047

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: 83,351

FL Bar Case No.: 92-70,732 (11F)

AMY L. BURKICH-BURRELL,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent,

PETITIONER'S AMENDED INITIAL BRIEF

The following is a review of a Report by a Referee in a Florida Bar

Disciplinary proceeding.

AMY L. BURKICH-BURRELL, ESQUIRE
Petitioner
FL Bar Number 398942
4475 Southwest 8th Street
Miami, Florida 33134
(305) 443-1822

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STATEMENT OF JURISDICTION

Review of this matter is sought under Art. 5, §15, of the Florida Constitution, and the Rules Regulating the Florida Bar, specifically Rule 3-7.7 (a)(1). A Report and Recommendation of Referee was entered on October 24th, 1994.

STATEMENT OF THE ISSUES

1A. There was insufficient evidence presented by the Florida Bar at the trial of this matter for the Referee to recommend a finding of guilt as to a violation of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4.

i. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had a duty to review the plaintiff's sworn answers to Interrogatories 18 and 20.

ii. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had any reason whatsoever, whether by suspicion or actual knowledge, to question the veracity of the answer given by the Plaintiff to Interrogatories #18 and #20.

B. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, *knowingly* violated Rules 4-4.1 and 4-8.4.

2. The sanction imposed by the Referee is disproportionate to the finding of guilt and the established goals of punishment. See Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

STATEMENT OF THE CASE

Attorney Elwood J. Lippincott issued a letter to the Florida Bar on November 27th, 1991 therein alleging unethical conduct by the undersigned counsel. An Amended Complaint was filed by Mr. Lippincott on or about December 23rd, 1991. The respondent/counsel filed a response to the complaint of Mr. Lippincott on February 4th, 1992. This matter was brought before Grievance Committee 11"F" on November 30th, 1993 for alleged violations of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4. The members of Grievance Committee 11"F" found probable cause as to the above citations, and thereafter, a Complaint was filed by the Florida Bar for the instant case on March 16th, 1994. This Court issued an Order on March 22nd, 1994, directing the Chief Judge of the Eleventh Judicial Circuit to appoint a Referee. Chief Judge Leonard Rivkind appointed the Honorable Juan Ramirez, Jr., as Referee, on March 28th, 1994. This matter was heard before the Honorable Juan Ramirez, Jr., on September 26th and 28th, 1994. A Report of Referee was entered by Judge Ramirez on October 13th, 1994, therein recommending a finding of guilt for violations of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4. The undersigned counsel filed a Petition For Review with this Honorable Court on November 29th, 1994.

STATEMENTS OF FACT

William Burrell, III, was involved in an automobile accident on December 25, 1989, in Miami, Dade County, Florida. As a result of this accident, Mr. Burrell suffered a neck, shoulder, right arm, left knee injuries and an aggravation of a pre-existing cervical injury, which was sustained in a 1986 automobile accident. The undersigned counsel filed the case of William Burrell, III, and Amy L. Burkich-Burrell v. Matias Garcia, Case Number 90-006195 CA 01, in the Eleventh Judicial Circuit on February 7th, 1990.

The undersigned counsel represented the plaintiff, William Burrell, III. Elwood J. Lippincott was employed by State Farm Insurance Company and entered an appearance as counsel for the defendant, Matias Garcia. Gary Kalos, Esquire, made an appearance on behalf of the Plaintiff, William Burrell's, Uninsured Motorist coverage provider, Allstate Insurance Company. Well into the case, attorney Karen Curran, made an appearance as new lead counsel for the plaintiff, William Burrell, III.

The defendant, Matias Garcia, by and through his attorney, furnished the undersigned counsel with Defendant's First Set of Interrogatories on or about March 7th, 1990. Counsel for the parties mutually agreed to an extension for the filing of the answers to said Interrogatories until April 17th, 1990. The undersigned counsel employed the services of a retired Illinois-licensed attorney, Cyrus Yonan, for one or two months, who advertised locally as a paralegal, to assist in the performance of

routine office tasks on a temporary basis. Upon receipt of the interrogatories from the defendant, the undersigned counsel gave them to Mr. Yonan, for him to meet with Mr. Burrell and fill in the answers to the questions. Upon completion, Ms. Burkich, also a Notary Public, notarized the executed interrogatories and forwarded them back to Mr. Lippincott.

The subject matter of these proceedings revolves around the claim that Attorney Elwood J. Lippincott makes in his complaint to the Florida Bar, where he alleges that during the petitioner's representation of the plaintiff, William Burrell, III, the petitioner failed to disclose the names of several medical providers from which the plaintiff had received treatment. Notwithstanding, the voluminous size of the case file in Burrell v. Matias Garcia, the only written question with reference to the extent of medical treatment received by the plaintiff, William Burrell, comes about in Defendant's Interrogatory #18 and #20. At no other point on the record does it appear that the defendant requests information as to Mr. Burrell's medical treatment, notwithstanding same, counsel for the defendant received **all** of Mr. Burrell's medical records from both accidents in response to counsel's Request For Production. The documents submitted to defense counsel contained the names of all the physicians where the plaintiff received medical treatment.

On April 27th, 1990, Mr. Lippincott filed a Motion For Better Answers as to Interrogatories #7 and plaintiff's objections to Interrogatory #20.

Defendant's Interrogatory 7, states:

7. Did you consume any alcoholic beverages or take any drug or medications within 12 hours before the occurrence of the accident described in the Complaint? If so, what type and amount and where did you consume them?

Plaintiff's Answer:

Type	Amount Consumed	Where Consumed
Beer	A couple	Friend's home

Mr. Lippincott stated in his motion that "Plaintiff's Answer to Interrogatory number 7 is incomplete, vague and evasive."

Defendant's Interrogatory 20, states:

20. If you have ever been involved in an accident of any kind before or after the accident in suit , please state the date and type of accident, the location of the accident, the injuries sustained, if any, and the complete names and addresses of all hospitals, physicians, dentists, and clinics you went to for any reason as a result of each accident. (This refers to any kind of accident, including vehicular, slip and fall, on the job, or otherwise.)

Plaintiff's Answer:

Date	Type	Location	Injuries	Hospitals/physicians etc.

Question is overly broad and burdensome seeking identification of whether Plaintiff has "ever been involved in an accident of any kind before or after the accident in suit." Nonetheless, in the spirit of cooperation, we offer the following

answer:

June 1986	Vehicular	Coral Gables	Right Knee	Victoria Hospital
March 1990	Bicycle	Coral Gables	Lower Back	Doctor's Hospital

Mr. Lippincott's Motion For Better Answer does not address the Answer to Interrogatories numbered 18 and 20. The only mention of the Answer to Interrogatory 20, is in the Notice of Hearing, where Mr. Lippincott states that he will bring for hearing "Defendant's Motion To Compel Better Answer to Interrogatory #7, [plaintiff's] objection to Interrogatory #20 and Request For Production paragraph 2" before Judge John A. Tanskley on May 29th, 1990. This scheduled hearing before Judge Tanskley on May 29th, 1990, never took place and plaintiff's objection to defendant's interrogatory #20 was never disposed of. The parties to the case of Burrell v. Matias Garcia, reached a settlement and an Order of Dismissal was entered on August 26th, 1991, finalizing the case. The issue of Mr. Burrell's medical providers was never heard of again until Mr. Lippincott wrote the letter to the Florida Bar on November 27th, 1991.

This Court must take into consideration that there was animosity between the undersigned counsel, Amy L. Burkich, and Mr. Lippincott, throughout the pendency of the subject case. The lack of evidence to support a finding that the undersigned was even negligent in the pursuit of the case, suggests that the actions of Mr. Lippincott were predicated on nothing more than retaliatory motivations and resentment for the petitioner.

SUMMARY OF ARGUMENTS

1. In the first issue, the respondent counters the Referees finding that there was sufficient evidence presented by the Florida Bar at the trial of this matter to support a finding: (1) that the respondent had an ethical duty to review her client's answers to plaintiff's Interrogatories 18 and 20 for accuracy; and (2) that the Florida Bar failed to provide sufficient evidence to support a finding that the respondent had any reason, whether by suspicion or actual knowledge, to question the veracity of her client's answers to the above interrogatories. That such a duty must be imposed by a standard of reasonableness, and as such, can only be reasonably required if it is proven by a preponderance of the evidence that the respondent attorney had actual *knowledge* of the omissions. Finally, that the Florida Bar failed to present sufficient evidence from which the Court could base or otherwise infer its assumption that the respondent knowingly violated Rules 4-4.1 and 4-8.4.

2. In the second issue, the respondent asserts that the punishment recommended by the Referee is disproportionate to the findings of guilt as the cases upon which the court sought guidance have little or no relevance to the instant case. The Court failed to take into consideration the more appropriate case of the Fla. Bar v. Sax, 530 So.2d 284 (Fla. 1988), which opinion was provided to the Court with the evidence presented by in this case.

ARGUMENTS AND CITATIONS OF AUTHORITIES

Issue 1

A. There was insufficient evidence presented by the Florida Bar at the trial of this matter for the Referee to recommend a finding of guilt as to a violation of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4.

i. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had a duty to review the plaintiff's sworn answers to Interrogatories 18 and 20.

ii. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had any reason whatsoever, whether by suspicion or actual knowledge, to question the veracity of the answer given by the Plaintiff to Interrogatories #18 and #20.

B. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, *knowingly* violated Rules 4-4.1 and 4-8.4.

It has been a longstanding rule that the scope of the Supreme Court in the review of a referee's recommendation is broader than that of findings of fact, because the Court has a responsibility to order the appropriate punishment [if any]. Fla. Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989). Notwithstanding that a referee's recommendation is afforded a presumption of correctness, this Court may depart from the findings if the recommendation is not supported by the evidence. Fla. Bar. v. Lipman, 497 So.2d 1165, 1168 (Fla. 1968). Fla. Bar. v. Poplack, 599 So.2d 116 (Fla. 1992).

The undersigned would premise this argument by acknowledging this Honorable Court's strong position toward issues of misrepresentation or dishonesty, as stated in Poplack, wherein this Court stated that [W]e find it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both which are synonymous with lying. Honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based. The theme of honest dealing and truthfulness runs throughout the Rules Regulating the Florida Bar and the Florida Bar's Ideals and Goals of professionalism. id at 118. Equally as much, the undersigned is aware of this Court's duty and obligation to seek truth and fact, especially when it involves this area of law. The mere inference of such behavior can destroy an attorneys career and have long-lasting negative consequences, even if such behavior is unsubstantiated. Therefore, the evidence for a conviction of this type of behavior must be clear and not based upon conjecture, innuendo or weak conclusions. The undersigned will show that the Florida Bar failed to demonstrate sufficient evidence to adjudicate the petitioner guilty of violating Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4

The Florida Bar charged the undersigned counsel with the violation of three Rules Regulating Professional Conduct during the representation of the plaintiff, William Burrell, III, in the matter of Burrell v. Garcia:

i. Rule 4-3.4(a), of the Rules Regulating Professional Conduct, which states:

"A lawyer shall not unlawfully obstruct another party's access to evidence ... that the lawyer knows or reasonably should know is

relevant to a pending or foreseeable proceeding, nor counsel or assist another person to do any such act.

ii. Rule 4-4.1, of the Rules Regulating Professional Conduct, which states:

"In the course of representing a client a lawyer shall not *knowingly*: (a) make a false statement of material fact or law to a third party; or fail to disclose a material fact to a third party when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client...."; and

iii. Rule 4-8.4, of the Rules Regulating Professional Conduct, which states:

"A lawyer shall not (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through acts of another; ... (c) engage in conduct involving dishonesty, fraud deceit or misrepresentation."

The Florida Bar relies on the language of Rule 4-3.4(a) and 4.4-1 to contend that the undersigned, by forwarding the above mentioned answers to Defendants' Interrogatories #18 and #20 to Defendant's counsel, unlawfully obstructed opposing counsel's access to evidence, which she knew was relevant to the pending action. The Bar bases its violations on the theory that since the petitioner, Amy Burkich, was involved in the accident of 1986, the undersigned counsel had an ethical duty, not only to review Mr. Burrell's answers for accuracy, as to the 1989 accident, but also to supplement them should any information be lacking or misleading. The trial court, in its report, attempts to hold the undersigned counsel to a higher standard of reasonableness than other counsel, because the undersigned was involved in the

1986 accident. The undersigned's involvement in the accident of 1986 and her representation of the then Plaintiff, William Burrell as to the accident of 1989, are mutually exclusive. There is no additional burden or duty of care imposed on the undersigned counsel by being involved in the accident and surely not in the preparation of the civil action for same, unless it is proven by the Bar that the undersigned had knowledge of an omission of fact or fraud. Generally, a lawyer [who has no knowledge of fraud] has no affirmative duty to inform an opposing party of relevant facts. See Comment Section of Rule 4-4.1.

Given that there is no past case which parallels the issues tried by the lower court, counsel for the undersigned provided the trial court with Florida Bar Staff Opinion 17571 for its review. Therein, in an effort to guide the Court in its determination of an attorney's duties to counsel and the profession, in general, the Florida Bar itself recognizes a standard of reasonableness in the duties of an attorney. Specifically, the Florida Bar stated that an attorney does not have a duty to check a client's sworn responses to each and every interrogatory question for accuracy, unless counsel has a reasonable suspicion which brings into question the veracity of the client. In order to establish a duty, the Florida Bar must pass a reasonability test to meet its burden and the facts of each case determine the extent of the reasonability test. The conduct which the Bar attempts to enforce upon the profession must be reasonable and necessary to protect the rights of all the parties involved. Arguendo, an attorney cannot avoid responsibility by avoiding inquiry. Nevertheless, Rules 4-5.3

and 4-1.2(c), do impose a minimum standard of reasonableness. It is reasonable and proper for an attorney to have a duty to check a client's sworn responses to each and every interrogatory question for accuracy, when the candor of a client is reasonably doubted or suspicious. However, the facts and circumstances as to when the duty arises will depend on the facts of each case. The Bar failed to present any evidence at the trial from which one could even infer that the petitioner, Amy L. Burkich, knew or should have known that William Burrell's answers to Interrogatory #18 and #20 were incomplete.

The only other way the Florida Bar could impose a duty upon the petitioner to review and/or correct the plaintiff answers Interrogatory #18 and #20, was if the Bar could made a reasonable showing that the petitioner, after the answers were submitted, had become aware or otherwise had a reasonable belief that an omission of information had occurred. (As addressed in Anderson, when the respondent/counsel was informed by opposing counsel that the information they cited was incorrect and misleading). Only then could the Florida Bar and the Court find the petitioner liable for not correcting the subject interrogatories. The imposition of such a duty other than by: (1) suspicion of the client's veracity at the time of preparation; or (2) an awareness by the attorney that the answers were deficient, would create an extraordinary duty which would be unreasonable.

The trial court commingles the issues in order to create a scenario that is

misleading and incorrect. In page 3 of the Report, the Court states:

> "Despite her (Mrs. Burkich) personal knowledge of Burrell's prior accident and injuries and omission of this information in his response to interrogatories, Respondent notarized Burrell's responses to interrogatories as true and correct."

A. First, although the undersigned counsel had knowledge as to Burrell's prior accident and injuries, the Florida Bar failed to provide any evidence that the undersigned/petitioner had any knowledge of the omissions until after the Florida Bar Complaint was filed. The lower court attempted therein to impose a duty upon the petitioner which the petitioner did not have. The burden is on the Bar to prove that the undersigned petitioner had knowledge or a reasonable belief that the answers to the interrogatories were incomplete, false or misleading, prior to the filing of same. The Florida Bar failed to prove knowledge or a reasonable belief by the petitioner, thus making its claim for a violation of Rule 4-3.4(a) and 4-4.1 moot.

B. Second, the petitioner notarized William Burrell's signature. A Notary does not attest to the truthfulness of the answers, but solely attests to the affiant's identity and claim that his answers are true and correct. A Notary does not attest to the content of a document, just to

> the assurances and identify of the affiant. The issue comes into controversy only if the Bar can prove, either by evidence or stipulation, that the Notary knew the statements which are being sworn to were false at the time the oath was given.

This Court addressed a similar issue in The Fla. Bar v. Sax., 530 So.2d 284 (Fla. 1988); where this Court reprimanded Carl S. Sax, an attorney, for notarizing an affidavit in the case of Palm Court, Inc., v. TPC..., which he knew contained statements that were false and filed same with the court. The difference between the Sax case and the instant case is that a showing of Mr. Sax's intent or knowledge at the time the fraudulent affidavit was made was not necessary since Mr. Sax admitted to his knowing the statements were false and subsequently entered into a Consent Judgment with the Bar during the trial.

As to the instant question of supplementing the answers, the undersigned's involvement in the 1986 accident and the plaintiff's representation are mutually exclusive from each other, until the point in time where the Florida Bar can prove that the petitioner became aware or had a reasonable belief that the omission of information had occurred. Only at that time can the Florida Bar and the court hold the petitioner liable for not correcting the subject interrogatories. Otherwise, the petitioner can only be held liable for not correcting the interrogatories after being advised of the omission. As evidenced in the Statement of Fact, the defendant never contested the contents of either of the two answers (#18 and #20) by Motion To Compel or Motion

For Better Answers. Therefore, the undersigned was never made aware that the answers given by her client, William Burrell, were not complete. Any other extraordinary duty implied by the court would be unreasonable.

Once the trial Court incorrectly assumed that the undersigned had a duty to "check or properly review the answers to the interrogatories" [18 and 20], the court goes further to address the issue as a violation of Rule 4-4.1 and also a violation of 4-8.4; both of which require knowledge on the part of the attorney as an essential element. The Court improperly charges that the petitioner, Amy L. Burkich, knowingly made a false statement of material fact or law to a third party and failed to disclose a material fact to a third party when disclosure was necessary to avoid assisting a criminal or fraudulent act by a client. In particular, the trial court did not take testimony from the client, William Burrell, III, and solely based its finding of knowledge on the deposition of the complainant defense counsel. There was no evidence provided by the Bar to support this egregious allegation.

Knowledge is an essential element to a violation of 4-4.1. The only case that remotely resembles this aspect of the instant case is, Fla. Bar. v. Agar, 394 So.2d 405 (Fla. 1981). Where Joseph V. Agar, Esquire, by his own admission, allowed his client to perpetrate a fraud upon the court and, according to the testimony of his client and the false witness, he was the one who suggested the fraud in the first instance. Mr. Agar also pled no contest to a charge of perjury as a result of this matter. The Agar

case is distinguished from the instant case in that the Bar in Agar took live testimony from the client to show a violation of the then applicable truthfulness clause of the Rules of Professional Responsibility. In the instant case, the Bar failed to present any evidence that the petitioner knowingly furnished the defense with the subject interrogatories to propound a fraud upon the court.

Accordingly as is evidenced from the record, the Bar failed to (1) provide sufficient evidence that the petitioner had any reasonable grounds to question the veracity of her client, Mr. Burrell's, answers to Defendant's Interrogatories 18 and 20; (2) provide sufficient evidence to support the conclusion that counsel knew that the answers given by her client, Mr. Burrell's, to Defendant's Interrogatories 18 and 20 were incomplete or misleading; and (3) provide sufficient evidence for the court to establish a reasonable basis for the imposition of a duty to require the petitioner to review or supplement the answers to Defendant's Interrogatories.

Issue 2.

The sanction imposed by the Referee is disproportionate to the finding of guilt and the established goals of punishment. See Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

As a result of the foregoing, the undersigned counsel was charged with violations of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4. The Referee recommended that the petitioner be suspended from the practice of law. This sentence is disproportionate to other cases that have come before this Court, specifically The Fla. Bar v. Sax., 530 So.2d 284 (Fla. 1988); where this Court reprimanded Carl S. Sax, an attorney, for notarizing an affidavit in the case of Palm Court, Inc., v. TPC..., which he knew contained statements that were false and filed same with the court.

The trial court improperly penalizes the petitioner for her refusal to admit that she did anything wrong, as is seen in Page 6 of the Report. The undersigned still maintains that she did not do anything which would violate the Florida Rules Regulating Professional Conduct.

For the sentencing portion of the instant case, the Referee examined the cases of The Fla. Bar v. Rood, 620 So.2d 1252 (Fla. 1993); The Fla. Bar v. Feige, 596 So.2d 433 (Fla. 1992); and The Fla. Bar v. Anderson, 538 So.2d 852 (Fla. 1989). The Court examined Rood and found that it does not parallel the instant case as E.C. Rood fraudulently transferred a piece of property to his father to avoid execution of a

U.S. District Court Judgment. E.C. Rood executed real property transfer documents himself, to defraud a creditor. In the instant case, Amy L. Burkich, signed nothing other than her Notary certification attesting to the identity and oath of the affiant, William Burrell.

In Fiege, an attorney, Hans C. Fiege, was receiving permanent alimony checks in trust for a Ms. Whalen, which payments were to cease upon Ms. Whalen's death or remarriage. Attorney Fiege, subsequently performed a marriage ceremony for Ms. Whalen and was informed by the new bride not to inform her ex-husband, Mr. Gale, of the remarriage. Mr. Gale kept making alimony payments for two years after his ex-wife had remarried. In an agreement with Mrs. Whalen, Attorney Fiege, kept the excess alimony payments as payment for his representation of her. This case also does not resemble the alleged facts, because it was indisputable that Fiege was a party to the fraud and knowingly allowed Mr. Gale to keep making alimony payments after he had performed the marriage ceremony.

The case of Anderson does not resemble the instant case because in Anderson counsel actually executed and submitted a brief to the court which contained inaccurate facts and misrepresented facts, despite opposing counsels exposure of the inaccuracy. As stated above, Amy L. Burkich signed nothing other than her Notary certification attesting to the identity and oath of the affiant, William Burrell. Moreover, it is clear from the record that opposing counsel never brought the issue to light even

after he had knowledge that the plaintiff, William Burrell, had left the names of several medical provider's out of his answers to Defendant's Interrogatories 18 and 20. Opposing Counsel, Mr. Lippincott, was provided with the names, addresses, and records of all of Mr. Burrell's accidents, including the ones of 1986 and 1989, which is where he obtained the information. In Anderson, the respondents finally acknowledged the misleading nature of their inaccurate representations, after they were brought to light by opposing counsel, and when they were confronted by the Court on a Motion For Sanctions.

In the Rood, Fiege, and Anderson cases, each respondent/counsel was actively engaged in fraud and deceit and personally executed documents to promote the fraud. The evidence in these cases that each respondent had actual knowledge of the fraud, and nonetheless promoted it, is uncontroverted. However, in the instant case, it was never shown that the undersigned even knew of the omissions by Mr. Burrell. The Referee makes the assumption that since Ms. Burkich was a passenger in the 1986 accident that she, when acting as counsel for the 1989 accident, should have reviewed Mr. Burrell's answers and corrected them. Even if such an unreasonable duty was to be imposed, there is nothing in the record to support the Bar's contention that counsel just did not remember all the doctors her husband had seen four and a half years earlier.

Notwithstanding the petitioner's arguments for acquittal as stated above, should

this Court rely on the allegations as asserted by the Bar, the respondent, Amy L. Burkich, should have been sanctioned for no more than a private reprimand, given her lack of a disciplinary history and the precedent as shown in The Fla. Bar v. Sax., 530 So.2d 284 (Fla. 1988).

In order for the Bar to obtain an adjudication of guilt and a suspension for false statements, fraud and misrepresentation, the Bar must show by a preponderance of the evidence that counsel *knowingly* made false statements or that material information is improperly being withheld, and takes no remedial action. See Rule 6.12, Florida Standards For Imposing Lawyer Sanctions.

In order for the Bar to obtain an adjudication of guilt and a public reprimand for false statements, fraud and misrepresentation, the Bar must show by a preponderance of the evidence that counsel *negligently* made false statements or that material information was withheld. See Rule 6.13, Florida Standards For Imposing Lawyer Sanctions. Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the proceeding. See Rule 6.14, Florida Standards For Imposing Lawyer Sanctions.

The trial court made an improper factual assumption in that the omission of the

names of several health care providers to the defense by Mr. Burrell, in the case of Burrell v. Garcia, caused injury by affecting the damages portion of the lawsuit. Counsel for the defense, Mr. Lippincott, stated at the hearing before Grievance Committee "11F" and in his deposition for this action, that he did receive the omitted information by way of a Request For Production for Mr. Burrell's medical records and that he was able to compile the names and addresses of all the providers from the records. Therefore, even if the respondent hereto is found to be at fault, there was no injury or adverse effect to the opposing party.

Should this Court still determine that Amy L. Burkich violated Rule 4-3.4(a) or 4-4.1, the more appropriate punishment, in light of the Bar's failure to present sufficient evidence of an intentional omission on the part of the respondent, would have been an admonishment or no more than a private reprimand.

CONCLUSION

In view of the petitioner's brief and consideration of the merits, this Honorable Court must conclude that there was insufficient evidence presented to support a finding of violations of Rules 4-3.4(a), 4-4.1, and 4-8.4, Rules Regulating Professional Conduct, or in the alternative correct the sentence imposed by the Referee to an admonishment or private reprimand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished to: Sid White, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1297, Pamela Pride Chavies, Esquire, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, on this 6th day of January, 1995.

Respectfully submitted.

AMY L. BURKICH, ESQUIRE
Petitioner
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