. Had Respondent been required to stipulate to the facts he would have gone to trial. This could be proved if Respondent had been given the opportunity. But the referee was not interested in the truth. Nor was the Florida Bar.

It is clear that Respondent by virtue of the referee refusing to grant Respondent's motion for continuance denied Respondent due process of law and his civil rights. It is clear that the Florida Bar joined in this travesty of justice.

Since Respondent was denied due process and the right to defend himself, the referee's report should be rejected.

4. The referee's report recommending disciplinary measures is erroneous, unlawful, unjustified and prejudiced. By virtue of and on the basis of arguments 1, 2 and 3 herein there should be no disciplinary measures imposed against Respondent at all since (1) the Florida Bar could not and did not prove the allegations of the complaint and (2) Respondent did not commit a criminal act or any other act in violation of Rule 4-8.4(b) of the Rules of Professional conduct. This should suffice to complete Respondent's arguments in regard to the recommended disciplinary measures. Nevertheless, Respondent shall set forth in this section why the recommended disciplinary measures in the referee's report are still erroneous, unlawful, unjustified and prejudiced even if Respondent had committed a criminal act, had in fact been found guilty of a misdemeanor by a court of competent jurisdiction, and had Respondent violated Rule 4-8.4(b) and had the Florida Bar so proved all these elements.

Paragraph a

A 30 day suspension would be fitting and proper. The Florida Bar admits this for the record on p.51 l.3-10 of the transcript of March 31, 1993.

> "In this case the Florida Bar is only asking for a 30 day suspension which is certainly entirely reasonable...".

The 120 day suspension was based on the Florida Bar's last minute theory that Respondent "abused the process", transcript p.6 l.12-22 and p.8 l.2-6. The Florida Bar

apparently takes the position that once accused, a lawyer is guilty. Once charges are filed a lawyer is guilty. Once a civil suit is filed the allegations of the complaint are true. Once a complaining witness testifies she is to be believed and Respondent should not be given an opportunity to cross examine or rebut. A 120 day suspension is uncalled for and unjustified. Especially since Respondent was not afforded any opportunity to defend himself against the requested additional 90 day suspension.

Paragraph b

Rehabilitation by successfully completing the Florida bar examination including the ethics portion is unlawful, unjustified, clearly prejudiced and totally unprecedented. It is "cruel and inhuman punishment". It is out of proportion with and has no relationship to the alleged conduct or even the criminal act(s) alleged to have been committed in the complaint. It is tantamount to disbarment. Was Respondent's conduct unethical? If criminal, does the ethic's provision of the Bar exam cover criminal acts? Does the ethic's provision include conduct between lovers? If Respondent's act(s) has no relationship to the practice of law why the recommendation to retake the Florida bar examination? Did Respondent exhibit a lapse of knowledge of substantive or procedural law? The referee was arbitrary, capricious and abused her discretion in recommending these harsh disciplinary measures. There is no precedent for such measures.

A sampling of recent disciplinary actions affirmed by this honorable court, taken from the Florida Bar News, gives an overview of the disciplinary measures versus the offence committee.

(1) Conflict of interest - 6 month suspension (April 1, 1993 edition).

(2) Theft - disbarment (May 1, 1993 edition).

(3) UPL - reprimand, probation (May 1, 1993 edition).

(4) Incompetence - 30 day suspension, probation (May 1, 1993).

(5) Misuse of funds - 1 year suspension (June 1, 1993 edition).

(6) Controlled substance - reprimand and 3 year probation (June 1, 1993 edition).

Pleaded guilty to violating Bar rules concerned with criminal conduct.

(7) Prejudicial conduct - 90 day suspension (July 1, 1993 edition).

Committing a criminal act.

(8) Perjury - disbarment (July 1, 1993 edition).

Pleaded no contest to perjury. Was found guilty.

It can be seen that even when a criminal act was committed, where adjudication <u>was not</u> withheld, where indeed a violation of Rule 4-8.4(b) existed the disciplinary measures did not include the retaking of the Florida Bar examination. (Or the ethics provision).

Paragraph c

As to the special conditions recommended in the referee's report, p.4 par.IV 1+2, it should be noted that the incident of February 13, 1991 took place over one and a half years ago. At the time of the incident Judge Backman did not see fit to impose such conditions. Probably because he clearly saw the blackmailing and extortion of the civil suit and the underlying reasons for the misdemeanor charges. Why did Judge Backman not impose such conditions as a condition of probation? Because he did not feel it necessary in light of what he knew to be the truth. Yet the referee, without having the benefit of even hearing Respondent's position or having any testimony before her to support such special condition disciplinary measures, arbitrarily recommended such measures. It clearly shows that referee's recommendations are erroneous, unlawful, unjustified and prejudiced. They should be rejected.

Paragraph d

As to the assessment of $2,347.16 cost against Respondent this too is unjustified. It is clear that if the court accepts Respondent's arguments 1, 2 and 3 that (1) the Florida Bar did not prove the allegations of the complaint or (2) that Respondent did not violate Rule 4-8.4(b) or (3) Respondent was denied due process, then there would be no taxation of any costs against

Respondent. But Respondent argues here, that even if this honorable court decides that Respondent should be suspended for 30 days, a maximum of $500 should be taxed against Respondent. Respondent had from the inception, prior to the matter going to the grievance committee, agreed to dispose of this matter without extensive or protracted proceedings. Respondent did not want to waste the court system's time and the tax payer's money. Respondent had agreed to a 30 day suspension. The Florida Bar refused the offer without Respondent admitting the guilt of the accusations against him. What great purpose was to have been served by "admission of guilt"? Respondent's record would have contained a 30 day suspension. Yet the Bar proceeded as if the admission of guilt was more important than an accepted resolution and penalty. Under these circumstances a maximum of $500 costs should be imposed.

~~~
~~~

CONCLUSION

Respondent seeks the following relief:

1. A finding that the referee's report is erroneous, unlawful and unjustified. A total rejection of the report and a finding of not guilty of violating Rule 4-8.4(b) of the Rules of Professional Conduct and a dismissal of the case.

   Or in the alternative,

2. Should this Court determine Respondent has violated Rule 4-8.4(b), that only a 30 day suspension be imposed and a <u>complete rejection</u> of the other recommended disciplinary measures, especially the retaking of the Florida Bar examination, be ordered.

3. If the Court orders No. 2 above then a maximum of $500 in costs be taxed against Respondent.

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO. 91-25126 CA 10

FLORIDA BAR NO. 559792

ROSE WOLOWITZ,

Plaintiff,

vs.

BARRY SCHREIBER,

Defendant.

_______________________________/

NOTICE OF VOLUNTARY DISMISSAL

COMES NOW the Plaintiff, ROSE WOLOWITZ, by and through her undersigned attorneys and hereby files her voluntary dismissal with prejudice, of the within cause.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Samuel S. Fields, Esquire, Box 1900, Ft. Lauderdale, Florida 33302 this 3d day of December, 1991.

MONTERO, FINIZIO & VELASQUEZ
Attorneys for Plaintiff
200 S.E. 9th Street
Ft. Lauderdale, Fl 33316

By:
MATTHEW D. WEISSING

wolowitz.dis

Appendix 1

IN THE COUNTY COURT IN AND FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

CASE NO. 91-002840MM40A

vs.

BARRY SCHREIBER,

Defendant.

Florida Bar Number 350321

ORDER TO SEAL ARREST RECORD

THIS CAUSE having come before the Court upon motion made by the Defendant, BARRY SCHREIBER, and the Court having heard representations of counsel and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Pursuant to F.S. §943.058 and Fla.R.Crim.P. 3.692, any and all records relating or referring in any way to the arrest or prosecution of BARRY SCHREIBER shall be expunged or sealed, and further in regard to the Official records of the court, including the court file of the cause, the Clerk shall do the following:

a. Remove from the official records of the court, except the Court file, all entries and records subject to such Order, provided that if it shall not be practical to remove such entries and records then to make certified copies thereof and thereafter seal by appropriate means such original entries and records.

b. Seal such entries and records or certified copies thereof, together with the court file and retain the same in a non-public index, subject to further order of the Court.

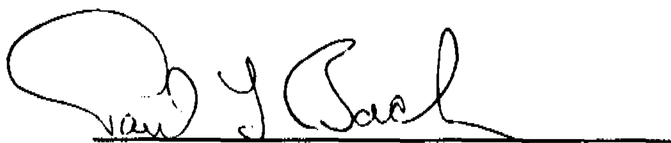
2. In regard to the official records of all agencies or departments named in such order, except those of the court, the head of such agency or department shall cause the official records thereof and which are the subject of said order to be sealed in a manner consistent with sub-division (e) of Fla.R.Crim.P. 3.692.

3. By virtue of this Order the Defendant shall be restored to the status occupied by the Defendant prior to the arrest and shall not be held henceforth to be guilty of perjury or

Appendix 2

otherwise giving a false statement by reason of failure to recite or acknowledge such arrest in response to any non-judicial inquiry except for those inquiries set forth as exceptions by statute.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 8th day of Jan, 1992.

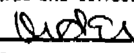


COUNTY COURT JUDGE

Conformed copies furnished to:
State Attorney, Broward County Courthouse, 201 SE Sixth Street, Fort Lauderdale, Florida 33301

Robert H. Dolman, Esquire, 2601 East Oakland Park Blvd., Suite 600, Fort Lauderdale, Florida 33306

STATE OF FLORIDA
BROWARD COUNTY
I HEREBY CERTIFY that the ab
and foregoing is a true and correct copy of



as filed in my Office.
WITNESS my hand and Official Seal in the City of FO
LAUDERDALE, FLA. this 11 day of Jan A.D. 19
ROBERT E. LOCKWOOD, Clerk

D.C.

Appendix 3

Delvista Towers

VISITORS PARKING PERMIT

PARK IN **GUEST** SPACE ONLY

Expires 3-3-91 Guest of Unit # 1922

PLEASE DISPLAY THIS PERMIT ON THE DASHBOARD

issued by S/O AGUILAR

ILLEGAL AND/OR OVERTIME PARKING SUBJECT TO STICKERING AND/OR TOWING

3/2/91

~~Surveillance ... # 1613~~

visitor: Walowitz

DESTINATION: Schribber Unit # 1922

vehicle: Black T-Bird

TAG #: YPQ-296

Time in 1:30 a.m.

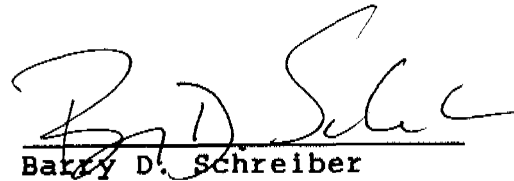
* Records retrieved by

Officer Matt Ludlow

[signature]

Certificate of Service

I hereby certify that an original and seven copies of respondent's initial brief was mailed/served to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and a true copy to Randi Klayman Lazarus, Bar Counsel, the Florida Bar at the address of record, this 1 day of September 1993.



Barry D. Schreiber