097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

R. MICHAEL ROBINSON,

Respondent.

_____/

Case No. 82,886
TFB Nos. 93-10,465(6D)
93-10,925(6D)

Case No. 83,590
TFB NO. 93,11,484(6D)

10/12

REPLY BRIEF

OF

R. MICHAEL ROBINSON

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SYMBOLS AND REFERENCES

In this Brief, The Complaint, The Florida Bar, will be referred to as "The Florida Bar. The Respondent, R. Michael Robinson, will be referred to as "Robinson." The transcript of the final hearing in this case held on May 13, 1994 will be referred to as "T." The Report of Referee, dated June 8, 1994, will be referred to as "RR". The Appendix will be referred to as "Appendix." The testimony of James McCloud taken from the transcript before the Grievance Committee 06D on July 13, 1993 will be referred to as "GC."

STATEMENT OF THE CASE

Respondent R. Michael Robinson agrees with The Florida Bar's Statement of the Case (Initial Brief P. 1), but disputes the Statement of the Facts.

STATEMENT OF THE FACTS
COUNT I: JAMES W. McCLOUD, TFB No. 93-10,465 (06D)

On November 7, 1989, Robinson was appointed to represent Mr. James McCloud for the purpose of obtaining visitation with McCloud's two minor children. (T. 123, L. 18) Prior to Robinson's appointment, the Court had ordered McCloud to undergo a psychological examination relating to visitation as a condition precedent to visitation. (T. 125, L. 14-19). Robinson and McCloud met in Robinson's office in January, 1990. (T. 127, L. 22) At that meeting, Robinson told McCloud he would need a psychological examination pertaining to visitation prior to any visitations with his children. (T. 154, L. 1-5). McCloud informed Robinson that he had already had a psychological examination at the VA Hospital, and that he did not want to have a second examination. (T. 126, L. 25 -- 127, L.3; T. 154, L. 7-8; T. 138, L. 13-16). Robinson instructed McCloud to obtain the report and send it to him. (T. 127, L. 4-5) McCloud understood that he was to furnish Robinson with the reports and admits to not being able to obtain his own records from the Veteran's Administration. (GC 46, L. 20 -- 47, L. 19) McCloud subsequently mailed a handwritten one page history or notes section to Robinson. (T. 127, L. 9-14). McCloud did not send Robinson a cover letter explaining the significance of the one page photocopy. (T. 141, L. 21-23) At first, Robinson did not even recognize the documentation as being an evaluation. (T. 128, L. 4-5). After he deciphered the one page document, Robinson instructed his secretary to contact McCloud and obtain the entire report. (T. 129, L. 6-14) When the reports were not forthcoming, Robinson obtained the VA records himself, (T. 136, L. 12 -- 14) and determined that the original evaluation was not sufficient for

purposes of obtaining visitation. (T. 140, L. 4-15) Robinson then made arrangements with the VA physician to perform a second evaluation that would comply with the Judge's Order. (T. 140, L. 17-22)

The client lived in Sanford, Florida, which made office visits nearly impossible. (T. 127, L. 18-19) The client was intermittently admitted and readmitted to VA hospitals in Orlando and St. Petersburg, (T. 139, L. 18--21) which exacerbated the problem of obtaining records. (T. 140, L. 5-15) McCloud moved several times, leaving his forwarding address with the post office rather than with Robinson's office. (GC 39, L. 23--40, L. 6) The Referee found that the client was indeed "difficult" due to his affliction of Post Traumatic Stress Syndrome coupled with alcoholism. (T. 196, L. 15--T. 197, L. 23).

COUNT II: DOUGLAS E. GILLIAM, TFB No.: 93-10,925 (06D)

R. Michael Robinson was appointed to represent Douglas E. Gilliam on criminal charges of aggravated battery, felonious possession of a firearm, and carrying a concealed firearm. (T. 12, L. 24) Gilliam went to trial April 9, 1991 on the aggravated battery charge. Every objection posed by Robinson was sustained by the judge; all of Robinson's requested jury instructions were given; and all the evidence was either suppressed or admitted in accordance with Robinson's objections. (T. 35, L. 15--T. 37, L. 5) After trial, Gilliam was found guilty of aggravated battery and was sentenced to thirty years, fifteen years suspended, on May 17, 1991. (T. 9, L. 24-25;T. 31, L. 24--T. 32, L. 8) As best as Gilliam remembers, there was only one witness who testified at trial and Gilliam did not testify (T. 21, L. 2--10) Robinson testified there were "one or two witnesses from the police department or the paramedics" and the "actual testimony from start to finish was between forty-five minutes and maybe an hour and a half. (T. 35, L. 9--21)

On May 16, 1991, Gilliam directed Robinson to file an appeal. (T. 13, L. 2--6 & 23-24) Robinson informed Gilliam that there was no point in filing an appeal as no errors were committed and there were no appealable issues. There were no justiciable issues for the appellate court and the appeal would be without merit. (T. 36, L. 15--T. 54, L. 142) Gilliam still requested an appeal; Robinson did not file one because the appeal would have been frivolous. (T. 40, L. 1-6) After the aggravated battery conviction, Robinson negotiated pleas on some additional charges. (T. 17, L. 19-25) Gilliam entered a guilty plea to the concealed firearms charge, because, as Gilliam freely admitted, "I would just go ahead and take a deal on the firearm because I did have the firearm. I pleaded to that one." (T. 20, L. 1--2;T. 25--L. 4-6) Gilliam was sentenced to thirty years, fifteen years suspended, on the firearm conviction, which ran concurrently with the thirty year, fifteen year suspended, sentence for the aggravated battery. (T. 18, L. 1--15). Gilliam filed a request for a belated appeal which had been denied at the time of the referee's hearing. (T. 23, L. 4--8) Subsequently, Gilliam filed a second Motion for Post Conviction Relief which was granted. (Appendix "A")

COUNT III: BOBBY HOLMES, TFB NO.: 93-11,484 (06D)

R. Michael Robinson was appointed to represent Bobby Holmes in early December, 1992. Holmes had been represented by the Public Defender's office prior to Robinson's appointment as his conflict attorney. The Public Defender had investigated the case including a making a video recording of the crime scene and taking depositions, including that of the victim. (T. 70, L. 20--T. 71, L. 12) Robinson had the benefit of the Public Defender's discovery to date; however, the video tape required a special adapter for viewing.

Holmes was charged with a three-count information: attempted first degree murder, arson and possession of marijuana. (T. 65. 1, 17-25) Robinson did not move to sever the counts

because all events were part of the same transaction (T. 66, L. 5-23); and the trial court would have denied a severance. (T. 101, L. 7---T. 102, L. 8) Mr. Richard Sanders, expert witness who also handled the Holmes' appeal, testified that trying the arson case with attempted first degree murder charge was not damaging to the Holmes' attempted first degree murder trial. (T. 80, L. 20-21). The trial was initially set for January 19, 1993. (T. 49, L. 10--12) Prior to January 19, 1993, Robinson moved for a continuance, which was granted and the trial was rescheduled for March 23, 1993. (T. 78, L. 1-3).

In January, 1993, Robinson was appointed to an unusually high number (17) of juvenile cases, each of which required substantial preparation and court time. (T. 69, L. 2-5). On the morning of the March 23, 1993 trial, Robinson orally moved for a continuance based upon inadequate time for preparation. (T. 70, L. 13-17) It is not unusual for both prosecutors and defense attorneys to orally move for continuance on the day of trial in Pinellas County. (T. 69, L. 21-25; T 70, L. 1-5). The trial court denied the motion for continuance. (T. 70, L. 12) Then Robinson moved to withdraw based upon ineffective assistance of counsel. (T. 70, L. 15) Again, the Court denied the Motion, and the matter proceeded to a three day jury trial. (T. 70, L. 18-19)

Bobby Holmes had two witnesses he wanted Robinson to interview. (T. 51, L. 20-21) Robinson had not been able to view the video tape, although the Public Defender had told him the gist of the contents. Robinson obtained approval for funds to hire a private investigator. Ultimately, Robinson did not use the investigator as he was able to perform those duties himself, that consisted of viewing the crime scene and tracking down two witnesses. (T. 54, L. 4-18) The state's expert witness was the arson dog who performed a demonstration.

On the evening of the first day of trial (which was still the prosecution's case) Robinson

personally viewed the crime scene. He also spoke to Lee Jones, Holmes' employer, one of the witnesses Holmes had wanted to be interviewed. Jones was called to testify at the trial, and he was an excellent impeachment witness. (T. 51, L. 20-21; T. 75, L. 3-9) A second potential witness, Holmes' girlfriend, could not testify to anything other than "what Holmes had told her" (T. 74, L. 15--T. 75, L. 9) and was therefore useless.

Holmes wanted the emergency room physician Dr. Elliott to testify because her initial report stated the injury was not a gunshot wound. (T. 59, L. 9-12) However, upon the doctor's examination of victim's X-Rays, Dr. Elliot discovered pellets consistent with a gunshot wound. (T. 73, L. 9-19) Because Robinson interviewed her informally, rather than by deposition, the State Attorney was not aware that Robinson had spoken to her and the State was not aware of her possible testimony. (T. 73, L. 15) The State Attorney did not call the emergency room physician to testify. (T. 74, L. 9)

During the trial, Robinson made objections and preserved issues for appeal. (T. 76, L. 1-2). On appeal, Holmes raised six issues: The trial court's error to: (1) conduct a hearing pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971); (2) refusal to give a requested instruction on attempted manslaughter per Taylor v. State, 444 So.2d 931 (Fla. 1983); (3) admit hearsay statements under the "excited utterance exception;" (4) limit defense counsel in his cross examination of the victim in which she testified against Holmes in an earlier trial; (5) give the proper jury instruction in that the verdict lacked the required determination that he used a firearm in the offense; and, finally, (6) grant the motion for continuance. The Appellate Court agreed with all of Holmes issues except for the request for a continuance, which was found to be without merit. (Appendix "B")

Richard Sanders, expert witness who also handled the Holmes' appeal, testified that

Robinson did "a fine job [on the trial]" (T. 96, L. 1--3) and that Robinson made all of the proper objections. (T. 96, L. 4-7) Sanders testimony was undisputed.

Holmes was charged with Attempted First Degree Murder and Arson, but was convicted of Attempted Second Degree Murder and Arson. (Appendix "B") He had plead to the marijuana charge at the commencement of the trial. (T. 67, L. 7-10) At the time of the referee's hearing, only the attempted second degree murder conviction had been overturned on appeal. (T. 94, L. 6--12) The District Court reversed that conviction because the trial court failed to make a Richardson inquiry as to a discovery violation and failed to give a jury instruction to attempted manslaughter, a lesser included offense of attempted second degree murder. (T. 97, L.7--T. 99, L. 23) As of this date, both convictions have been overturned on the issue of the failure of the trial court to conduct a Richardson inquiry. (Appendix "B") The referee noted that he believed Holmes' case to be the more serious of the three, and that:

> "[I]f we had just the two cases and not the Holmes' case, a public reprimand would be more than appropriate."

(T. 220, L. 7--9) The Bar attorney agreed with the referee. (T. 220, L. 10)

SUMMARY OF ARGUMENT

The referee's findings and recommendations carry the burden of correctness and are presumed to be appropriate. The Florida Bar v. Newhouse, 520 So.2d 25, (Fla. 1988). Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified. Rule 3-7.7(c)(5). The Florida Bar has failed to carry its burden. In each case, Robinson's clients did not suffer injury or potential injury attributable to Robinson's conduct. Gilliam has been granted leave to file a belated appeal. Both of Holmes' convictions have been reversed on appeal because of Robinson's competent representation at the trial level. In fact, The Florida Bar concedes that but for the Holmes case, a public reprimand would be more than appropriate. (T. 220, L. 7-10). At the time of the hearing, the referee did not know that the Holmes' convictions were going to be overturned by the Second District Court of Appeal.

The referee's recommendation of a public reprimand, probation and assessment of costs is appropriate and should be accepted. However, Robinson does dispute the amount of costs assessed against him in this matter.

ARGUMENT

I. ROBINSON PROVIDED COMPETENT, DILIGENT REPRESENTATION AND KEPT HIS CLIENT'S REASONABLY INFORMED; THEREFORE, THE REFEREE DID NOT ERR BY RECOMMENDING PUBLIC REPRIMAND AND PROBATION.

Under the Florida Standards for Imposing Lawyer Sanctions, public reprimand or even admonishment is an appropriate sanction in this case. The Referee could easily have determined that admonishment was proper, especially in light of the developments in each case that occurred after the referee's hearing. Standard 4.43 states that a public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes

injury or potential injury to the client. Standard 4.44 provides that admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client. Both Holmes' convictions were appealed; both convictions were reversed on appeal on grounds other than Robinson's representation. Gilliam's appeal has yet to be heard by the District Court of Appeal. Regardless of the outcome of his appeal, Gilliam will serve 15 years in prison as a result of his guilty plea to another unrelated charge. McCloud refused to undergo a second psychiatric evaluation, and as a result of his own actions, was unable to visit his children.

The Florida Bar v. Titone, 522 So.2d 822 (Fla. 1988) supports a public reprimand. Titone improperly attempted to withdraw from a criminal case and ceased his representation before the Court had granted his motion to dismiss. Robinson did not abandon his clients. The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990) the respondent was publicly reprimanded for disobeying several court orders to appear for his DUI offense. The Florida Bar v. Maas, 510 So.2d 291 (Fla. 1987) public reprimand is proper for neglect of a case he was incompetent to handle. The Florida Bar v. Weil, 511 So.2d 988 (Fla. 1987) failure to timely pursue clients' claim warrants public reprimand. Weil had a history of one other public reprimand. The Florida Bar v. Hawkins, 444 So.2d 961 (Fla. 1984) respondent was given public reprimand for failing to competently handle criminal matter.

The major factor in The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981) is the history of discipline. Obviously, Baron had not altered his conduct after prior disciplinary sanctions were imposed, hence, Baron's stiffer penalty was warranted. Robinson does not have a prior disciplinary record. By adding the two year probation, the referee has meted out a more sever punishment for the three instances than it would have for a single instance. Even so, this Court

issued a sixty day suspension for Baron, which is less than The Florida Bar is seeking here. Baron collected fees for two dissolution cases, then entirely neglected them -- to the extent that he did not show up for the final hearing. At no time did Robinson entirely neglect any cases.

The Florida Bar v. Vernell, 374 So.2d 472 (Fla. 1979) does not support a harsher penalty for Robinson. Vernell was found guilty of misdemeanor criminals activities. Id. at 475. The suspension was predicated on Vernell's prior breaches of professional discipline and his cumulative misconduct and was suspended from the practice of law for six months. Id. at 476.

None of Robinson's clients were caused actual or potential injury as a result of Robinson's representation. Subsequent to the hearing, Holmes' convictions were reversed and Gilliam was given his right to file a belated appeal.

II. ROBINSON WAS DILIGENT AND KEPT HIS CLIENT JAMES McCLOUD REASONABLY INFORMED AS TO THE STATUS OF THE CASE.

Robinson personally informed McCloud what the court required McCloud to do to obtain visitation (T. 139, L. 6-21). Robinson was appointed to assist McCloud to obtain visitation with client's two children. The Bar's only complaint is that Robinson communicated through his secretary instead. The client was well aware that he had the burden of obtaining the psychological reports; was well aware that he could obtain an examination at no cost to facilitate visitation; and was well aware that the "record" he obtained was insufficient. In fact, McCloud admitted that he had taken the first examination three years ago, and that even he could not obtain the results. (GC 47, L. 17-19) No amount of "direct phone contact" would have made a difference in this case as only the client could submit to the examination. McCloud's actions were the sole impediment to obtaining visitation with his son and daughter.

Robinson did make efforts to obtain the existing reports for his client. Even though Robinson made it clear that visitation would not occur absent an evaluation, McCloud refused

to take a second psychological examination (T. 127, L.1-2); he spent at least six months in jail for a DUI (T. 151, L. 1; T. 197, L. 24-25); and the client moved several times, leaving his forwarding address with the post office, not Robinson. (GC 39, L. 23-40, L. 3). McCloud stated he called Robinson "four or five times" during the course of the case (GC 37, L. 16-19) and he received a response from the secretary. (GC 37, L. 20-22)

McCloud states, "he had no problems with Robinson, he just wanted to know what was going on with his case." (GC 36, L. 10-15). That information had already been conveyed in no uncertain terms: without the evaluation, no visitation.

The Referee faulted Robinson for failing to obtain" an order directing the Board of County Commissioners to pay for a psychological examination." McCloud had refused said resource and wanted to rely on the VA evaluations. Ultimately, Robinson was able to persuade his client to obtain another psychological evaluation from the VA doctor that was sufficient for the Court's purposes.

The Florida Bar cites The Florida Bar v. Witt, 626 So.2d 1358 (Fla. 1993) as support for its position that Robinson should receive a harsher discipline than recommended by the Referee. Unlike Witt, Robinson did pursue McCloud's case. Robinson did arrange the psychological examination needed in furtherance of commencing McCloud's visitation and attempt to regain custody of his children. Robinson did meet with his client and stressed the importance of the psychological examination.

Witt's second offense, that of failing to file initial briefs in five appeals is considerably different from Robinson's failure to file one notice of appeal. Clearly, failure to pursue five appeals demonstrates a "pattern of misconduct" warranting a suspension. In addition, Witt had a prior private reprimand, and he was found guilty of neglect, conduct involving false statements

or representations, conduct prejudicial to the administration of justice, fee violations, and providing financial assistance to a client. Robinson has only been deemed guilty of lack of diligence, failure to keep a client informed, and failure to provide competent representation. (RR. 3-4) Robinson's actions cannot be described as having Witt's total lack of concern for the administration of justice, and yet, the Supreme Court suspended Witt for 91 days.

The Florida Bar v. Graves, 153 So.2d 297 (Fla. 1963) resulted in a three month suspension. Attorney Graves absolutely ignored and neglected his client's case for almost two and one half years. Id. at 298. Graves did not respond to any letters or communication from his client, prompting this Court to find that "he grossly neglected his trusteeship and sense of responsibility to his client." Id. The Referee found that Robinson "depended upon his secretary to advise Mr. McCloud. . . . Respondent relied too heavily upon his secretary to covey these requests to Mr. McCloud. It appears there were no conversations between Respondent and McCloud for a year and a half, except through his secretary and one or two pieces of correspondence." (RR. 2) Robinson's communication was certainly more extensive than Graves' communication. The facts in the instant case are not as severe as Graves, and Graves was suspended for three months, the same penalty The Florida Bar seeks to impose upon Robinson. Given the less severe nature of Robinson's perceived lack of communication, the Referee's recommendation, and The Florida Bar's agreement, a public reprimand is appropriate.

III. ROBINSON PROVIDED COMPETENT REPRESENTATION TO DOUGLAS E. GILLIAM.

Robinson is accused of failing to provide competent representation, failing to abide by his client's decisions, and failing to act with reasonable diligence and promptness in representing a client. The singular omission of not filing a Notice of Appeal generated three separate breaches of the Rules. The totality of the circumstances dictated against filing an appeal. The

short trial plus all defense objections being sustained, overwhelmingly indicated there were no meritorious issues to appeal.

The Aggravated Battery was not the only case Robinson was handling for Gilliam. Gilliam's subsequent entry of a guilty plea to a firearms charge resulted in an identical and concurrent sentence. Gilliam admitted that he was guilty of the firearms charge, and he was sentenced to another thirty year sentence, with fifteen years suspended, to be served concurrently with the sentence for the Aggravated Battery. (T. 18, 1-8; T. 17, L. 16-T. 18, L. 15)

Since the time of the Referee's hearing, Gilliam has been allowed, with leave of court, to file a belated appeal. The Referee did not have the benefit of Judge Claire K. Luten's Order granting leave to file a belated appeal on February 26, 1992. One of the aggravating factors for consideration is actual harm to clients and Gilliam has suffered no harm. "We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation." The Florida Bar v. Sandstrom, 609 So.2d 583 (Fla. 1992), at 585, FN1.

The Florida Bar concedes that this is not a case warranting suspension. These facts amply support the referee's recommendation that Gilliam's complaint should be dealt with by a reprimand.

IV. ROBINSON PROVIDED COMPETENT REPRESENTATION TO HOLMES AND ACTED WITH DILIGENCE.

The Florida Bar has completely misplaced its reliance upon The Florida Bar v. Sandstrom, 609 So.2d 583 (Fla. 1992). The referee found, and correctly so, that the facts of Sandstrom are not similar to the Holmes case. (T. 207, L. 1--T. 208, L. 15) Sandstrom's conduct was reprehensible. Sandstrom completely failed to prepare for the trial; he failed to ascertain whether his client's wife died as a result of medical malpractice or whether she died as a result of his client's blow to her head. Sandstrom at 584. At a subsequent Rule 3.850

hearing, two medical experts firmly established that the client's wife died of medical malpractice, and in fact would have completely recovered from the blow to her head. Id. This Court found that Sandstrom's failure to properly investigate that issue resulted in prejudice to his client. Id.

The Florida Bar states that Robinson's preparation for Holmes' trial parallels Sandstrom's. Unlike Sandstrom, Robinson had investigated the case and had the benefit of the Public Defender's discovery. Robinson reviewed the two transcripts, one being the victim and only eye-witness to the Defendant's direct involvement; interviewed the witnesses his client wanted him to interview; and personally viewed the crime scene. Robinson made all the proper objections at trial and properly preserved critical appellate issues. (T. 96, L. 4-7)

The Florida Bar complains that Robinson did not conduct a proper investigation because the court had approved funds for a private investigator and Robinson did not use one, nor did he view the crime scene video tape. The referee found that Robinson should have used an investigator to find and interview the witnesses' "required or desired by the client." (RR. 3) Merely declining to use a private investigator does not mean Robinson did not prepare for trial. Robinson personally sought out Holmes' witnesses, personally viewed the crime scene, and interviewed them in addition to evaluating the possible testimony of Dr. Elliott.

The Florida Bar faults Robinson for failing to view a copy of the video tape of the crime scene. After conversing with the Public Defender, Robinson had been informed of the contents of the video and decided to take a first hand look at the crime scene in lieu of viewing the video tape.

The Florida Bar stated Robinson "failed to research scientific testing methods used in arson cases." (Initial Brief, P. 10). The Florida Bar failed to present any evidence or testimony regarding whether research into scientific testing used in arson cases was necessary, appropriate,

or would have assisted in the defense of Holmes.

The scientific testing methods used in Holmes' trial merely verified the fact that an accelerant had been used to start the fire. The "scientific testing methods" did not, and in fact, could not link Holmes to the site of the arson. Fingerprints linked the client to the arson as Holmes' fingerprints were found on the "Prestone" jug next to the residence of the victim.

The Florida Bar complains that Robinson "failed to move for a continuance the week before trial." The Florida Bar presented absolutely no evidence that had he moved for a continuance at that time, the trial court would have granted it. The Florida Bar complains that Robinson failed to move for severance of the first degree murder charge from the arson charge. At the hearing, Richard Sanders, the expert witness and counsel for Holmes on appeal, testified a severance would not have limited the evidence due to the likelihood that "there would have been Williams' Rule in one way or another. I don't think a motion for a severance would have been granted. And I think the Appellate Court would have affirmed on that issue anyway." (T. 102, L. 6-8)

The Florida Bar has not made it clear that this complaint stems from the trial of only one of the three cases Robinson was appointed to handle. The case of Possession of Cocaine and Felonious Possession of a Firearm and the case of Sexual Battery were the other two cases and were set for trial on later dates.

Had Sandstrom adequately prepared for trial, his client, unlike Robinson's client, probably would not have been convicted. Holmes was charged with attempted first degree murder, and was convicted of the lesser charge of attempted second degree murder. The key witness, the victim who was the defendant's former girlfriend, testified she was shot and that Holmes shot her with a shotgun. Robinson had use of her transcribed deposition for trial

preparation.

In Sandstrom, the referee recommended a one year suspension. In light of the Sandstrom's egregious lack of trial preparation, this Court overruled the referee's recommendation and imposed a sixty day suspension even though it was entirely probable that Sandstrom's client would have escaped conviction had there been trial preparation. Id. at 584. In addition, Sandstrom had been previously privately reprimanded. Id. In the instant case, the Referee has recommended a reprimand, but the Bar is requesting a ninety day suspension, a much harsher penalty than Sandstrom received from this Court. Robinson, unlike Sandstrom, has no disciplinary history.

V. ROBINSON SHOULD NOT BE ASSESSED FOR THE COST OF TRANSCRIPTS THAT WERE NOT INTRODUCED AT TRIAL.

Robinson objects to paying for the grievance committee transcripts that were not used at trial. Only the testimony of James McCloud, deceased, was used at the Referee hearing. According to Standard 2.8, imposition of costs is not mandatory. The Guidelines published by the Florida Conference of Circuit Judges for taxation of costs provides that only the cost of "daily copy" of trial transcripts used for impeachment should be taxed. In this case, none of the transcript was used for impeachment purposes. However, James McCloud's testimony was used as he was deceased at the time of trial. According to Rule 1(B), only the cost of the original pages used, plus court reporter's per diem, plus one copy of the pages actually used, should be taxed. In this case, that amounts to a reduction as follows: the two charges of $167.66 should be stricken. The transcripts were not introduced at trial. The entire appearance and cost of the referee's hearings ($966.75) should be stricken. Robinson did not file this appeal, and The Bar should therefore be responsible for the costs of the transcript. The entire costs of the Holmes transcript ($308.50) should be stricken as not one page was introduced into

evidence. Accordingly, the costs of this matter should be reduced by $1,610.57. Merely incurring costs does not entitle one to recover them unless the costs are reasonable and incurred for a purpose as set out in the Statewide Uniform Guidelines for Taxation of Costs in Civil Litigation.

In addition, the Referee reserved the right to hold a hearing to determine the actual costs. (T. 221, L. 20-22). No hearing was conducted.

CONCLUSION

The referee stated, and the Bar conceded, that "but for the Holmes case, a public reprimand would be more than appropriate." (T. 220, L. 7-10). Nobody had the benefit of the Appellate's reversal of Holmes' arson conviction nor Judge Claire K. Luten's order granting a belated appeal. Because Robinson's clients did not suffer an actual or potential injury as the result of his representation, an admonishment would not be inappropriate. Therefore, the Referree's recommendation for a public reprimand with the two years probation is more than appropriate. The Florida Bar request for a ninety day suspension should be denied.

The costs should be reduced by $1,610.57, the amount of charges for the transcripts for the Grievance Committee transcripts that were neither used nor referred to in the hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to David R. Ristoff, Branch Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, on this 27th day of September, 1994, by regular U.S. mail.

JOSEPH F. McDERMOTT, ESQ.
Counsel for Respondent