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CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL A. CATALANO,

Respondent.

_____/

Supreme Court Case
No. 81,809

The Florida Bar File
No. 91-71,669(11D)

ON PETITION FOR REVIEW

Answer Brief of Complainant

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PREFACE

The Complainant, The Florida Bar, will be referred to as the Bar. The Respondent, Michael A. Catalano, will be referred to as the Respondent.

The following symbols have been used in Respondent's brief and will likewise be used for purposes of identification in the Bar's Reply Brief.

ST	shall designate the Supplemental Transcript filed on appeal in accordance with the index provided by Respondent's Supplemental Record on Appeal
ST A-E	shall designate separate Supplemental Transcripts as presented in accordance with the index provided by Respondent's Supplemental Record on Appeal
R	shall designate Respondent's Brief
SR	shall designate the exhibits as presented in Respondent's Supplemental Record on Appeal, page numbers shall follow this designation

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The Florida Bar takes exception with the Respondent's statement of the case and facts and accordingly provides the following:

In July of 1991, the Respondent was advised that the Florida Bar had commenced an investigation concerning the Respondent's relationship with the Broward County State Attorney's Office in connection with a criminal DUI case, The State of Florida v. April Stidham, Broward County Court Case No. 88-31860 MM 10A, in which Respondent represented the defendant. (ST B 26-27) Respondent was advised that based upon the investigation being conducted in that matter and others concerning the Respondent's professional conduct, a hearing before the Eleventh Judicial Circuit Grievance Committee (11D) was being scheduled. (ST C 42) Respondent at the grievance committee hearing, provided evidence in defense of his cause in these matters. (ST C 49)

Grievance committee 11D, pursuant to the conduct evidence reviewed recommended that the Respondent receive an admonishment for minor misconduct in this cause.

Upon Respondent's rejection of the finding of minor misconduct, pursuant to Rule 3-5.1, a formal complaint alleging three (3) counts of minor misconduct was filed in the Supreme Court of Florida on May 21, 1993 against the Respondent by The Florida Bar. (SR 1-8)

On June 1, 1993, the Honorable Jon I. Gordon, a Dade County Circuit Judge, was appointed as Referee in the above captioned matter. (SR 1-8).

The Referee heard testimony and took evidence in this matter on October 28, 1993, November 9, 1993, November 10, 1993, and November 11, 1993.

On November 19, 1993, the Report of Referee was filed (SR 37-39), and provided the following; ... "after considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

That the Respondent, Michael A. Catalano is guilty of violation of Rule 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal) of the Rules of Professional Conduct, in that he knowingly averred in his Amended and Verified Motion to Issue Rule to Show Cause for Assistant State Attorney Alberto Milian (in and for the 17th Judicial Circuit, Broward County, Florida, Criminal Case No. 88-31860 MM 10-A), that said "Mr. Milian agreed in open court, with Judge Lebow that he would cooperate with the defense and see to it that the witnesses appear at time of trial for the Defendant and that they contacted defense counsel before trial ...," when said averment as to contacting defense counsel before trial was in fact false.

As to Count II

That the Respondent, Michael A. Catalano, is guilty of violation of Rule 4-4.1(a) (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person) of the Rules of Professional Conduct in that he knowingly represented to one John Nixon and to one Lisa

Shoop by letter that Judge Lebow had entered an order compelling them to contact Respondent's office, when said representation was in fact false.

As to all other charges, I find the Respondent not guilty.

As to the charges for which the Respondent has been found guilty, I recommend that he receive a public reprimand.

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

The facts upon which the Referee made his ruling, finding the Respondent guilty of Counts I and II of the Bar's complaint, were as follows:

In October, 1989, the Respondent Michael A. Catalono represented Ms. April Stidham in a traffic matter, captioned State v. Stidham. (SR 1) On October 13, 1989, Respondent appeared before the Honorable Susan Lebow for a docket call in that case. (SR 1,2) During the docket call, the Respondent informed the Court that he was encountering difficulties with the Broward Sheriff's Office in getting subpoenas served upon witnesses for trial. (SR 9-18) At the docket call, the Assistant State Attorney, Alberto Milian, agreed, after being directed by the court to issue mandatory subpoenas for trial to all witnesses listed on the State precipe list who were also being listed as defense witnesses. (SR 13-16) Said subpoenas for trial were in fact, issued by the State Attorney's Office and Alberto Milian. (ST A 92)

On or about January 23, 1990, the Respondent filed an Amended and Verified Motion to Issue a Rule to Show Cause for Assistant State Attorney Alberto Milian. (SR 19-26) On page three (3) of the

Respondent's motion, the Respondent stated, under oath, that at the docket call held on October 13, 1989, "'Mr. Milian agreed, in open court, with Judge Lebow that he would cooperate with the defense and see to it that the witnesses appear at time of trial for the Defendant and that they contacted defense counsel before trial...'" (SR 21).

In Count I, the Bar specifically charged that the Respondent violated Rule 4-3.3(a)(1), (which prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal) regarding the false averment made in the above-stated motion. (SR 1-3)

In the trial of this matter before a Referee, the Bar called as one of its witnesses, Broward Assistant State Attorney, Alberto Milian, the prosecutor in the Stidham case. Milian testified in reference to Count I of the Bar's complaint. Milian testified to the content of his agreement with the Court and the Respondent on October 13, 1989, concerning the effort he would expend in getting the witnesses to appear at trial. (ST A 92) Milian confirmed that the significance of his agreement was that he would assist the Court by complying with its order to issue mandatory trial subpoenas for all of the witnesses that were on the witness list. (STA 89-93)

Milan further testified that he did not make the statement attributed to him by the Respondent in Respondent's Verified Motion for Rule to Show Cause. (ST 92-93) Milian categorically denied Respondent's the sworn statement contained in Respondent's motion, which purported that Milian had agreed that the witnesses were to

contact the Respondent's office prior to trial. (SA 92-95)

In Count I, the fact that the Respondent, under oath, made a representation to a tribunal in a verified motion that was in fact false, was conduct which the Referee found violated the Rules of Professional Conduct. (See Appendix I)

In addition to the aforementioned violation, the Bar charged the Respondent in Count II of the Complaint, with a violation of the Rules Regulating Professional Conduct, for actions in which he caused certain letters to be mailed to at least two witnesses in the Stidham case, one John Nixon, and one Lisa Shoop, advising them that although they had been subpoenaed by the state attorney's office, they were also being compelled by court order (emphasis added) to contact the Respondent's office, when no such order as represented by the Respondent existed. (SR 3-5), (SR 27-30)

Judge Susan Lebow, the Broward County Court Judge in the Stidham matter, was deposed prior to the trial on video tape, in order to preserve her testimony and prevent her from having to travel to Dade County as a witness. Judge Lebow testified to her recollection concerning the letters and her opinion as to the accuracy of the Respondent statements with regard to a court order (emphasis added) compelling the witnesses to contact the Respondent's office prior to trial. (ST E 32,33)

Judge Lebow had no recollection of making such an order, and stated that Respondent's statements implying that there was a court order compelling the witnesses to contact the Respondent's office before trial as stated in the Respondent's letters was an inaccurate reflection of what occurred. (ST E 33)

Respondent's conduct as charged in Count II in the Bar's formal Complaint was based upon the false statement contained in the letters sent to witnesses in the Stidham case, and alleged to have been a violation of Rule 4-4.1(a), which states that, in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person. (SR 4-5)

Upon having taken and reviewed all of the evidence presented at trial, the Referee, the Honorable Jon I. Gordon, found the Respondent guilty as to Counts I and II of the Bar's Complaint, in that, Respondent knowingly committed acts in the course of his involvement in the Stidham case which violated both Rule 4-3.3(a)(1) and Rule 4-4.1(a) of the Rules of Professional Conduct.

The Referee's findings of guilt and recommendation that Respondent receive a public reprimand, were predicated upon the evidence and the testimony of the witnesses taken at trial.

The Respondent now disputes the decision of the Referee by filing a "Petition for Review from a Final Ruling of a Referee in a Florida Bar Disciplinary Proceeding."

SUMMARY OF THE ARGUMENT

ARGUMENT I

THE REFEREE DID NOT ERR IN FINDING THE RESPONDENT GUILTY OF KNOWINGLY MAKING A FALSE STATEMENT OF FACT OR LAW TO A TRIBUNAL.

In a court pleading, Respondent stated under oath, that certain statements contained in the pleading were true, when in fact, the statements were false.

A review of the evidence presented at trial clearly demonstrated that the Respondent had knowledge that the statements he averred were untrue.

This false statement having been made with knowledge, under oath, to a tribunal was found to violate Rule 4-3.3(a)(1) of the Rules Regulating Professional Conduct. A violation of the Rule was found against the Respondent by a Referee at trial. The findings of the Referee and the imposition of a sanction based upon the violation was properly predicated upon the evidence taken and reviewed at trial.

The Referee's findings were correct and enjoy a presumption of correctness under Rule 3-7.6(k)(1)(A) unless proven otherwise. The Respondent failed to show that the Referee was incorrect in making his findings against the Respondent and the Referee's decision therefore, should be affirmed.

ARGUMENT II

THE LETTERS SENT BY THE RESPONDENT TO WITNESSES IN A CRIMINAL CASE WERE IN VIOLATION OF RULE 4-4.1(a) BASED UPON THE FACT THAT THE LETTERS CONTAINED A FALSE STATEMENT OF FACT.

The Respondent caused certain letters to be sent to witnesses in a criminal case which advised the witnesses that they were compelled by court order to contact the Respondent office before the trial. No court order had been issued compelling the witnesses to contact the Respondent before the trial. The Respondent's acts were therefore found to be in violation of Rule 4-4.1(a) of the Rules Regulating Professional Conduct, which prohibits a lawyer from knowingly making a false statement of material fact or law to a third person, by the Referee.

The evidence and testimony presented at trial supported the findings of guilt as recommended by the Referee.

Based upon the fact that the Referee found that the letters to knowingly contained a false statements of fact, the findings of the Referee as to this issue, should be affirmed.

ARGUMENT III

NEITHER THE ELEMENTS OF LACHES NOR ESTOPPEL WERE PROVEN BY THE RESPONDENT AS EVIDENCED BY THE REFEREE'S FINDINGS OF GUILT AND RECOMMENDATION OF DISCIPLINE.

Respondent's third argument raises the affirmative defenses of laches and estoppel. Both of these arguments are unsupported by facts or law. The Bar refutes the relevance of either of these theories to the instant circumstances or their application to the Respondent's case.

ARGUMENT IV

THE RESPONDENT WAS AFFORDED AMPLE OPPORTUNITY TO PRESENT EVIDENCE IN MITIGATION OF HIS CAUSE AT TRIAL AND PRIOR TO THE REFEREE'S DECISION OF THE MATTER.

Respondent's fourth argument alleges that the Referee did not provide an adequate opportunity for the Respondent to present mitigating factors prior to imposing a disciplinary sanction.

There is overwhelming evidence to show that the Referee provided ample opportunity for the Respondent to present mitigation to the Court.

ARGUMENT V

THE REFEREE PROPERLY TAXED THE COSTS OF THIS PROCEEDING AGAINST THE RESPONDENT.

The Referee was within his proper discretion in taxing costs against the Respondent and did not abuse any privilege the Respondent was entitled to in doing so.

The Respondent's arguments are without merit.

ARGUMENT

I

THE REFEREE DID NOT ERR IN FINDING THE RESPONDENT GUILTY OF KNOWINGLY MAKING A FALSE STATEMENT OF FACT OR LAW TO A TRIBUNAL

In Argument I of his brief, the Respondent submits that the statement submitted to the Court by way of his Amended and Verified Motion for Rule to Show Cause for Assistant State Attorney Alberto Milian, in the State v. Stidham matter, to wit that; "Mr. Milian agreed in open court, with Judge Lebow that he would cooperate with the defense and see to it that the witnesses appear at time of trial for the Defendant and that they contacted defense counsel before trial", was not false. (R 18)

Respondent alleges in his argument that the transcript of the docket call held October 13, 1989, supports his position as proposed in his Amended and Verified Motion to Issue Rule to Show Cause for Assistant State Attorney Alberto Milian. A review of the docket call transcript however, is void of the language Respondent attributes to it. (SR 9-18) The transcript makes no mention of the fact that witnesses were to contact the Respondent's office prior to the time of trial. The transcript reveals that the alleged conditions were neither agreed to by the prosecutor nor directed by the Court. Respondent's statement that the transcribed record supports his position therefore is and was found by the Referee to be false.

Evidence, heard by the Referee in the testimony of Alberto Milian, the Assistant State Attorney concerning the Stidham matter, refuted the veracity of Respondent's position. Milian controverted

the Respondent's contention by flatly denying that he had made any such statement. (TR A 92-93)

The evidence revealed, that the Respondent knew at the time of the averment made in his sworn motion, that the statement contained therein was false. This proposition cannot be disputed or denied based upon the fact that Respondent was present at the October 13th hearing and that no such statement was ever made. (SR 9-18)

A Referee's findings of fact is entitled to a presumption of correctness. See Rule 3-7.6(k)(1)(A) of the Rules of Discipline and The Florida Bar v. Winderman, 614 So.2d 484 (Fla. 1993). Accordingly, the Referee's finding based upon the facts, adjudging the Respondent guilty of violating Rule 4-3.3(a)(1), by knowingly making a false statement of material fact or law to a tribunal is presumed correct.

The transcript of the events as they happened at the docket call on October 13, 1989 speaks for itself. (SR 9-18) A simple reading and review of the words contained within the transcript displays that the Respondent's statement was false. The Referee made his finding of fact in a prudent, justified and lawful manner based on the evidence presented at trial and did not err in form or result.

In the second part of the Respondent's argument, Respondent seeks to excuse the fact that he made a false statement to the tribunal, by stating it was made unintentionally. This argument is not only irrelevant to the instant charge, but the fact that Respondent was present at the docket call on October 13, 1989, and had an opportunity to review the transcript prior to drafting, and

swearing to his motion, completely discounts an argument of this type.

The Referee's findings demonstrate that Respondent's purported lack of intent to misrepresent the facts to the Court, was not accepted as an excuse at trial when evidence of the Respondent's knowledge of the facts was so overwhelming.

In his brief, the Respondent cites to The Florida Bar v. Burke, 578 So. 2d 1099 (Fla. 1991). In Burke, it is shown that "'[i]ntent is a major and necessary element in a finding of guilt for dishonesty, fraud, deceit, or misrepresentation.'" (R-19) The Respondent argues that this case is an applicable case to the one here upon review.

The Respondent's case must however, be distinguished from Burke.

In Burke, the Respondent was charged with a violation of Rule 4-8.4(c). Said Rule prohibits acts of dishonesty, fraud, deceit or misrepresentation. The Burke case concerned the negligent handling of client funds which did not support a finding that the attorney acted intentionally.

The instant Rule 4-3.3(a)(1) provides as follows: "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal" The Referees's finding clearly establishes that there was sufficient evidence to demonstrate a violation of this rule, as he found that the Respondent knowingly made a false averment. See Report of Referee, Page 2.

In his argument, Respondent also proposes the relevance of The Florida Bar v. Bariton, 583 So. 2d 334 (Fla. 1991) and The Florida

Bar v. Weidenbenner, 18 F.L.W. S616 (Fla. 1993). As with Burke, these cases are not applicable to the instant facts.

In Bariton, the Court found that the facts did not rise to the level of a misrepresentation. The instant case does not concern a violation of the rule which deals with misrepresentation rather, the relevant issue concerns whether the Respondent knowingly made a false statement of material fact or law to a tribunal. The Referee's report found that a knowing and false statement was in fact made by the Respondent to the court. This finding was supported by the testimony of Alberto Milian, the Assistant State Attorney. (TR 90-93)

In Weidenbenner, the Court found there was insufficient evidence to show an intentional misrepresentation. As previously stated, the instant case does not concern itself with the rule governing misrepresentation. The Referee properly found that the record supported grounds for a finding under the charged rule, knowingly making a false averment.

The Courts have emphasized the importance of truthfulness and fairness of counsel concerning matters before a tribunal. In Hays v. Johnson, 566 So. 2d 260 (5th DCA 1990), where counsel omitted material facts in a petition for writ of habeas corpus, counsel was admonished.

In The Florida Bar v. Lund, 410 So. 2d 922 (Fla. 1982), the Respondent was suspended for a period of ten (10) days for untruthful testimony given before a grievance committee. In Lund, the Respondent unsuccessfully argued that there was no intentional misrepresentation. In the instant case, the Respondent was found

by the Referee to have knowingly averred false facts to a court and that said false facts were sworn to by the Respondent. (SR 37-39)

In Respondent's Amended and Verified Motion to Issue Rule to Show Cause for Assistant State Attorney Alberto Milian, Respondent under oath stated false facts. (See SR 19-26 and Referee's Findings, SR 38). The Court in The Florida Bar v. O'Malley, 534 So. 2d 1159 (Fla. 1988), held that a lawyer may commit no greater professional wrong than deliberately and unequivocally lying under oath. Id at 116. The O'Malley court further stated:

> Our system of justice depends for its existence on the truthfulness of its officers. When a lawyer testifies falsely under oath, he defeats the very purpose of legal inquiry. Such misconduct is grounds for disbarment. (citation omitted).

The instant Respondent in his motion, submitted under oath (SR 19-26), false facts (SR 19-26) and the Referee found he acted knowingly (SR 19-26).

Respondent has failed in his petition for review to sustain the burden required of him in Rule 3-7.7(c)(5) of the Procedures before the Supreme Court of Florida. Rule 3-7.7(c)(5) requires that the Respondent upon petition for review demonstrate that the Report of Referee is erroneous, unlawful or unjustified.

Respondent has failed to sustain such burden and the Report of Referee therefore, as to Count I, must be affirmed.

ARGUMENT

II

THE LETTERS SENT BY THE RESPONDENT TO WITNESSES IN A CRIMINAL CASE WERE IN VIOLATION OF RULE 4-4.1(a) BASED UPON THE FACT THAT THE LETTERS CONTAINED A FALSE STATEMENT OF FACT.

The Respondent disputes the Referee's findings of guilt as to Count II, wherein the Referee found that Respondent violated Rule 4-4.1(a) of the Rules Regulating Professional Conduct. (SR 38) Said Rule provides, that "a lawyer shall not knowingly make a false statement of material fact or law to a third person." Respondent in his second argument attempts to support his position in a manner similar to the manner proposed and contained in Argument I.

The Respondent continues to incorrectly apply the facts and law contained in the Burke, Bariton and Weidenbenner cases which are inapplicable to the instant facts. These cases base their findings upon conduct charging dishonesty, fraud, deceit, or misrepresentation, found under Rule 4-8.4(c) of the Rules Regulating Professional Conduct.

Although the Respondent was charged with a violation of Rule 4-8.4(c) he was not found guilty of it by the Referee. Therefore, Respondent's argument related to these cases as cited relate to a different charge and should be dismissed as inapplicable.

The Referee's recommendation that the Respondent be found guilty of violating Rule 4-4.1(a), for writing letters to the witnesses in the Stidham matter which advised them that they "were being compelled by the Court to contact defense counsel in addition to the State Attorney's Office, prior to trial" (SR 27-30), when no

such court order existed was a correct finding by the Court. (SR 19-26)

As was held in The Florida Bar v. Weidenbenner 614 So 2d 484 (Fla. 1993), it should be noted that a "Referee's findings of fact in attorney disciplinary case are presumed correct and will be upheld on appeal unless clearly erroneous and lacking in evidentiary support."

Judge Susan Lebow, the trial judge in the Stidham matter, testified before the Referee that she had no recollection of ordering or compelling the witnesses to contact the Respondent and that the statement contained in the Respondent's letters to the witnesses was inaccurate. (ST E 32-33) Judge Lebow's testimony, provides the requisite evidentiary support to uphold the Referee's finding.

The Referee's finding in the instant matter was properly based upon the evidence presented in this cause. The Respondent has made no showing that any error was committed by the Referee. The findings made herein therefore, enjoy the presumption of the correctness and must be affirmed by this Court.

ARGUMENT

III

NEITHER THE ELEMENTS OF LACHES NOR ESTOPPEL WERE PROVEN BY RESPONDENT AS EVIDENCED BY THE REFEREE'S FINDINGS OF GUILT AND RECOMMENDATION OF DISCIPLINE.

A suit is barred on the grounds of laches only where the following factors are present:

a. Conduct by a defendant which give rise to the complaint;

b. Delay by a complainant in asserting their rights despite having had notice or knowledge of the misconduct and opportunity to institute the suit;

c. Lack of knowledge by defendant that the Complainant would assert the right on which the suit is based;

d. Injury or prejudice if the Complainant is afforded relief. (See The Florida Bar v. McCain, 361 So 2d 700 (Fla. 1978).

A review of the record in the instant matter clearly indicates that the Respondent has failed to establish the four elements necessary to demonstrate laches. Not only did the testimony and evidence presented show that Respondent had knowledge of The Florida Bar's potential and actual claims against him, but Respondent has failed to show that any prejudice resulted to him based upon The Florida Bar's being afforded the relief it sought.

Testimony at trial by Arlene K. Sankel, indicated that she had knowledge of Respondent's case because it was already pending at the grievance committee and being investigated for possible misconduct when she came to the position of Assistant Staff Counsel for The Florida Bar in 1992. (ST C 42-43) Warren Stamm, a former Assistant Staff Counsel for The Florida Bar who handled

Respondent's case prior to Ms. Sankel's assuming the position, testified that he advised that Respondent that the entire "Stidham" matter was closed sometime prior to 1991. (ST C 24-26) While this testimony by Stamm was not supported by any documentary evidence, it was vividly contradicted by the evidence and by the testimony of the Bar's witness, Arlene K. Sankel. Ms. Sankel stated that she received the case in an open status and that the matter had never been closed. (ST C 42)

Regardless of whether an investigation of Respondent's conduct had previously been closed, the Rules Regulating The Florida Bar permit a file to be reopened at a subsequent time. See Rule 3-7.4(j). Accordingly, while the witness Sankel testified that she inherited the file as an open and pending matter at the grievance committee, (ST C 42,43) the issue raised by the Respondent is irrelevant to dismissal of this cause, in that, there would have been nothing improper in the reopening of the file even if it had been previously closed. Rule 3-7.4(j).

Moreover, Respondent has grossly failed to show that any prejudice resulted to him by reason of the Bar's proceeding. Not once has Respondent successfully pointed to any particular matter which he was unable to defend, based upon any lapse of time between The Florida Bar's discovery of the alleged misconduct and the filing of the Complaint.

Laches is not predicated on a mere lapse of time, but requires a finding of unexplained or unexcused delay for an unreasonable length of time. Block v. Ferguson, 47 So 2d 694 (Fla. 1950). The record in the present proceeding indicates that Respondent was

advised of the continuing nature of an investigation of his conduct. No unexplained or unreasonable delay occurred To the contrary, once having acquired knowledge of the misconduct, the Bar proceeded to investigate what appeared to be ethical violations. (ST C 42-49) Further, Respondent was notified on more than one occasion that the Bar was investigating possible misconduct on his part. Having been placed on notice, Respondent had ample opportunity to obtain and preserve evidence which he determined necessary to his defense. Unavailability of such evidence, if any, cannot be blamed on the Bar and has not been shown to have resulted in any injury to the Respondent. The only evidence that Respondent alleged in furtherance of his argument was related to charges in Count III of the Bar's Complaint which involved Respondent's actions in the State v. Reimer, in case No. 00064 IS, Traffic Division, in the County Court of the Eleventh Judicial Circuit in and for Dade County Florida. As to Count III, the Respondent was found not guilty by the Referee. (ST C 54) Clearly no prejudice has occurred or can be shown.

The Referee did not fail to rule upon the Respondent's Motion to Dismiss, predicated on arguments of laches and estoppel. In fact, the contrary is true. By having heard and considered testimony and evidence in support thereof and thereafter having made findings of misconduct and recommendations of discipline, the Referee by implication denied the Respondent's Motion to Dismiss and correctly concluded that no valid evidence existed to support Respondent's theories.

ARGUMENT

IV

THE RESPONDENT WAS AFFORDED AMPLE OPPORTUNITY TO PRESENT EVIDENCE IN MITIGATION OF HIS CAUSE AT TRIAL AND PRIOR TO THE REFEREE'S DECISION OF THE MATTER.

Respondent has previously posed the argument that he was not afforded an opportunity to present mitigating evidence at trial to this Court, in his Motion for Reopening of Hearing Before the Referee. Said Motion was properly denied. The Florida Bar argued in Response to Respondent's motion, that the Respondent was afforded ample opportunity to present any and all mitigating factors to the Referee at trial. Respondent was invited to introduce such evidence on the final day of the trial. (ST D 30,33)

The Referee clearly and openly afforded Respondent an opportunity to discuss any factors in mitigation. The Honorable Jon I. Gordon cordially offered "...so if you have anything else that you want to give me as you would call it mitigation or otherwise, I'm going to invite you, please, to give it to me now." (ST D 30) Respondent's counsel then proceeded to proffer information concerning the Respondent's background to the Court in response to the Referee's invitation to present mitigation. (ST D 30,32) At the conclusion of counsel's remarks on mitigation, Respondent made no request for additional time to provide the Court with further commentary. Nothing toward the supplementation of the record concerning mitigation was requested by the Respondent or his counsel.

Later in the trial, the Referee provided another opportunity

for the Respondent to raise any unfinished business with the Court. Any issues of concern could have been raised at that time before the Referee took the matter under advisement for a ruling. The Court stated, "All right, I'll tell you what, unless you feel you have something further to share with me, I will take this matter under advisement and give you a ruling rather promptly..." (ST D 33)

To this final pronouncement and prior to the Referee retiring to decide the case, the Respondent had a final opportunity to raise any unfinished issues with the Court. Respondent gave no indication whatsoever that additional factors of mitigation should be considered or needed to be offered.

At no time did the Referee caution, prohibit or limit the Respondent from presenting or offering factors in mitigation of his cause to the Court. Mitigation had in fact already been offered. (ST D 30-32)

It is believed by the Bar that the Respondent may, in retrospect, had wished to present additional information to the Court. Respondent now seeks to have those additional matters heard by incorrectly claiming that he was prohibited from doing so at trial. The facts do not support such a position and the law does not provide such an opportunity under the instant circumstances.

Respondent's claim that mitigation was not allowed is simply untrue. The record aptly reflects the Referee's offer to hear mitigation from the Respondent on two separate occasions. (ST D 30-33) The Referee made specific reference on at least one occasion that his offer was an opportunity to present "as you would

call it, mitigation". (ST D 30) The fact that such an opportunity was not utilized by the Respondent, was not fault or error by the Referee.

No valid reasons have been proposed for further consideration of this argument. Respondent's argument lacks substance and should therefore be denied.

ARGUMENT

V

THE REFEREE PROPERLY TAXED THE COSTS OF THIS PROCEEDING AGAINST THE RESPONDENT.

In dealing with the issue of costs, the Court in The Florida Bar v. Miele, 605 So. 2d 866, 867 (Fla. 1992) held that "[a]ssessment of costs in attorney disciplinary proceeding is within the referee's discretion and will not be reversed absent abuse of discretion." The Court further stated that "[a]ssessment of costs of attorney disciplinary proceeding against attorney was not abuse of discretion, even though Bar did not prove all of its allegations against attorney; but for attorney's misconduct, there would have been no complaint, thus no costs." Id.

Under Rule 3-7.6(k)(1)(E) in the Procedures Before A Referee, it is stated that, the Referee's Report shall include a statement of costs incurred by The Florida Bar and recommendations as to the manner in which such costs shall be taxed. The costs of the proceedings shall include investigative costs, including travel and out of pocket expenses, court reporter's fees, copying costs, witness and traveling and out of pocket expenses of the referee and bar counsel, if any. Costs shall also include a $500.00 charge for administrative costs. Costs taxed shall be payable to The Florida Bar." Id.

The Referee issued his Report of Referee on November 23, 1993. (See Appendix I). The Florida Bar submitted its Statement of Costs on November 29, 1993, Amended Statement of Costs on December 2,

1993 and Second Amended Statement of Costs of December 3, 1993. (See Appendices II, III and IV). The Referee received copies of all of the above-listed Statements of Costs and did not change his ruling in his Report of Referee taxing all of The Florida Bar's costs against the Respondent. (See Appendix I). The Referee did not abuse his discretion by not setting a hearing on this issue.

As previously stated, investigative costs are properly included, pursuant to Rule 3-7.6(k)(1)(E) of the Rules of Discipline.

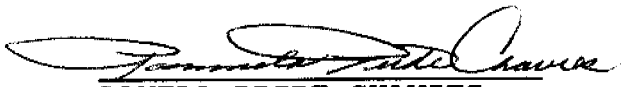
Respondent incorrectly alleges in his brief that, The Florida Bar did little or no investigation. (R 26) The Florida Bar's Statements of Costs clearly reflects investigation performed in this matter. Respondent further incorrectly states that The Florida Bar called no witnesses other than the Respondent, (R 26) the record clearly reflects that The Florida Bar called as to Counts I and II the following witnesses: Alberto Milian, Esq., Arlene K. Sankel, Esq. and Judge Susan Lebow. (ST A 87, ST C 42, ST A 114)

Accordingly, the Referee properly taxed the costs of this proceeding against the Respondent and same should not be remanded to the Referee.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the findings set forth in the Report of Referee.

The discipline recommended by the Referee is based upon findings of fact which are merited in light of the violations committed by the Respondent and support the costs incurred in this proceeding.



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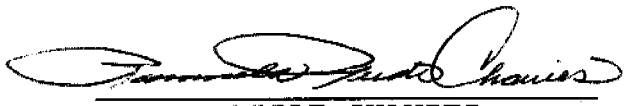
Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Answer Brief was forward via Express Mail to Sid J. White, Clerk Supreme Court, 500 South Duval Street, Tallahassee, Florida, 32399-1927 and via U.S. mail, true and correct copies to Richard Hersch, Counsel for Respondent, 2937 S.W. 27th Avenue, Suite 301, Coconut Grove, Florida 33133, to Sean J. Greene, Esq., Counsel for Respondent, 1411 N.W. North River Drive, Miami, Florida 33125 on this 30th day of April, 1994.



PAMELA PRIDE-CHAVIES
Bar Counsel

INDEX TO APPENDIX

A P P E N D I X

Appendix Part 1

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

Complainant,

v.

Michael A. Catalano,

Respondent,
_____/

Supreme Court Case No. 81,809

The Florida Bar File No.
91-71,669(11D)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates: October 28, 1993, November 1, 1993, November 9, 1993, November 15, 1993, and November 17, 1993.

The following attorneys appeared as counsel for the parties:

For the Florida Bar: Pamela Pride-Chavies, Esq.

For the Respondent: Richard Hersch, Esq.

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, pertinent portions of which are commented upon below, I find:

As to Count I

That the Respondent, Michael A. Catalano is guilty of violation of Rule 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal) of the Rules of Professional Conduct, in that he knowingly averred in his Amended and Verified Motion to Issue Rule to Show Cause for Assistant State Attorney Alberto Milian (in and for the 17th Judicial Circuit, Broward County, Florida, Criminal Case # 88-31860 MM 10-A), that said "Mr. Milian agreed in open court, with Judge Lebow that he would cooperate with the defense and see to it that the witnesses appear at time of trial for the Defendant and that they contacted defense counsel before trial ...," when said averment as to contacting defense counsel before trial was in fact false.

As to Count II

That the Respondent, Michael A. Catalano, is guilty of violation of Rule 4-4.1(a) (in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person) of the Rules of Professional Conduct in that he knowingly represented to one John Nixon and to one Lisa Shoop by letter that Judge Lebow had entered an order compelling them to contact Respondent's office, when said representation was in fact false.

As to all other charges, I find the Respondent not guilty.

III. Recommendation as to Disciplinary Measures to be Applied: As to the charges for which the Respondent has been found guilty, I recommend that he receive a public reprimand.

IV. Statement of Costs and Manner in Which Cost Should be Taxed: It is recommended that all cost and expenses be charged to the Respondent.

Dated this 19th day of November, 1993.

JON I. GORDON

Referee Jon I. Gordon
Circuit Court Judge

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on Pamela Pride-Chavies, Esq., at 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, Richard Hersch, Esq., at 2937 S.W. 27th Avenue, Suite 301, Miami, Florida 33133, and John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 19th day of November, 1993.

FILE COPY

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

Complainant,

vs.

MICHAEL A. CATALANO,

Respondent.

_____/

The Florida Bar File
No. 91-71,689(11D)

Supreme Court Case
No. 81,809

THE FLORIDA BAR'S STATEMENT OF COSTS

THE FLORIDA BAR, through undersigned Counsel, hereby files it's Statement of Costs incurred in the above-referenced case numbers:

Administrative Costs

(Pursuant to Rule 3-7.5(k) (5) of the Rules of Discipline).....	$500.00
Court Reporter Costs (Personal Touch) (Grievance Committee Hearing 6/9/93 Attendance & Transcripts.....	$93.55
Court Reporter Costs (Brickell, Gomberg) (Grievance Committee Hearing 10/28/93 Attendance and Transcript.	$346.70
Court Reporter Costs (Brickell, Gomberg) (Final Hearing 11/9/93, 11/10/93 & 11/17/93 Attendance & Transcripts.....	$_____
Investigator Costs (Jim Crowley).....	$918.12
Investigator Costs (Art Gill).....	$38.88
Bar Counsel Costs (Pamela Pride-Chavies).....	$41.10
SUB-TOTAL:	$1,938.35
TOTAL:	$_____

Dated this 29th day of November, 1993.

Respectfully submitted,

PAMELA PRIDE-CHAVIES
Bar Counsel
#497010
The Florida Bar
Rivergate Plaza, Suite M-100
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the original of The Florida Bar's Statement of Costs was forwarded to Sid J. White, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies of the foregoing were mailed to The Honorable Jon I. Gordon, Referee, Dade County Courthouse, 73 West Flagler Street, Room 400, Miami, Florida 33130, to Richard Hersch, Counsel for Respondent, 2937 S.W. 27th Avenue, Coconut Grove, Florida 33133 via Certified Mail, Return Receipt Requested No. P 153 515 924 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 29th day of NOVEMBER, 1993.

PAMELA PRIDE-CHAVIES
Bar Counsel

c:\pleading\costs

SENDER:
- Complete items 1 and/or 2 for additional services.
- Complete items 3, and 4a & b.
- Print your name and address on the reverse of this form so that we can return this card to you.
- Attach this form to the front of the mailpiece, or on the back if space does not permit.
- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):
1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Richard Hersch Esq,
2937 S.W. 27 Ave.
Suite 301
Coconut Grove, FL
33133

4a. Article Number
P 153 515 924

4b. Service Type
☐ Registered ☐ Insured
☒ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
12-16-93

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
[signature]

PS Form **3811**, December 1991 ☆ U.S.G.P.O.: 1992-307-530 **DOMESTIC RETURN RECEIPT**

Is your RETURN ADDRESS completed on the reverse side?

Thank you for using Return Receipt Service.

Costs
Catalano
97,709 (110)

P 153 515 924

Receipt for Certified Mail

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to Richard Hersch, Esq	
Street and No. 2937 S.W. 27 Ave.	
P.O., State and ZIP Code Suite 301	
Postage Coconut Grove,	$
Certified Fee FL 33133	2.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form **3800**, June 1991

Appendix Part 3

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

FILED

THE FLORIDA BAR

Complainant,

vs.

MICHAEL A. CATALANO,

Respondent.

_____/

The Florida Bar File
No. 91-71,689(11D)

Supreme Court Case
No. 81,809

THE FLORIDA BAR'S AMENDED STATEMENT OF COSTS

THE FLORIDA BAR, through undersigned Counsel, hereby files it's Amended Statement of Costs incurred in the above-referenced case numbers:

Administrative Costs

(Pursuant to Rule 3-7.5(k) (5) of the Rules of Discipline).....	$500.00
Court Reporter Costs (Personal Touch) (Grievance Committee Hearing 6/9/93 Attendance & Transcripts.....	$93.55
Court Reporter Costs (Brickell, Gomberg) (Grievance Committee Hearing 10/28/93 Attendance and Transcript.	$346.70
Court Reporter Costs (Brickell, Gomberg) (Final Hearing 11/9/93, 11/10/93 & 11/17/93 Attendance & Transcripts.....	$_____
Investigator Costs (Jim Crowley).....	$1,630.56
Investigator Costs (Art Gill).....	$38.88
Bar Counsel Costs (Pamela Pride-Chavies).....	$41.10
SUB-TOTAL:	$2,650.79
TOTAL:	$_____

Dated this 2 day of DECEMBER, 1993.

Respectfully submitted,

PAMELA PRIDE-CHAVIES
Bar Counsel
#497010
The Florida Bar
Rivergate Plaza, Suite M-100
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the original of The Florida Bar's Amended Statement of Costs was forwarded to Sid J. White, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies of the foregoing were mailed to The Honorable Jon I. Gordon, Referee, Dade County Courthouse, 73 West Flagler Street, Room 400, Miami, Florida 33130, to Richard Hersch, Counsel for Respondent, 2937 S.W. 27th Avenue, Coconut Grove, Florida 33133 via Certified Mail, Return Receipt Requested No. P 843 394 790 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 2nd day of DECEMBER, 1993.

PAMELA PRIDE-CHAVIES
Bar Counsel

c:\pleading\costs

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SENDER:
- Complete items 1 and/or 2 for additional services.
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- Print your name and address on the reverse of this form so that we can return this card to you.
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- Write "Return Receipt Requested" on the mailpiece below the article number.
- The Return Receipt will show to whom the article was delivered and the date delivered.

I also wish to receive the following services (for an extra fee):

1. ☐ Addressee's Address
2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to:
Richard Hersch Esq,
2937 S.W. 27 Ave. #301
Coconut Grove, FL
33133

4a. Article Number
P843 394 790

4b. Service Type
☐ Registered ☐ Insured
☑ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery
12-6-93

5. Signature (Addressee)

8. Addressee's Address (Only if requested and fee is paid)

6. Signature (Agent)
Jamie Bocma)

PS Form 3811, December 1991 ☆U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

Thank you for using Return Receipt Service.

Amnesty Staff Costs

P 843 394 790

Receipt for Certified Mail

No Insurance Coverage Provided
Do not use for International Mail
(See Reverse)

Sent to: Richard Hersch Esq.	
Street and No.: 2737 S.W. 27 Ave. #301	
P.O., State and ZIP Code: Coconut Grove, FL	
Postage 33133	$
Certified Fee	2.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form 3800, JUNE 1991

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

Complainant,

vs.

MICHAEL A. CATALANO,

Respondent.

_____/

The Florida Bar File
No. 91-71,689(11D)

Supreme Court Case
No. 81,809

THE FLORIDA BAR'S SECOND AMENDED STATEMENT OF COSTS

THE FLORIDA BAR, through undersigned Counsel, hereby files it's Second Amended Statement of Costs incurred in the above-referenced case numbers:

Administrative Costs

(Pursuant to Rule 3-7.5(k) (5) of the Rules of Discipline).....	$500.00
Court Reporter Costs (Personal Touch) (Grievance Committee Hearing 6/9/93 Attendance & Transcripts.....	$93.55
Court Reporter Costs (Brickell, Gomberg) (Grievance Committee Hearing 10/28/93 Attendance and Transcript.	$346.70
Court Reporter Costs (Brickell, Gomberg) (Final Hearing 11/9/93, 11/10/93 & 11/17/93 Attendance & Transcripts.....	$1,375.50
Investigator Costs (Jim Crowley).....	$1,630.56
Investigator Costs (Art Gill).....	$38.88
Bar Counsel Costs (Pamela Pride-Chavies).....	$41.10
TOTAL:	$4,026.29

Dated this 3rd day of DECEMBER, 1993.

Respectfully submitted,

PAMELA PRIDE-CHAVIES
Bar Counsel
#497010
The Florida Bar
Rivergate Plaza, Suite M-100
444 Brickell Avenue
Miami, Florida 33131
(305) 377-4445

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that the original of The Florida Bar's Second Amended Statement of Costs was forwarded to Sid J. White, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies of the foregoing were mailed to The Honorable Jon I. Gordon, Referee, Dade County Courthouse, 73 West Flagler Street, Room 400, Miami, Florida 33130, to Richard Hersch, Counsel for Respondent, 2937 S.W. 27th Avenue, Coconut Grove, Florida 33133 via Certified Mail, Return Receipt Requested No. P 843 394 791 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 5th day of DECEMBER, 1993.

PAMELA PRIDE-CHAVIES
Bar Counsel

c:\pleading\costs

2ND Amended Statement of Claim

P 843 394 791

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UNITED STATES POSTAL SERVICE

Sent to: Richard Hensch Esq.	
Street and No. 2937 SW. 27 Ave., #301	
P.O., State and ZIP Code Coconut Grove FL 33133	
Postage	$
Certified Fee	2.00
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to Whom & Date Delivered	
Return Receipt Showing to Whom, Date, and Addressee's Address	
TOTAL Postage & Fees	$
Postmark or Date	

PS Form **3800**, JUNE 1991

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- Complete items 3, and 4a & b.
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2. ☐ Restricted Delivery

Consult postmaster for fee.

3. Article Addressed to: Richard Hensch Esq. 2937 SW. 27 Ave, #301 Coconut Grove, FL 33133

4a. Article Number P 843 394 791

4b. Service Type
☐ Registered ☐ Insured
☐ Certified ☐ COD
☐ Express Mail ☐ Return Receipt for Merchandise

7. Date of Delivery 12-10-93

8. Addressee's Address (Only if requested and fee is paid)

5. Signature (Addressee)

6. Signature (Agent) Richard Hensch

PS Form **3811**, December 1991 *U.S. GPO: 1993—352-714 **DOMESTIC RETURN RECEIPT**

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