**IN THE SUPREME COURT**
**OF FLORIDA**

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CASE NO.: 81,145

TFB CASE NO.: 92-31,975(07C)

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THE FLORIDA BAR,

Complainant,

vs.

PETER L. NILES, JR.,

Respondent.

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# INITIAL BRIEF OF RESPONDENT

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## PRELIMINARY STATEMENT

In this Initial Brief, Peter L. Niles, Jr., will be referred to as "respondent" or Mr. Niles. The Florida Bar will be referred to as "the Bar" or "petitioner." References to Report of Referee, dated January 6, 1994, will be designated "RR.," followed by the appropriate page numbers set out in brackets. References to the transcript of the final hearing held on December 28, 1993 will be designated "Tr.," followed by the appropriate page numbers set out in brackets.

## STATEMENT OF THE CASE AND FACTS

Following a finding of probable cause further disciplinary proceedings by the Seventh Judicial Circuit Grievance Committee "C," on November 25, 1992, the Florida Bar filed its complaint against Peter L. Niles on January 26, 1993. The hearing was held before the referee, The Honorable Robert M. Foster, Circuit Judge, on December 28, 1993. The Report of Referee was entered January 6, 1994, finding that Mr. Niles violated certain rules of professional conduct and finding Mr. Niles guilty as charged as to each count of the complaint, and further recommended that Mr. Niles be suspended from the practice of law for one year, with proof of rehabilitation required prior to reinstatement and taxed with costs. Mr. Niles filed his Petition for Review in this Court on March 7, 1994. The Florida Bar served its Cross-Petition for Review on or about March 18, 1994. This brief follows.

On September 13, 1993, Deidre Hunt was placed in Broward Correctional Institution (BCI) pursuant to her guilty plea to first degree murder, for which she received the death penalty. (RR 1). Florida Department of Corrections rules did not allow media interviews during the initial orientation, which may last two to three weeks. (RR 1). However, during that time, an attorney is allowed to meet with his client. (Tr. 51).

On September 25, 1990, Mike Watkiss, who is a reporter for the news program "A Current Affair," met with Deidre Hunt's attorney, Peter Niles, to request an interview with Ms. Hunt. (Tr. 101). Mr. Niles did not give such permission but did agree

to allow Mr. Watkiss and a cameraman to accompany him to the BCI where Ms. Hunt could make that decision herself. (Tr. 103).

Niles was going to BCI to have a video taped testimony taken of his client in regards to a case against her co-defendant. (Tr. 99). Mr. Niles had received authorization to do so from BCI Superintendent Marta Villacorta. (Tr. 100). On September 26, 1990, at BCI, Mr. Niles requested to see Superintendent Villacorta who was not present that day. (Tr. 105). Mr. Niles was told there was no problem in a media interview. (Tr. 106). Mr. Watkiss and the cameraman displayed their press cards to the security guards who allowed them entrance. (Tr. 106). In the BCI control room log, the security guards did not identify the camera crew as being with "A Current Affair." (RR 5). However, the television equipment was clearly designated as such and one guard even asked when this episode would air so that he could watch it. (Tr. 106).

A media interview subsequently took place that same day after Mr. Niles informed his client of the situation. (Tr. 107). Ms. Hunt agreed to the interview. (Tr. 107).

Mr. Niles told Ms. Hunt's mother, Carol Hunt, and Kathy Kelly, a reporter for the Daytona News Journal that he had not received any money for the "A Current Affair" interview. (Tr. 109-110). Mr. Niles had received a $5000 consulting fee from "A Current Affair" for obtaining and sending public information which was not readily available to any correspondent of "A Current Affair." (Tr. 111). The consulting fee agreement was contingent on the airing of Ms. Hunt's story. (Tr. 111).

One tape of September 26, 1990, was made to give to Judge Foxman to demonstrate Ms. Hunt's willingness to cooperate with the State and testify against codefendant Fotopoulos. (Tr. 106). Mr. Niles also carried a copy with him to a meeting he had with prosecutor David Damore in that case but may not have given the prosecutor the video tape. (Tr. 122-123). The video tape was merely a means by which to persuade Mr. Damore to allow Ms. Hunt to testify in the Fotopoulos case against her co-defendant. (Tr. 122).

Mr. Niles received a $5,000 check from "A Current Affair" shortly after "Deadly Deidre" aired. (RR 6). Because of the resulting investigation, Mr. Niles wrote a $5000 check to Volusia County on December 14, 1990. (RR 7). Mr. Niles expressly stated to Mr. Damore that he did not have sufficient funds in his account at that time, and was instructed to write the check anyway and that he would be notified before the check was deposited. (Tr. 116).

Three and one-half months later on March 26, 1991, Mr. Niles' check was deposited without notification and it subsequently was returned for insufficient funds. (RR 7). When notified of the returned check, Mr. Niles immediately replaced the check with a cashier's check. (RR 8).

## SUMMARY OF THE ARGUMENT

A referee's findings of fact and recommendation of discipline in a bar disciplinary action will be upheld unless clearly erroneous and lacking in evidentiary support. In this case, the referee's findings are clearly erroneous and lack evidentiary support.

The referee found erroneously that Peter Niles had violated a number of Rules Regulating the Florida Bar. In his report as to Count I, the referee found that Mr. Niles had made misrepresentations to BCI Superintendent Marta Villacorta to obtain an interview of Deidre Hunt for "A Current Affair." However, any breach of security occurred as a result of the security guards on duty who after seeing the camera crews' press cards, allowed them to enter.

Mr. Niles did not misrepresent his consulting fee to Carol Hunt, Deidre Hunt's mother, or Kathy Kelly, a reporter for the Daytona News Journal. Mr. Niles was not paid for the interview of Ms. Hunt conducted on September 26, 1990. Mr. Niles received a $5,000 consulting fee for providing "A Current Affair" public information over a five or six month time period.

As to Count II, Mr. Niles had an agreement with prosecutor David Damore that he would be notified before his $5000 check was deposited so that he could ensure sufficient funds in his account. Mr. Niles was not notified, the check bounced, and Mr. Niles immediately replaced the returned check with a cashier's check. The referee's cases cited are distinguishable and unpersuasive.

Furthermore, the referee's recommendation of discipline is excessively severe. The public, the attorney, and other professionals will be adequately served by a public reprimand.

## ARGUMENT

### I.

### PROCEDURAL REQUIREMENTS

A. Standard of Review

The findings of fact of a state bar referee will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993); The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991); The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990). The referee's findings of fact which are supported by competent and substantial evidence are considered conclusive. The Florida Bar v. Smiley, 622 So. 2d 465 (Fla. 1993); see The Florida Bar v. Gross, 610 So. 2d 442 (Fla. 1992). Similarly, the referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or unsupported by the evidence. The Florida Bar v. Poplack, 599 So.2d 116, 188 (Fla. 1992). However, the Supreme Court's scope in reviewing a referee's recommendation of discipline is broader than in reviewing the findings of fact. Id. The burden is upon the party seeking review to demonstrate that the referee's report is erroneous, unlawful, or unjustified. Rules Regulating the Fla. Bar 3-7.7(c)(5); The Florida Bar v. Scott, 566 So. 2d 765 (Fla. 1990).

B. Jurisdiction

Supreme Court of Florida has, under the Constitution of Florida, exclusive jurisdiction to discipline those admitted to

the practice of law. Art. V, §15,Fla. Const.; see The Florida Bar v. Weil, 575 So. 2d 202 (Fla. 1991).

## II.

## THE REFEREE'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND LACKING IN EVIDENTIARY SUPPORT.

### A. Count I

As to Count I, the referee found the following rule violations: 3-4.3 (misconduct and minor misconduct), 4-1.2(a) (scope of representation), 4-1.4 (communication), 4-1.5 (fees for legal services), 4-1.6(a) (confidentiality of information), 4-1.7(b) (conflict of interest; general rule), 4-1.8(b, d, i) (conflict of interest; prohibited transactions), 4-2.1 (advisor), 4-4.1(a) (truthfulness in statements to others); 4-4.4 (respect for rights of third persons), and 4-8.4(d) (misconduct). (RR 1-3). However, none of these findings are supported by the record and accordingly, should be overturned on review.

In his report, the referee found that Mr. Niles had misrepresented to Broward Correctional Institution (BCI) Superintendent Marta Villacorta that his visit with his client on death row on September 26, 1990, was for an attorney-client interview rather than a media interview. (RR 5). As support, the referee relies on the fact that Mike Watkiss, a television reporter for "A Current Affair," and a cameraman accompanied Mr. Niles to BCI. (RR 5). Also, the BCI control room log did not identify Mr. Watkiss or his companion as being associated with "A Current Affair." (RR 5). However, the actions or omissions of the BCI correctional officers was wrongly attributed to Mr. Niles. Such a finding is clearly erroneous and unsupported by the evidence.

Mr. Niles' intention was to video tape Deidre Hunt, his client, in preparation for her testimony in a case against her co-defendant pursuant to an agreement with the State prior to her resentencing as ordered by this Court. See, Hunt v. State, 613 So.2d 893 (Fla. 1992). (Tr. 99). On September 25, 1990, Mr. Niles was contacted by Mr. Watkiss, who requested a meeting. (Tr. 101). As a result, Mr. Niles allowed Mr. Watkiss and a cameraman to accompany him to BCI for his client to decide whether she desired to be interviewed, which she had previously desired.[1] (Tr. 103).

Mr. Niles was not aware of Department of Corrections regulations against media interviews during an inmate's orientation, but requested to meet with Ms. Villacorta when he arrived at BCI. (Tr. 105). After he learned that she was not present that day, Mr. Niles proceeded to visit his client. Mr. Watkiss and the cameraman were granted permission to enter by the correctional officers, who saw Mr. Watkiss' and the cameraman's press cards, and the television equipment clearly designated as property of "A Current Affair," and one officer even asked when the show would air so he could watch it. (Tr. 106). Any breach of Department rules resulted from the conduct of the officers, not Mr. Niles. Further, there is no evidence that Mr. Niles made any misrepresentation to Superintendent Villacorta so that he

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[1] In fact, Deidre Hunt had made numerous requests for her story to be published or broadcast and had previously spoken to Mr. Watkiss from "A Current Affair." (Tr. 98, 107).

could gain access for a camera crew from "A Current Affair" to interview his client.

The referee further found that the planned videotaped statement of Deidre Hunt never occurred. (RR 5). That finding is clearly erroneous. Mr. Niles obtained two such statements. (Tr. 106). One went to Judge Foxman for the Fotopoulos case. (Tr. 106). Mr. Niles took the other copy with him to a meeting with prosecutor David Damore, although he may not have given the prosecutor the video tape because the prosecutor agreed to let Ms. Hunt testify against co-defendant Fotopoulos. (Tr. 122).

Moreover, the referee found that Mr. Niles denied to Carol Hunt, Deidre Hunt's mother, and Kathy Kelly, a reporter of Daytona's News Journal,that he had received $5000 from "A Current Affair." (RR 6). That finding also is not supported by the evidence. As Mr. Niles explained, he was not paid for the interview of Ms. Hunt conducted on September 26, 1990. Mr. Niles received a $5,000 consulting fee for providing "A Current Affair" public information, which was available to anyone who requested it, because the news program did not have a correspondent in the area who could readily obtain the information. (Tr. 111). Mr. Niles acknowledged to Mr. Damore and The Florida Bar that he had received money from "A Current Affair" for consulting fees. (Tr. 113-114).

Mr. Niles understood that the consulting fee was contingent on the airing of Ms. Hunt's story, not necessarily on the granting of an interview as concluded by the referee. (RR 6). Also, between the time Mr. Niles agreed to the $5000 fee and the

time the interview was conducted, five to six months had passed. (RR 6). If Mr. Niles wanted to arrange an interview, he could have acquiesced to Ms. Hunt's desire to be interviewed before September 26, 1990.

The foregoing demonstrates that the findings of fact of the referee as to Count I are clearly erroneous and lacking in evidentiary support. Accordingly, the referee's report and recommendation should be overruled.

B. Count II

As to Count II, the referee found that Mr. Niles had violated Rules Regulating the Fla. Bar 4-1.15 (safekeeping property) and 4-8.4(b) (misconduct). (RR 3-4). These findings arose from Mr. Niles receiving a $5,000 check from "A Current Affair," and the subsequent tendering of that sum to the County of Volusia. (RR 7). Mr. Damore instructed Mr. Niles to write a check for that amount even after Mr. Niles told him that he lacked sufficient funds at that time. (Tr. 116). Mr. Niles' check was deposited three months after being tendered, without Mr. Niles being notified as agreed upon by Mr. Niles and Mr. Damore, and returned for insufficient funds. (RR 3, Tr. 116). The referee found erroneously that there was no condition that Mr. Niles be notified prior to his check being deposited. (RR 7).

The referee's finding is clearly erroneous and lacking evidentiary support. Mr. Damore and Mr. Niles agreed that Mr. Niles would be notified when his check would be deposited so that

Mr. Niles could make arrangements to have sufficient funds. (Tr. 116). In fact, when the check was returned, Mr. Niles did not have to pay the normal returned check charge because the county manager learned of the notification agreement and waived the fee. (Tr. 116-117).

Also, Mr. Niles was able to replace the returned check with a cashier's check promptly after it was returned. (RR 8). If Mr. Niles had been notified, he would have been able to ensure sufficient funds in his account to avoid the incident.

The referee relied on three cases in support of his findings: The Florida Bar v. Brennan, 411 So. 2d 176 (Fla. 1982) (among other charges, the attorney wrote a check to a client which was returned for insufficient funds and the client did not recover his money for over four months); The Florida Bar v. Dingle, 235 So. 2d 479 (Fla. 1970) (among other charges, the attorney wrote a check to a client which was returned for insufficient funds and the attorney admitted to repeatedly writing bad checks); The Florida Bar v. Harris, 436 So. 2d 88 (Fla. 1983) (among other charges, three successive checks written by the attorney were returned to the same business for insufficient funds, and the attorney failed to pay until ordered by the Florida Supreme Court).

These cases are distinguishable and rendered persuasive under the facts of this case on a number of grounds. Dingle and Harris involve repetitious patterns of bad check writing, not merely one check. In both Brennan and Dingle, the checks were made to the attorney's client, not a third party. The

disciplinary rules and resulting case law set forth a hierarchy of culpability when rules are violated to the detriment of the client, a judge, another member of the profession, and a member of the public, respectively. See, The Florida Bar v. Ward, 599 So. 2d 650, 652-53 (Fla. 1992). Thus, an attorney's rule violation victimizing client renders the attorney more culpable than a rule violation against any other entity. In Brennan and Harris, the attorney did not immediately make good the returned check(s). One attorney waited over four months to pay off the check, see, Brennan, supra, and the other attorney had to be ordered by the Florida Supreme Court to pay the check, see Harris, supra. In the instant case, only one check was returned for insufficient funds, which check was not written to a client, and which Mr. Niles immediately made good with a cashier's check when he learned of it being returned.

The referee also stated that a worthless check reflects adversely on Mr. Niles' honesty, trustworthiness, and fitness as a lawyer. However, this whole incident demonstrates quite the opposite. When Mr. Damore requested that Mr. Niles turn over the $5,000, Mr. Niles was candid about the lack of funds in his bank account at that time. Mr. Niles did not try to hide this fact and did not challenge Mr. Damore's request that the funds should be paid to the county. Mr. Niles and Mr. Damore agreed that Mr. Niles would be notified when the check was to be deposited. For these reasons, the referee's findings of fact are clearly erroneous and lack evidentiary support.

## III.

## THE REFEREE'S RECOMMENDATION IS EXCESSIVELY SEVERE AND UNJUSTIFIED.

The referee recommended that Mr. Niles be suspended for one year with proof of rehabilitation required prior to reinstatement. (RR 8). This recommendation was also based on Mr. Niles' personal history[2] and prior disciplinary record.[3] (Tr. 8-9).

The three purposes of disciplinary action for unethical conduct are (1) to protect the public from unethical conduct and at the same time not deny the public the services of a qualified attorney; (2) to be fair to the attorney in punishing the breach of ethics and at the same time encourage reformation and rehabilitation; and (3) to be severe enough to deter others. The Florida Bar v. Neu, 597 So. 2d 266, 269 (Fla. 1992).

In light of Mr. Niles' arguments, any punishment of suspension would be improper as clearly erroneous and lacking in evidentiary support. Mr. Niles did not violate any of the rules alleged before the referee. As such, the referee's report should be overturned.

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[2] Mr. Niles, at the time of the referee's report, was 57 years old and had been admitted to the Florida Bar since October 15, 1965 and the Tennessee Bar since 1961. (RR 8).

[3] Mr. Niles had received two public reprimands, for technical trust account violations and for making financial advances to clients, and a private reprimand. (RR 8-9).

In the alternative if the referee's report is affirmed in part or in whole, a one-year suspension with proof of rehabilitation is excessively severe and unjustified. The proper disciplinary action for isolated instances of neglect, lapses of judgment, or technical violations, such as in the instant case, is a public reprimand. The Florida Bar v. Rogers, 583 So. 2d 1379, 1382 (Fla. 1991); The Florida Bar v. Price, 569 So. 2d 1261, 1263 (Fla. 1990). Particularly under the odd facts of this case and absence of any willful violation by Mr. Niles, any suspension would be excessive.

A. Count I

As to Count I, Mr. Niles is essentially charged with making misrepresentations to prison officials and other third parties, not communicating with his client, charging excessive fees, and coercing his client to participate in an unauthorized interview.

The Florida Supreme Court has deemed a public reprimand an appropriate discipline for an attorney's misrepresentation to third parties. See, e.g., The Florida Bar v. McLawhorn, 505 So. 2d 1338 (Fla. 1987) (misrepresentation to client's doctor); The Florida Bar v. Jennings, 482 So. 2d 1365 (Fla. 1986) (misrepresentation to attorney's own relatives). In light of previous reprimands and mitigating circumstances, an attorney's failure to communicate with a client warrants a public reprimand. See, e.g., The Florida Bar v. Kaplan, 576 So. 2d 1318 (Fla. 1991). Charging excessive fees, among other violations, warrants a public reprimand and forfeiture of the excessive fees. See,

e.g. The Florida Bar v. Hollander, 594 So. 2d 307 (Fla. 1992); In re Meyerson, 581 So. 2d 581 (Fla. 1991). Improperly coercing a client to act in such a way which may potentially damage the client of a third party warrants a public reprimand. See, e.g., The Florida Bar v. Betts, 530 So. 2d 928 (Fla. 1988) (attorney coerced incompetent client to execute a codicil).

In view of these examples, the referee's recommendation is excessively severe and unjustified. At most, Mr. Niles should receive a public reprimand. A public reprimand would also serve the three purposes of attorney disciplinary action. Society would not lose the services of a qualified attorney, who does much pro bono work, but would still be protected from unethical conduct. Additionally, a public reprimand would sufficiently punish Mr. Niles and encourage rehabilitation. Finally, a public reprimand is severe enough to deter other attorneys from similar unethical conduct.

B. Count II

In regard to Count II, Mr. Niles is essentially charged with passing a worthless check. Although technically an unethical act, writing an insufficient funds check does not automatically reflect any moral turpitude on part of the attorney. See, The Florida Bar v. Davis, 361 So. 2d 159, 162 (Fla. 1978). In The Florida Bar v. Brennan, 411 So. 2d 176 (Fla. 1982), cited by the referee in his report, the Florida Supreme Court held that issuing an insufficient funds check, taking more than four months to make good on that check, and failing to file quarterly trust

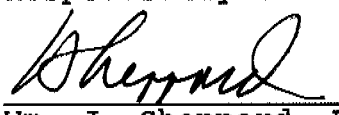
account reconciliations, in light of past disciplinary action, warranted a public reprimand and one year supervised probation.

In the instant case, Mr. Niles, in Count II, is charged with writing a single check which was not honored due to insufficient funds in the bank. Unlike Brennan, Mr. Niles paid promptly with a cashier's check after the initial check was returned. Mr. Niles' conduct does not warrant discipline as severe as in Brennan, and clearly not seen as severe as the suspension recommended by the referee. A public reprimand is appropriate should this Court find any violation to have occurred.

## CONCLUSION

For the foregoing reasons, respondent Peter Niles respectfully requests that this Honorable Court reject the referee's findings of Rules violations. Alternatively, if this Court affirms that the appellant has violated one or more of the Rules Regulating the Florida Bar, the respondent respectfully requests that the imposed discipline be no greater than a public reprimand.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **Jan K. Wichrowski, Esquire,** Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801, by mail, this 22d day of April, 1994.

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