IN THE SUPREME COURT OF FLORIDA

The Florida Bar,

Complainant,

vs.

Michael A. Catalano,

Respondent.

_____/

Case No.:81,809

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

A PETITION FOR REVIEW FROM A FINAL RULING OF A REFEREE IN A FLORIDA BAR DISCIPLINARY PROCEEDING

BRIEF OF RESPONDENT

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INTRODUCTION

The Respondent, Michael A. Catalano is a member of the Florida Bar. The Florida Bar is the Complainant herein. Before the Referee below, the parties were in the same position as there are before this Honorable Court. Therefore, in this brief, the parties will be referred to as they exist in this petition to the Florida Supreme Court.

The Florida Bar and the Clerk of the local court have not prepared an indexed "record" on appeal so, simultaneous with the filing of this Brief of the Respondent, a complete supplemental record (SR) will be filed with a separate motion to accept it as the record on appeal along with all necessary transcripts (ST). The symbol, "R" will be used to designate the Record on Appeal and "SR" to designate the Supplemental Record on Appeal. The symbol, "T" will designate the transcripts of proceedings below and "ST" will designate the Supplemental Transcripts on appeal. Any other documents will be given specific references so that they can be located in this Supreme Court file.

All emphasis has been supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Florida Bar filed a complaint against the Respondent alleging minor misconduct arising out of the actions of Respondent during his representation of the Defendant in ***State of Florida v. April Stidham***, Broward County Court Case No. 88-31860 MM 10 A. (SR-1-8). Despite the fact that Bar Counsel Warren Stamm found no probable cause to believe any Bar rule was violated by the Respondent and closed his file in late July of 1990 (ST-B-54-59), and despite the fact that the trial judge who presided over the ***Stidham*** matter in 1989 and 1990 firmly believed that the Respondent had violated no Bar rules (ST-E-25;27-28), the Referee found the Respondent guilty of minor misconduct. (SR-37-39).

The Florida Bar presented a 3 count complaint against the Respondent. All counts charged "minor misconduct." (SR-1-8). All counts contained numerous alleged violations of Bar rules. After the hearing before the Referee, the Referee found the Respondent guilty of violating only two specific rules and specifically found the Respondent **not** guilty of all other allegations. (SR-39). The Bar has not appealed the ruling of the Referee. The Respondent herein now appeals only the part of the ruling finding him guilty of violating two specific rules. Therefore, the Respondent will not address the allegations found in count III of the complaint. The Respondent was found guilty of violating two Bar rules. In essence, the Respondent was found guilty of intentionally telling witnesses that they had to contact his office, **in addition** to the prosecutors office for trial testimony scheduling purposes. There are no allegations in this entire matter that the Respondent had any ill motive or devious reasons for advising the witnesses to call his office, pursuant to what he had good reason to think was a court order compelling both the State and Defense to work together to coordinate the appearance of numerous witnesses at a jury trial.

The Respondent primarily practices as a criminal defense attorney in South Florida. The facts that gave rise to the instant complaint concern the Broward County Misdemeanor case of ***State v. April Stidham***. On December 22, 1988, client April Stidham was arrested in Broward County, Florida and charged with misdemeanor DUI. (SR-19-26). Respondent entered pleas on behalf of Stidham and represented her on a *pro bono* basis. (SR-21).

The ***Stidham*** matter was originally prosecuted by Assistant State Attorney Alberto Milian. The Respondent proceeded with normal discovery actions by obtaining police reports and taking full and complete depositions of all the witnesses listed by the State in the State's discovery response. (SR-20). During the discovery process, the Respondent learned that almost all of the State's witnesses had testimony to give that was actually more beneficial to the Defense than to the State. (SR-20-21). Additionally, the Respondent learned that the police officers who arrested Stidham were acting outside their police jurisdictional boundaries. Consequently, the Respondent filed a pre-trial motion to suppress evidence because of an illegal detention. (SR-19).

Upon receiving the Motion to Suppress, the prosecutor, Alberto Milian became outraged with the Respondent and made threats to him on the phone. The Respondent brought the problem to the attention of the trial judge, County Court (now Circuit Judge) Susan Lebow. A hearing was conducted upon the motion to suppress and Judge Lebow denied the motion. Thereafter, the trial of the matter was set. (SR-20.)

As a result of her indigent status, Stidham's subpoenas for both depositions and trial had to be served by the Broward County Sheriff's office. (SR-9-18). The Sheriff at the time was Nick Navarro. The Respondent had great difficulty in getting the Sheriff's office to serve the indigent subpoenas and brought the problem to the attention of the trial judge, Judge Lebow by

filing a motion and setting it down before the Judge.[1] (ST-9-18; ST-E-14).

On October 13, 1989, the case was set for calendar call before Judge Lebow. It was routine practice in Judge Lebow's court to call the calendar on a Friday and see which cases were ready to proceed to trial the following week. (ST-E-14). Stidham wanted to compel the attendance of many (12) police and civilian witnesses at the trial and Respondent displayed numerous "stand by" subpoenas to Judge Lebow and explained that he would have been ready for trial the following week but for the Sheriff's Office refusing to serve the subpoenas. (SR-10-13). These subpoenas appear at SR-31-32. At the beginning of the hearing, the Respondent explained his frustration in getting indigent subpoenas served upon the witnesses. (SR-11-12.) The prosecutor, Mr. Milian said he was "shocked" by the treatment the Respondent was receiving from the Sheriff's office. (ST-12). The trial judge immediately commented that, "None of the defense lawyers are shocked; none of them are shocked." (SR-12). The critical transcript is that which occurred on October 13, 1989 and is attached as SR-9-18. When the issue of the service of the subpoenas arose, the following discussion was had:

> MR.MILIAN: I think what he's saying he needs to get the subpoenas served.
>
> MR. CATALANO: There is one way I could be ready, if the state subpoenas these people, **if they help**. They are all State witnesses.
>
> MR. MILIAN: I didn't subpoena all the witnesses. I know who he's talking about. I
> did not subpoena all of them.
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> MR. CATALANO: I'm trying to get ready. I really am.

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[1] Judge Lebow was well aware of the problem, having had numerous other cases delayed because the same "service of process" problems. The Sheriff's Office would hold the timely presented subpoenas for days or weeks and then, when it was too late to serve them, would mail them back to the defense attorney and mark them as delivered too late to serve. (SR-11-13.)

THE COURT: I know you are. This is ridiculous.

MR. CATALANO: We can reset on the calendar. I have a suggestion, Judge. I have a proposed order setting for a rule to show cause. You sign this. Your clerk gives me one. I'll have my independent process server serve Mr.Navarro.

MR. MILIAN: I think Mr. Catalano we should reset. I would suggest that the Court issue an order for BSO, whatever division, to serve the subpoenas, whoever he wants served. I think that would be sufficient.

THE COURT: **I'm giving you an order compelling them to serve the subpoenas within five days of the date of the order.** We'll set this for a date certain for trial.

MR. MILIAN: I don't think I need a rule. **I'll cooperate with the Court to have the State witnesses present.** (emphasis supplied.)

(SR-12-13). Thus the question of service of Stidham's subpoenas was squarely addressed. The significance of this is as follows. Contained in these subpoenas **is the direction to the witness to contact the office of the Respondent for scheduling purposes**. At this point in the hearing there existed an order of the court to the parties **to serve the Defendant Stidham's subpoenas**. (SR-13).

Subsequently, the prosecutor raised the potential problem of some witnesses being unavailable for a newly selected trial date. The following discussion ensued:

THE COURT:... Let's do this, Mr. Catalano. If you want, I guess, wait until next week if we know for sure if he [referring to the prosecutor], has any witness problems. If I find [sic] your order compelling you to serve those subpoenas and you serve them for the 28th and he comes back and he needs a continuance on the 28th, then you have got to re do them.

MR.MILIAN: I'll tell you what, Judge. If I get back to you and all the witnesses are available under those dates, if you like, **I'll issue mandatory subpoenas to all of the witnesses, all of the witnesses that are submitted on the witness list. That would be**

> **sufficient. Then, the remedy would be the same. If would be holding them in contempt if the court accept it for the purposes of expediency.** I would hate to see the Sheriff have to be held in contempt and give an explanation. I think we can do that. **It will be more expedient with the same subpoena power.**
>
> MR. CATALANO: I want to make sure they are all coming. You know, it is a car accident. She [referring to Defendant Stidham] got hurt. They all say she wasn't drunk. I would like them all to come in a tell the jury.
>
> THE COURT: **So the State will issue mandatory subpoenas for all the witnesses on your list?**
>
> MR. MILIAN: **Yes.** (emphasis supplied).

(SR-16-17). Thus, the State agreed to serve subpoenas to insure the attendance of **Stidham's witnesses.** Further, the exact words of the prosecutor were that he would provide Stidham with the same remedy as service of the original Stidham subpoenas. (ST-16). As noted above, the original Stidham subpoenas contained an order of the Court directing the witnesses to contact defendant's counsel, the Respondent. (SR-31-32).

Five days after the calendar call, the Respondent sent a letter to each witness asking them to contact his office, **in addition** to the State Attorney's office for trial testimony scheduling purposes. (SR-27-30). These letters formed part of the basis for Count II of the Bar's Complaint for Minor Misconduct. (SR-3-5). The other portion of Count II alleged a Bar violation for the sending of the subpoenas.[2] The Referee found no violation of the Bar Rules in regard to the

[2] As is noted later, when prosecutor Milian reneged on his agreement to cooperate with Respondent in insuring the attendance of the defense witnesses, Respondent successfully served the very same subpoenas as had been addressed on October 13th, 1989. It is the issuance of these subpoenas about which the Bar complained. These subpoenas can be found at (SR-3-5).

issuance of the subpoenas. (SR-39) [3] Oddly, the Referee then found the Respondent guilty of making a false representation in the letters sent to the witnesses. (SR-38). The Referee made no specific finding however that the Respondent **intentionally** mislead the witnesses by sending the letters. (SR-37-39). Rather, the Referee failed to address, in his Report, the language in the October 13th transcript and all the other evidence that showed that the Respondent did not violate any rules at all.

After the sending of these letters to the witnesses and copies to the prosecutor and the Court, Mr. Milian called the Respondent and threatened him with criminal prosecution for even attempting to contact the witnesses. (SR-22). He did this even thought the witnesses were the same ones he said he was trying to help bring to court to testify. He said that the Respondent was "tampering" with his witnesses by contacting them via the letter and that the Respondent could only contact them after he "first approved of it." (SR-22).

It was later learned that Mr. Milian called most of the witnesses and told them to ignore the Respondent's letter. He basically told them not to appear in court unless **he** wanted them there. (SR-19-25). Sometime thereafter, Prosecutor Milian was formally asked to leave Judge

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[3] The Bar complained that the sending of the letter violated the Bar Rules because there was no specific order to contact the Petitioner. The Petitioner agrees with the Bar that there was no specific order compelling each witness to call the Petitioner before the trial but, inherent in the Court's order was an order compelling the service of "these subpoenas" (SR-31-32). The subpoenas referred to as "these subpoenas" are the stand-by subpoenas that were routinely used by both the State and almost all defense attorneys in Judge Lebow's court. Stand-by subpoenas would be useless if the witness receiving one didn't know how they were expected to comply with the subpoena. When asked about the issue, Judge Lebow said that she did not think that the Petitioner violated any Bar Rules by sending the letters or the subpoenas. During the trial before the Referee, Judge Lebow, said that knowing everything she knows about the instant matter [the Bar complaint and the criminal litigation], she firmly felt that the Petitioner violated no bar rules. If the Petitioner had, Judge Lebow would have had an affirmative duty to report the matter to the Bar. The Petitioner explained that the only purpose in having the witnesses contact his office was so that they could be called to testify at the appropriate time and not be inconvenienced by sitting outside the courtroom for many days waiting for their turn to speak.

Lebow's court permanently because, as Judge Lebow said, he was simply obnoxious. (ST-E-12.)[4]

So, the witnesses, who had no reason to distrust the Respondent, after friendly dealings with the Respondent during the pre-trial depositions, were now, as Judge Lebow later said... "confused." (ST-E-31). They received a letter and later a subpoena from the Respondent telling them to come to court and a phone call from the prosecutor telling them to ignore the Respondent's attempts to have them in court to testify for the Defendant. (***Id.***)

Fearing that the witnesses would not appear at trial, the Respondent sent the Sheriff's office a complete set of stand-by subpoenas for each witness. (SR-21-2;31-2). This time, the Sheriff served them all and sent returns of service to the Respondent. As noted above, these subpoenas served as the basis for part of Count II of the instant complaint for misconduct. (SR-3-5). The Respondent was found not guilty of any wrongdoing in regard to these subpoenas and the Bar has not appealed this finding. (SR-39).

Shortly before trial, only Police Officer Gordon and the Bowen family witnesses contacted the Respondent's office about scheduling. (SR-22). At the trial, the State, via a new prosecutor, Mr. Hankin, had to send out their investigators to find the witnesses and explain to them that despite what Mr. Milian had said, they had to appear and testify. (SR-22-36). Eventually everyone testified and Ms. Stidham, the Defendant, was convicted.

After the trial, Judge Lebow asked the Respondent to prepare a written motion for rule

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[4] Prosecutor Milian has been recognized for his outbursts and heavy handed dealing with opposing counsel, jurors and the court. Twice, the Fourth District Court of Appeal publicly rebuked Mr. Milian in appellate opinions. In **Klepak v. State**, 622 So. 2nd 19 (Fla. 4th DCA 1993), the court said, "Even if this had been one isolated instance of an emotional outburst, Mr. Milian's conduct would have been deplorable. Unfortunately this incident was not isolated, **see Landry v. State**, 620 So. 2d 1099 (Fla. 4th DCA 1993)." In **Landry**, the court noted that Mr. Milian called the Defense attorneys "maggots" and "poor excuses for human beings" and reversed a criminal conviction because of Mr. Milian's improper comments to the Court, opposing counsel and the jury.

to show cause why Mr. Milian should not have been held in contempt of court pursuant to Fla. R. Crim. P. 3.840, 2.330 (i) and F. S. 914.22. (SR-19-27). A careful reading of the motion shows that Mr. Milian violated numerous rules and laws and obstructed the defense from preparing the Stidham matter for trial. (SR-19-27).[5] After the trial, Defendant Stidham appealed the conviction. [6]

The Grievance Committee voted to not institute Bar proceedings against Mr. Milian, (ST-B-53-60), and Stamm closed his file. Mr. Stamm testified before the Referee that in late July of 1990, he advised the Respondent that the entire matter was closed. (ST-B-52-60).

Approximately May of 1991, Mr. Stamm left the Bar and went into practice as a corporate attorney. (ST-B-5). The "Milian" file was then somehow assigned to a new Bar Attorney, Ms. Arlene K. Sankel. She reopened the matter and had it set before a grievance committee. (ST-C-42-50). The committee found minor misconduct on the Respondent's behalf. The Respondent rejected the report of the committee.

The Bar then filed a three count complaint alleging only "minor misconduct" and the

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[5] Judge Lebow recused herself from the matter and the motion for rule to show cause was transferred to another Broward County Judge, Judge Barry Seltzer, who declined to issue a rule to show cause but did suggest that the Florida Bar investigate Mr. Milian's actions. The matter was also sent to the Governor for a special prosecutor to investigate Mr. Milian's activities. The Special Prosecutor from Tampa took statements from many of the parties involved and declined to prosecute. Never did anyone, Judge Lebow, Judge Seltzer, the Tampa prosecutor or even Mr. Milian file any complaint with the Bar about the Respondent. To this date, no party to this action has ever filed a written complaint with the Bar about the Respondent. Instead, Mr. Milian called Bar counsel numerous times during and after the Bar found no probable cause to discipline him and insisted that the Bar prosecute the Respondent. (ST-B-60-63). The Bar somehow initiated it's own complaint that brings us now before this Honorable Court.

[6] The public defender of Broward County represented Defendant Stidham on appeal and the conviction was reversed. The appellate court ruled that the police officers were outside their jurisdiction and remanded the case with instructions to discharge the Defendant. The opinion became final and the State nolle prossed the case.

matter was set before Referee, Dade Circuit Court Judge Jon I. Gordon. (SR-1-8). Count I complained that the Respondent violated Bar Rule 4-3.3 (a)(1). The Rule makes it a Bar violation for an attorney to "Knowingly make a false statement of material fact or law to a tribunal." The Bar charged that the words in the Motion for Rule to Show Cause, "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 an that they contacted defense counsel before trial..." were in fact false. (SR-1-3).

Count II complained that the Respondent violated Bar Rule 4-4.1 (a). The Rule makes it a Bar violation for an attorney to "Knowingly make a false statement of material fact or law to a third person." The Bar also complained that the Respondent violated Rule 4-4.4 "In representing a client, a lawyer shall not use a means that have no substantial purpose other than to embarrass, delay or burden a third person or knowingly use method of obtaining evidence that violate the legal rights of such a person," Rule 4-8.4(c) and (d), "A lawyer shall not engage in conduct involving: (c) dishonesty, fraud, deceit, or misrepresentation; and (d) engage in conduct that is prejudicial to the administration of justice." (SR-3-5).

A trial upon the complaint was had before Referee Gordon. Although the Referee's report does not state a factual basis for his finding, he nevertheless found the Respondent guilty of violating two bar rules. (SR-37-39). He said as to Count I that the Respondent violated Rule 4-3.3 (a)(1)(a lawyer shall not knowingly make a false statement of material fact of law to a tribunal) when he filed the Motion for Rule to Show Cause. He said that the statements made in the Motion were in fact "false" even though the entire record shows that the statements were true or if not completely clear, then, the Respondent had a good faith basis for believing that the statements were true.

The Bar rested its case upon the transcript of the calendar call of October 13, 1989, the

testimony of the Respondent and brief testimony from Mr. Milian.[7] The Bar and the Referee ignore that fact that the same sworn motion also contains the language of..."See transcript for exact details...already transcribed and located in the Court file." (SR-21). The Respondent argued to the Referee that one can not intentionally make a false statement when the statement says to refer to a transcript for exact details and no one disputes the facts found in the transcript. The Respondent was obviously calling the reader's attention to the transcript to show the truth of the matter. (SR-21). So, unless there was no transcript (and there was), or it was not located in the court file (and it was), the Respondent argued that he could not have violated the Rule.

The Respondent testified at the hearing before the Referee and the Bar did not dispute the following facts:

1. The Respondent took pre-trial depositions of all the witnesses and knew what they were going to say at trial. Therefore, he had no improper reason to ask the witnesses to call his office to "gather" additional evidence by means of misstatements of the facts or law. (SR-19-26).

2. The Respondent had good and friendly relations with the witnesses. No witness from the Stidham case testified in the hearing before the Referee. No witness claimed the Respondent was rude, coercive, aggressive, or unethical in the Stidham matter. The Respondent had no reason to harass, intimidate or bother the witnesses. (ST-E-31).[8] To the contrary, the evidence

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[7] Mr. Milian was not listed in the Bar's pre-trial catalogue but, appeared on his on volition and the Referee allowed him to testify.

[8] The Respondent was charged with violating Rule 4-4.4, and 4-8.4(c) for the same conduct. The Referee found the Respondent guilty of violating Rule 4-4.1(a) which was **inconsistent** with his finding the Respondent not guilty of violating the other two rules. When the Referee found the Respondent not guilty of "dishonesty, fraud, deceit or misrepresentation, that showed clear proof that the Respondent had no ill reason to misrepresent any fact to any third person. (SR-19-26).

shows that all the Respondent was trying to do was make the trial testimony of the witnesses as convenient as humanly possible. It was Mr. Milian who caused problems with the witnesses. (SR-19-26).

3. The only reason the witnesses were to call the Respondent's office was to speak with the Respondent's secretary about scheduling. The letter says that the witnesses were to contact "my secretary, Maria, and talk to her about scheduling..." (SR-27-30). The letter goes on to say that if the witness does not call for purpose of scheduling, that the Respondent would bring the matter before the Judge. (SR-27-30). As Judge Lebow said in the hearing before the Referee, the letter could have been clearer but, on page two the Respondent clears up any confusion by telling the witnesses to call the Judge immediately if they are not sure about their obligation to the court. (ST-E-26).

4. Stand-by subpoenas are routinely used in the court for the convenience of the parties and the witnesses. (ST-A-32). The Bar's complaint alleged that the issuance of the subpoena was also in violation of the Bar rules. (SR-3-5). The Referee found the Respondent not guilty of that allegation. The subpoena in question was also sent to the witnesses and it says,

> Call the attorney listed below before the first date listed above to find out when you will be required to be present in court. Your failure to contact the below listed attorney **and** thereafter attend court could result in you being held in contempt of court **for your failure to appear.** (emphasis added).

(SR-31-32). Just as the subpoena said, the **purpose** of the subpoena was to have the witness show up in the courtroom at the needed time and date. The contempt provision was for failure to appear **and not for failure to call and talk with the attorney**. (SR-31-34). After carefully reading the entire subpoena, Referee Gordon found the Respondent not guilty of violating the same rule he later found him guilty of violating in reference to the letter and motion for rule to show cause. (SR-37-39).

5. The Respondent has an excellent reputation among the criminal bar. (ST-A-69). The Respondent is very experienced in DUI matters having been a DUI prosecutor and thereafter a successful and respected criminal defense attorney. (ST-A-69). The Respondent did not benefit from the alleged rules violations and had no reason to violate the rules he was convicted of violating.

As to Count II, the Referee found the Respondent guilty of violating Rule 4-4.1 (a)(in the course of representing a client a lawyer shall knowingly make a false statement of material fact or law to a third person), when, the Respondent sent the letters to the witnesses. (SR-37-39). Again, the Respondent argued that the letters contained the truth. Even if the letters are not perfectly clear, then, at worst the Respondent was negligent and the Rule can only be violated by clear and convincing proof of an intentional act.

The Respondent rejected the Referee's report and filed the instant petition before this Honorable Court.

The Respondent believes that he did not violate any Bar Rules and moves this Honorable Court to set aside the finding of the Referee and enter a final judgement of not guilty as to both counts.

SUMMARY OF THE ARGUMENTS

I

THE RESPONDENT DID NOT VIOLATE ANY BAR RULE. THE RESPONDENT DID NOT "KNOWINGLY MAKE A FALSE STATEMENT TO A TRIBUNAL" WHEN HE FILED A SWORN MOTION FOR RULE TO SHOW CAUSE AND SPECIFICALLY REFERRED TO A ALREADY FILED COURT TRANSCRIPT AS A FACTUAL BASIS FOR THE MOTION.

Respondent was charged with "knowingly making a false statement of fact or law to a tribunal" when he swore in a court pleading to the statement: "Mr. Milian (the prosecutor) 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 and that they contacted defense counsel before trial..." In fact, the allegations of the Bar neglected to point out that immediately following this statement was a citation to the transcript of proceedings of October 13, 1989. Respondent thus incorporated the transcript support or interpretation of his statement.

Further, Respondent's statements are a reasonable interpretation of what occurred on October 13, 1989. The court had initially ordered service of Respondent's subpoenas which contained a direction to the witnesses to contact Respondent's office for scheduling purposes. (The Bar initially charged that the issuance of these subpoenas was a violation as well. The Referee found no violation.) Milian agreed to serve mandatory subpoenas on **Respondent's witnesses** thereby effecting the "same remedy" as the compelled service. Respondent believed that the State had agreed to serve subpoenas and effect the same direction as was in the original "stand-by" subpoenas

Finally, the Referee made no specific finding that the Respondent intended to utter a false

statement. There existed no motive or interest for Respondent to intentionally misstate the facts, especially when he directed any reader of the pleading to the transcript of the proceedings. In the absence of a finding by the Referee, and in light of the fact that the facts do not support a finding of intent, the Referee's findings should be rejected as to Count I.

II

THE RESPONDENT DID NOT "KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON" WHEN HE SENT A LETTER TO WITNESSES IN A CRIMINAL CASE ASKING THEM TO CONTACT "DEFENSE COUNSEL" IN ADDITION TO COUNSEL FOR THE STATE SO THAT THEIR TRIAL TESTIMONY COULD BE SCHEDULED AT A TIME CONVENIENT TO ALL PARTIES. THE RESPONDENT WAS JUSTIFIED IN BELIEVING THAT THE PROSECUTOR AGREED TO COOPERATE IN BRINGING WITNESSES TO COURT TO TESTIFY.

Count II of the Bar's Complaint for Minor Misconduct alleged "knowingly making a false statement of fact or law to a third person" arising out of the sending of a letter to the same defense witnesses which informed them, inter alia, that they were under court order to contact defense counsel (Respondent) before trial. The letter also informed them that the purpose of their call was to learn of scheduling and for their convenience. No evidence was shown of reason for Respondent to mislead or misspeak. These witnesses had previously given favorable testimony in deposition. Respondent believed that the result of the October 13 proceedings was that he had received the same remedy as the service of his subpoenas. Those subpoenas directed the witnesses to contact his office. Absent from the evidence is any intent of the Respondent to mislead or speak falsely to **the witnesses he had listed for trial.** The absence of this intent warrants reversal of the findings of the Referee.

III

THE REFEREE SHOULD HAVE DISMISSED THE INSTANT MATTER UNDER THE DOCTRINES OF LACHES AND ESTOPPEL WHEN BAR COUNSEL MANY YEARS EARLIER HAD ADVISED THE RESPONDENT THAT THE BAR HAD FOUND NO PROBABLE CAUSE TO BELIEVE THAT THE RESPONDENT HAD VIOLATED ANY BAR RULE. NO NEW EVIDENCE OF FACTS WERE PRESENTED TO THE BAR MANY YEARS LATER TO JUSTIFY THE BAR'S WAITING SO LONG TO PROSECUTE THE RESPONDENT. ADDITIONALLY, THE REFEREE NEVER ENTERED AN ORDER OF ANY KIND RULING UPON THE RESPONDENT'S MOTION TO DISMISS UNDER THE DOCTRINES OF LACHES AND ESTOPPEL.

The events that spawned the instant disciplinary proceedings occurred in late 1989. The Bar had all information in hand in regard to the instant charges in the Spring of 1990. In the Summer of that year Bar Counsel Warren Stamm informed Respondent that the matter was closed. After Stamm left the Bar in May 1991, new proceedings were initiated by the Bar *sua sponte*. The instant complaint was filed three years after the actual events, after Respondent and others suffered normal impairment of memory inherent in the passage of time.

IV

THE REFEREE NEVER GAVE THE RESPONDENT AN ADEQUATE OPPORTUNITY TO PRESENT MITIGATING FACTORS BEFORE THE REFEREE RECOMMENDED A DISCIPLINARY MEASURE.

During the hearing on the Bar's Complaint for Minor Misconduct, the Referee informed Respondent that the proceeding would be bifurcated to allow a guilt or innocence presentation and decision and then evidence would be presented in mitigation if necessary. During closing statements, the Referee, without warning or notice, asked counsel to proffer mitigation. Counsel proffered some information but was in no position to present the numerous witnesses available to testify. This Court has previously been asked to remand this cause for further fact finding on

mitigation factors and Respondent seeks to incorporate that motion (Respondent's Motion for Remand to Referee for Further Fact Finding and to Toll Time filed on or about Jan 12, 1994.)

V

THE BAR SHOULD BE REQUIRED TO SHOW PROOF OF THE COSTS THEY ARE SEEKING TO TAX AGAINST THE RESPONDENT. THE BAR SHOULD NOT BE ALLOWED TO TAX INVESTIGATIVE COSTS WHEN THEY DID LITTLE OR NO INVESTIGATION.

After the Bar requested that costs be assessed against the Respondent, an objection and request for hearing was filed with the Referee. After Respondent learned that the Referee had transmitted his Report, Respondent again objected to the lack of hearing on this issue. The Referee has never made a finding regarding costs and this issue requires a evidentiary hearing.

ARGUMENT

I

THE RESPONDENT DID NOT VIOLATE ANY BAR RULE. THE RESPONDENT DID NOT "KNOWINGLY MAKE A FALSE STATEMENT TO A TRIBUNAL" WHEN HE FILED A SWORN MOTION FOR RULE TO SHOW CAUSE AND SPECIFICALLY REFERRED TO A ALREADY FILED COURT TRANSCRIPT AS A FACTUAL BASIS FOR THE MOTION. THE REFEREE ERRED WHEN HE FOUND THE RESPONDENT GUILTY OF VIOLATING RULE 4-3.3(a)(1).

The Referee found that the Respondent violated Bar Rule 4-3.3 (a)(1). The Rule makes it a Bar violation for an attorney to "Knowingly make a false statement of material fact or law to a tribunal." The purpose and intent of the rule are obvious.

The Referee appears to have found that the words, "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..." were in fact false. However, the Referee made no finding that they were intentionally made knowing they were false. Immediately after the language in the motion that caused the concern to the Referee, the Respondent said,..."See transcript for exact details...already transcribed and located in the Court file." (SR-21).

The Bar has contended that the statements in the motion were intentionally made knowing that they were false. The Bar has presented absolutely no evidence of any motive or reason the Respondent would have to intentionally mislead the court. When the Respondent referred to the transcript for "exact details," he incorporated the transcript into his factual statement by reference. As noted by this Court in ***Obs Company, Inc. v. Pace Construction Corp.***, 558 So. 2d 404 (Fla. 1990), "It is a generally accepted rule of contract law that, where a writing expressly refers to

an sufficiently describes another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing." 558 So. 2d at 406. If there is any ambiguity, it must be resolved in favor of the language specifically referred to in the original statement. See also, ***Harris v. Gentrac, Inc.***, 578 So. 2d 879 (Fla. 1st DCA 1991).

Even if the Respondent was negligent in choosing his choice of words, this clearly falls well short of conduct that should be punished by Rule 4-3.3(a)(1). In ***The Florida Bar v. Burke***, 578 So. 2d 1099 (Fla. 1991), this Court said,

> **We have reviewed the record and agree with Burke that the record does not support nor did the referee make a specific finding that he knowingly, willfully, or intentionally misappropriated funds. The Bar argues that even if Burke's acts of misconduct were unintentional, his behavior still warrants disbarment.** The Bar contends that Burke should have discovered the accounting errors in this case and that his failure to do so renders just as culpable as if he had taken affirmative, intentional action. We disagree. The Bar has the burden of proving by clear and convincing evidence that Burke is guilty of specific rule violations. **Intent is a major and necessary element in a finding of guilt for dishonesty, fraud, deceit, or misrepresentation.** (emphasis added).

578 So. 2d at 1102. This Court went on to reject the finding of the Referee in the ***Burke*** matter and reversed the final ruling of the Referee. Just as in ***Burke***, the Referee below did not make any specific findings that the Respondent knowingly, intentionally or willfully mislead the tribunal. The best evidence of intent is the reason why someone would do something improper. As stated in the statement of facts in this brief, the Respondent had no motive or reason to violate the rule. Accordingly, this Court should also reject the findings of the instant Referee.

In ***Bar v. Bariton,*** 583 So. 2d 334 (Fla. 1991), the Bar tried to discipline Bariton for attaching a copy of a letter to a complaint that was not a true copy of the original letter. Despite the fact that the letter was not "material" within the meaning of Rule 4-3.3(a)(1) the Referee found Bariton guilty and gave him a reprimand. In reversing the finding of misconduct, this

Honorable Court said that the evidence was insufficient to support the Referee's conclusion. In the instant matter, the statements were also not "material."

This rule was never intended to punish attorneys for the instant conduct. The rule was meant to punish those who intentionally lie to a tribunal for a reason. There is a large difference between an intentional misstatement and an ambiguous statement made with the belief that it was true when it was made. Otherwise, every misstatement under oath could result in a perjury conviction.

Rule 4-3.3(a)(1) has traditionally been used when dishonest attorneys lie to a tribunal in an attempt to cover up their misconduct. The Respondent herein had nothing to hide or cover-up. As this Court said in ***The Florida Bar v. Weidenbenner***, 18 F.L.W. S616 (Fla. Dec. 2, 1993),

> Weidenbenner contends that the referee erred in finding him guilty of misrepresentation and dishonesty, fraud, and deceit **because the referee made no finding to show that the conduct was intentional.** We find that we must agree with Weidenbenner's contentions because there is insufficient evidence to show that he intentionally misrepresented his position to the bank or acted dishonestly under the facts of this case...
>
> Moreover, Weidenbenner received no financial benefit from this distribution given the offset provision in the will, which was subsequently determined to be valid. (emphasis added).

18 F.L.W. at S616. Even if the Respondent negligently violated the Rule, the Rule was never intended to punish the actions of the instant Respondent. The Respondent had no ill motive or devious reasons to improperly compel the witnesses to contact his office before the trial. The evidence at worst shows that the parties could have been more careful in spelling out the details of how the witnesses were to be scheduled for trial. If the instant facts constitute a Bar violation then, any simple misunderstanding between parties and the Court could result in a Bar violation if any attorney is later asked to state what he or she believed happened and the statement later turns out to be a mistake.

Therefore, this Honorable Court should reject the findings of the Referee upon Count I as they are not supported by the record. Just as in ***Bariton***, ***supra***, this Honorable Court should dismiss the complaint filed by the Florida Bar.

II

THE RESPONDENT DID NOT "KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON" WHEN HE SENT A LETTER TO WITNESSES IN A CRIMINAL CASE ASKING THEM TO CONTACT "DEFENSE COUNSEL" IN ADDITION TO COUNSEL FOR THE STATE SO THAT THEIR TRIAL TESTIMONY COULD BE SCHEDULED AT A TIME CONVENIENT TO ALL PARTIES. THE RESPONDENT WAS JUSTIFIED IN BELIEVING THAT THE PROSECUTOR AGREED TO COOPERATE IN BRINGING WITNESSES TO COURT TO TESTIFY. THE REFEREE ERRED WHEN HE CONCLUDED THAT THE RESPONDENT VIOLATED RULE 4-4.1(a).

The Referee found that the Respondent violated Bar Rule 4-4.1 (a). The Rule makes it a Bar violation for an attorney to "[k]nowingly make a false statement of material fact or law to a third person." The purpose and intent of this rule is also obvious.

The arguments propounded in part I of this brief are also applicable to the instant count. In addition, the Respondent states that again, the Referee did not specifically find that the Respondent "knowingly, willfully or intentionally," violated the rule. Under ***Burke***, ***Bariton***, and ***Weidenbenner***, ***supra***, this Court must reject the finding of the Referee because there was no finding of "knowing, willful, or intentional" misconduct in addition to the fact that there was no evidence of any intentional misconduct.

The Respondent had no reason to misstate a law or fact to the persons who received the letters. The Referee's finding in regard to Count II was inconsistent because, the Referee found that the Respondent did not, as charged in Count II violate Rule 4-4.4 ("In representing a

client, a lawyer shall not use a means that have no substantial purpose other than to embarrass, delay or burden a third person or knowingly use method of obtaining evidence that violate the legal rights of such a person,") or Rule 4-8.4(c) and (d), ("A lawyer shall not engage in conduct involving: (c) dishonesty, fraud, deceit, or misrepresentation; and (d) engage in conduct that is prejudicial to the administration of justice."). (SR-37-39).

Therefore, this Court should reject the findings of the Referee upon Count II as they are not supported by the record. Just as in ***Bariton***, ***supra***, this Court should dismiss the complaint filed by the Florida Bar.

III

THE REFEREE SHOULD HAVE DISMISSED THE INSTANT MATTER UNDER THE DOCTRINES OF LACHES AND ESTOPPEL WHEN BAR COUNSEL MANY YEARS EARLIER HAD ADVISED THE RESPONDENT THAT THE BAR HAD FOUND NO PROBABLE CAUSE TO BELIEVE THAT THE RESPONDENT HAD VIOLATED ANY BAR RULE. NO NEW EVIDENCE OR FACTS WERE PRESENTED TO THE BAR MANY YEARS LATER TO JUSTIFY THE BAR'S WAITING SO LONG TO PROSECUTE THE RESPONDENT. ADDITIONALLY, THE REFEREE NEVER ENTERED AN ORDER OF ANY KIND RULING UPON THE RESPONDENT'S MOTION TO DISMISS UNDER THE DOCTRINES OF LACHES AND ESTOPPEL. THE REFEREE ERRED WHEN HE FAILED TO RULE ON RESPONDENT'S MOTIONS TO DISMISS THE COMPLAINT UNDER THE DOCTRINES OF LACHES AND ESTOPPEL.

A. LACHES:

The actions of Respondent about which the Bar complained occurred in Fall 1989 and January 1990. A Bar file was opened shortly after the ***Stidham*** trial in January 1990. Over three and one half years later, on May 24, 1993, the Bar filed a complaint alleging minor misconduct against the Respondent. (SR-1-8). The Respondent moved to dismiss on laches and estoppel grounds. Testimony about the laches and estoppel issues were presented to the Referee but, the

Referee has to this day not ruled upon the motions. The Respondent moved to reopen the case for a ruling upon the motions to dismiss and this Honorable Court denied the relief. The same issues will now be raised in this brief on the merits.

Former Bar Counsel Warren J. Stamm testified that he opened a file to investigate Mr. Milian in 1990. By July 5th 1990, the Bar had completed it's investigation of Mr. Milian. Sometime around late July 1990, Bar Counsel Stamm advised the Respondent that the file was being closed and the Respondent was **not** being investigated by the Bar. (SR-52-66).

Mr. Stamm also testified that he was very familiar with all of the allegations contained in the Milian file and all of the issues in the instant matter and in his opinion, the Bar did nothing further to investigate the matter other that to again rely on the "four corners" of the paperwork supplied to the Bar by Mr. Milian and Mr. Catalano in 1990. (SR-52-66). Despite all of this, the Bar filed the instant complaint on May 24, 1993.

To prove the defense of laches, four elements must be proven:

1. Conduct on the part of the defendant, or one under whom he claims giving rise to the situation of which complaint is raised:

2. Delay in asserting the claimant's rights, the complainant having knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit;

3. Lack of knowledge or notice on the part of the Defendant that the complainant would assert the right on which he bases his suit; and

4. Injury or prejudice to the Defendant in the event relief is afforded to the complainant.

The Florida Bar v. Mc Cain, 361 So. 2d 700 (Fla. 1978) and ***The Florida Bar v. Rubin***, 362 So. 2d 12 (Fla. 1978).

The instant petitioner has met the 4 part test for a defense of laches.

As to paragraph 1; The events complained of occurred in Fall of 1989. The Bar made its own complaint many years after they had full and complete knowledge of all the facts and circumstances surrounding the ***Stidham*** matter;

As to paragraph 2; The Bar waited over three and one half years to file a complaint after telling the Respondent that no complaint would be filed;

As to paragraph 3; The Respondent was under no notice he was being investigated until he received a letter from the Bar reopening the "Milian" matter with a new case number attached. The Respondent immediately wrote to the Bar and stated that the matter was closed years earlier;

As to paragraph 4; The Respondent and the witnesses can not now remember as well as they could have years earlier the exact course of events at the time the ***Stidham*** matter was being litigated.

The Respondent proved a valid defense of laches. This Court should make a final determination on the issue because the Referee never entered an order granting or denying the motions to dismiss.

ESTOPPEL:

To prove the defense of estoppel, the Respondent must prove:

1. Words and admissions, or conduct, acts, and acquiescence, of or all combined causing another person to believe in the existence of a certain state of things;

2. In which the person so speaking, admitting, acting, acquiescing did so willfully, culpably, or negligently; and

3. By which such other person is or may be induced to act so as to change his own previous position injuriously. See ***Mc Cain***, ***supra*** at 706.

The Respondent proved a valid defense of estoppel. Bar counsel told the Respondent he

was not being investigated. The Respondent closed his file and assumed nothing more would come of it. Memories faded and at the hearing before the Referee, Judge Lebow, the Petitioner and Mr. Stamm all admitted that they could not remember much of what happened years ago.

IV

THE REFEREE NEVER GAVE THE RESPONDENT AN ADEQUATE OPPORTUNITY TO PRESENT MITIGATING FACTORS BEFORE THE REFEREE RECOMMENDED A DISCIPLINARY MEASURE.

In the same report finding a violation of two Bar Rules, the Referee also recommended a "public reprimand." (SR-37-39). During the hearing on the merits of this cause, the Referee informed Respondent that he could present any evidence he desired in mitigation should there be a finding of a violation. However, the Referee preferred to complete the merits of the cause first. (ST-C-101). Unfortunately, Respondent has never had the opportunity to present full mitigation evidence. Some evidence, by way of a proffer, was presented to the Referee but, Counsel for the Respondent thought that the proffer was only partial proffer of all the evidence the Respondent had to offer in mitigation. The Referee made his findings and recommended specific discipline without ever hearing Respondent's mitigation witnesses.

The Referee could have recommended a "private" reprimand but instead recommended a "public reprimand" before hearing all of the proposed evidence of the Respondent's good character, long hours of community service, hundreds of hours of volunteer work for the Florida Bar, lack of any previous disciplinary actions with the Bar and voluntary bar associations. The Respondent has previously moved this Court to relinquish jurisdiction back to the Referee for further consideration, (Motion for Remand to Referee for Further Fact Finding and to Toll Time filed on or about January 12, 1994.). Respondent requests that this motion and the arguments

contained therein be incorporated by reference in this brief.

The Referee erred when he failed to conduct a full and complete hearing about mitigating factors before recommending a public reprimand. This Court should remand the matter for further consideration or consider reducing the public reprimand to a "private" reprimand.

V

THE BAR SHOULD BE REQUIRED TO SHOW PROOF OF THE COSTS THEY ARE SEEKING TO TAX AGAINST THE RESPONDENT. THE BAR SHOULD NOT BE ALLOWED TO TAX INVESTIGATIVE COSTS WHEN THEY DID LITTLE OR NO INVESTIGATION AND CALLED NO WITNESS OTHER THAN THE RESPONDENT. THE REFEREE ERRED OR ABUSED HIS DISCRETION WHEN HE REFUSED TO SET A HEARING WHERE THE BAR WOULD BE REQUIRED TO PROVE ITS BASIS FOR TAXING COSTS.

The Bar has filed a petition to tax costs. The Bar has not justified the requested costs nor has the Bar explained how the costs being sought are taxable in the instant matter. The Respondent moved this Honorable Court to relinquish jurisdiction over this matter and transfer it back to the Referee for a hearing upon the costs issue. The motion was denied by this Honorable Court. The Respondent challenges the requested costs and objects to all of them as they has not been a hearing upon the Bar's request for costs. The Bar is seeking substantial "investigative" costs even though they did almost no investigation and relied solely on documents and transcripts supplied by the Respondent and Milian in early 1990. (ST-B-52;60-2).

Additionally, the Referee erred and/or abused its discretion when it ruled that costs should be taxed in a Florida Bar proceeding when the costs are not properly justified. In ***The Florida Bar v. St. Laurent***, 617 So. 2d 1055 (Fla. 1993), this Honorable Court said that the "assessment" of costs will not be disturbed on appeal absent an abuse of discretion. In ***St Laurent***, the Referee held a hearing a disallowed approximately $15,000.00 of costs that the Bar sought to tax against

St. Laurent. Therefore, the instant Referee erred and/or abused his discretion when he failed to conduct a hearing upon disputed costs. See ***The Florida Bar v. Carr***, 574 So. 2d 59 (Fla. 1990), ***The Florida Bar v. Miele***, 605 So. 2d 866 (Fla. 1992) and ***The Florida Bar v. Righmeyer***, 616 So. 2d 953 (Fla. 1993).

CONCLUSION

The Respondent hereby moves this Honorable Court to set aside the Referee's final finding as to both counts as there was no factual or legal basis for the finding. Further, on the facts presented, no discipline is justified. If this Honorable Court does not set aside the finding of guilt by the Referee, then the Respondent moves this Honorable Court to reverse and remand for proceeding consistent with the positions taken herein in regard to mitigation evidence and costs.

If this Honorable Court sets aside the Referee's findings, then it is respectfully requested that the appellate opinion be published with only the initials of the Respondent in the caption so as not to injure the good reputation of the Respondent.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant brief has been furnished to the Pamela Pride-Chavies, Assistant Bar Counsel 444 Brickell Ave, Suite M-100, Miami, FL 33131 this 17 day of March, 1994.

By: _____
Richard Hersch, Esq.
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By: _____
Sean J. Greene, Esq.
Attorney for the Respondent