IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	
Complainant-Appellee,	)	Supreme Court Case
	)	No. 84,097
	)	
V.	)	The Florida Bar Case
	)	No. 94-50,185(17C)
DAVID SMITH NUNES,	)	
	)	
Respondent-Appellant.	)	

ANSWER BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the Bar" or "The Florida Bar". David S. Nunes, Appellant, will be referred to by his full name, or as "respondent" or "Nunes". The symbol "RR" will be used to designate the report of referee. The symbol "T1" will be used to designate the transcript for the first day of the final hearing and the symbol "T2" will be used to designate the transcript for the second day.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent's version of the case and the facts is incomplete, inaccurate and argumentative. In addition, Respondent's discussion of the facts is devoid of even one citation to the record. Therefore, The Florida Bar feels constrained to set forth its version based on the evidence and proceedings below.

I. THE CASE

The Florida Bar filed its Complaint against respondent on July 27, 1994 pursuant to a probable cause finding by Grievance Committee 17 "C" on June 13, 1994. On August 8, 1994, the Honorable Karen L. Martin was appointed as referee and on August 22, 1994, respondent served his initial response to the Complaint. On August 31, 1994, the bar served a Motion to Compel Better Answer and on October 12, 1994, the bar's Motion was granted. On October 20, 1994, respondent served his "Answer, Affirmative Defenses, Countercharges and Impeachment of Complainant's Credibility." On November 11, 1994, respondent filed a Motion for Change of Venue and for Inconvenience and a Motion to Abate and to Recuse. On November 18, 1994, the Referee denied these motions as well as respondent's ore tenus Motion to Continue. On December 7, 1994, respondent served a Motion to Dismiss which was denied by the referee on December 12, 1994 (T1 22). The case proceeded to final hearing on December 12, 1994 and December 13, 1994.

The referee found the respondent guilty on Count I of the bar's complaint for violating Rule 4-4.2 of the Rules Regulating The Florida Bar concerning improper communication with a person represented by counsel. (RR 7). The referee found respondent not guilty on Count II of the bar's complaint because the evidence did not rise to the standard of clear and convincing. (RR 7). The referee recommended that respondent be suspended for ten (10) days with automatic reinstatement.

(RR 7). The referee further recommended that upon respondent's readmission, he receive a public reprimand and be placed on probation for a period of 18 months during which time he should be required to pass the ethics portion of The Florida Bar Exam and during which time he should be supervised to ensure that he understands and abides by the Rules of Professional Conduct. (RR 8).

In making her recommendation, the referee found no factors in mitigation but found the following factors in aggravation:

> 9.22(f) Submission of false evidence, false statements or other deceptive practices during the disciplinary proceeding (as evidenced by the respondent's differing and inconsistent explanations for communicating with Mr. Garcia's client without consent).
>
> 9.22(g) Refusal to acknowledge wrongful nature of conduct (as evidenced by the respondent's personal attacks on Mr. Garcia and various other persons during the course of the proceeding).
>
> 9.22(i) Substantial experience in the practice of law (The respondent was admitted to The Florida Bar on October 23, 1980). (RR 8).

Respondent filed a Motion for Re-hearing which was denied on January 9, 1995. Contrary to the respondent's assertion on page 8 of his brief, The Florida Bar's response to the Motion to Re-hear did not concede any re-hearing ground. Also, on January 9, 1995 (and omitted from respondent's Statement of the Case), the referee entered a Supplemental Order on Costs to add the court reporter charges for the final hearing to the prior award of costs in favor of the bar. The total costs awarded to the bar were $2,927.16 not the $1,642.41 stated by respondent.

II. THE FACTS

Respondent appeared post-final judgment in a foreclosure proceeding on behalf of Amanda

Illes, a minor, in which Attorney Maurice Garcia represented First Nationwide Bank (T1 40).[1] Respondent was not successful in front of the trial judge, the Honorable Harry G. Hinckley, Jr. and respondent then applied to the appellate court for relief by way of mandamus against Judge Hinckley. (T1 50, T2 21).[2]

In response to respondent's petition, the Fourth District Court of Appeal issued a rule to show cause on June 14, 1993. (Exhibit 3 in evidence). Mr. Garcia received a copy of the rule to show cause directly from the Fourth District Court of Appeal and also a copy by fax from Mr. Nunes. (T1 57). On June 16, 1993, Mr. Garcia wrote respondent with regard to the matter (Exhibit 4 in evidence). The purpose of the letter was to acknowledge that he had received the order from the Fourth District and to advise respondent that the locks had previously been changed on the property but that respondent's client could make arrangements to remove any remaining personal property. (T1 59). The letter further authorized respondent's client to directly contact Ray Nerdin of Little & Company to make such arrangements and provided a telephone number for Mr. Nerdin. (See, Exhibit 4). Little & Company was the independent removal company used by First Nationwide to assist in

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[1] The foreclosure was originally filed by First Nationwide Bank against Amanda's grandfather, Karl Illes. Upon Karl Illes' death, First Nationwide Bank named Andrew Illes, Amanda's father, as a defendant. (T1 44-45). Andrew Illes was not successful at trial and then filed various post-trial motions including one for a new trial on the grounds that a newly discovered Hungarian will purportedly devised the property directly to Amanda. (T1 46). Andrew Illes' motion in the trial court in this regard was denied and his appeal was ultimately dismissed. (T1 48).

[2] Respondent's Statement of the Facts (page 4 and 5) makes reference to Mr. Garcia's over-broad writ of possession in the foreclosure as well as other alleged irregularities and errors in the foreclosure proceedings without any citation to the record. In fact, Mr. Nunes was not successful in front of the Fourth District Court of Appeal in the proceedings in question herein. (T1 99; See also, Exhibit 14 admitted in evidence).

foreclosures. (T1 59).

Both Ray Nerdin as well as Mr. Garcia's client representative, Gina Sherman from First Nationwide Bank, were copied on the June 16, 1993 letter (see Exhibit 4). Mr. Garcia did not, however, provide a telephone number or fax number or address for Gina Sherman (see Exhibit 4 and T1 60) nor did Mr. Garcia authorize respondent at that time on any other time to contact First Nationwide Bank or Gina Sherman (T1 60).[3]

In response to the June 16, 1993 letter from Mr. Garcia, respondent wrote a letter to Mr. Garcia on which he copied Ray Nerdin with a fax number in the (801) area code and Gina Sherman with a fax number in the (916) area code. (See, Exhibit 5). In the June 25, 1993 letter, respondent recognized that he was copying Mr. Garcia's client. In paragraph two of the letter, respondent referred to "your client, First Nationwide Bank" and in paragraph four of the letter, respondent stated:

> Because neither First Nationwide nor Little & Company are parties to my client's claim and are not represented, I am duty bound as an officer of the court to copy them herewith so that they may seek competent, independent legal advise [sic] and counsel. (See Exhibit 5).

The letter went on to state in paragraph five that Mr. Garcia had recklessly subjected Mr. Garcia's client to certain liability and otherwise criticized Mr. Garcia's representation. The letter concluded:

Based on the foregoing, I believe you have seriously breached ethical standards for

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[3]Contrary to respondent's assertion that Mr. Garcia provided a "800" number for both persons, Mr. Garcia testified that Gina Sherman and Ray Nerdin, to his knowledge did not have the same telephone number and that Ray Nerdin was located in Salt Lake City or Denver whereas Gina Sherman was located in California. (T1 143, see also Exhibit 4). Respondent did not testify that he reached Gina Sherman at Ray Nerdin's "800" telephone number (T2 155).

Florida attorneys with respect to your duties to your client, as well as to the Courts. (See Exhibit 5).

Mr. Garcia testified that there was no question in his mind that respondent knew that Gina Sherman was Mr. Garcia's client representative when respondent faxed her the June 25, 1993 letter:

> Q. When Mr. Nunes faxed Gina Sherman a copy of the June 25, 1993 letter, that has been marked as Exhibit 5, did you believe that Mr. Nunes knew that Gina Sherman was your client representative?
>
> A. No question in my mind. (T1 63)

Mr. Garcia protested the improper communication with his client by return letter faxed to respondent on June 25, 1993. (Exhibit 6 in evidence).

Respondent replied by letter dated June 28, 1993 in which he stated in part:

> Later you sent me a letter authorizing me to contact Ray Nerdin of Little & Company, and a copy to Ms. Gina Sherman. I do not know who these people are and I am sure you don't represent either of those people. However, seeing that you copied them and brought them to my attention, I did not ex parte these people, as you apparently have done with Andrew Illes. So if you gave me authorization to send copies to those people, I cannot understand why you would turn around and yell. I did not send any copies to your client, the First Nationwide Bank and I do not know who those people are relative to Amanda Illes. (See, Exhibit 7 in evidence).

The referee found that the explanation in respondent's letter of June 28, 1993 in which respondent denied knowing the identity of Gina Sherman was not consistent with his letter of June 25, 1993 in which he stated he was duty bound to copy First Nationwide Bank. (RR 5).

Respondent then gave a third explanation on his letter of August 31, 1993 to The Florida Bar:

> He [Attorney Garcia] then in his last paragraph stated "We are prepared to allow Andrew Illes and Amanda Illes to directly contact by phone Ray Nerdin of Little & Company..." He [Attorney Garcia] informed me that he was going out of town, so when he faxed the letter to me, the letter showed copy to Ms. Gina Sherman (faxed), Mr. Ray Nerdin (faxed) and then he gave me a phone number. I contacted the phone number which was supposed to have been Ray Nerdin's phone number, and they gave me their fax number and I asked them if they had a fax number for Gina Sherman

> because Garcia had forgotten to put her number on the letter. [emphasis added]. I did not know who she was. So Nerdin gave me her fax number and I faxed it to them." (See, Exhibit 17 in evidence and RR 5).

In his letter of September 15, 1993 to the bar, respondent explained his reason for copying Gina Sherman as follows:

> I told Mr. Garcia that he was the one who gave me Gina Sherman's name. I did not know, nor do I now know who Gina Sherman is. I also told Mr. Garcia that I am not in the habit of copying my clients with pleadings and letters to opposing counsel, so if he wrote me a letter showing that he sent copies to some people, obviously I am going to send copies to those people. (See, RR 6).

Finally, in his testimony before the grievance committee, respondent testified that someone at Little & Company whose name he did not recall and who he believed to be female instructed him to contact Gina Sherman leading him to believe that Gina may have been a Little & Company supervisor. (T2 87-90).

The deposition testimony of the owner of Little & Company, Ralph Little, was read into the record (beginning T2 117). Mr. Little testified that it would not be in accordance with Little & Company procedure to have someone instruct respondent to fax a letter to Gina Sherman. (T2 120). If that occurred, it should have been reflected in the file and it was not. (T2 120). Gina Sherman's name and fax number was not information that they would have at Little & Company. (T2 121). Little & Company employees in June, 1993 were dealing with Kathy Hauer from First Nationwide Bank (T2 121) not Gina Sherman and Mr. Little nor any of his employees, to his knowledge, had ever dealt with Gina Sherman. (T2 118).

SUMMARY OF ARGUMENT

I. RESPONDENT'S ARGUMENT THAT HIS LETTER OF JUNE 25, 1993 DID NOT RELATE TO THE SUBJECT MATTER OF THE REPRESENTATION IS WITHOUT MERIT.

A simple review of respondent's letter of June 25, 1993 (Exhibit 5 in evidence) shows that one, the letter related to the foreclosure suit and two, regardless of the formal proceeding referenced, the matter related to the subject of Mr. Garcia's representation. Respondent himself recognized this representation when he referred repeatedly in the letter to First Nationwide Bank as Mr. Garcia's client.

II. THE EVIDENCE WAS OVERWHELMING THAT RESPONDENT KNEW THAT GINA SHERMAN WORKED FOR A REPRESENTED PARTY.

Respondent's letter stated explicitly that he was copying First Nationwide Bank. Attorney Garcia testified that respondent had reason to know the identity of Gina Sherman. Respondent's differing and inconsistent explanations of his conduct further supported the proposition that not only did respondent knowingly communicate with Attorney Garcia's client but that respondent was being less than forthright about his actions.

III. THE EVIDENCE ESTABLISHED THAT RESPONDENT KNOWINGLY COMMUNICATED WITH MR. GARCIA'S CLIENT.

Gina Sherman had the responsibility from First Nationwide Bank for dealing with First Nationwide Bank's attorney, Maurice Garcia. That responsibility made her an inappropriate person for respondent to contact.

IV. SUMMARY DENIAL OF RESPONDENT'S MOTION FOR REHEARING WAS NOT IMPROPER NOR WAS THERE ERROR IN THE AWARD OF COSTS.

Respondent was not entitled to a hearing on his motion, and respondent cites no authority for that proposition. Under Rule 3-7.6(o), the referee had discretion to award costs and the bar contends that the referee's award should not be disturbed The bar does not and did not concede any error on the award of costs. The bar took the position in front of the Referee that the matter did not merit further hearing and maintains that position.

V. THE RECOMMENDED DISCIPLINE IS APPROPRIATE.

Given the serious rule violation found by the referee as well as three aggravating factors including submission of false evidence, false statements of other deceptive practices during the disciplinary proceedings, the bar submits that the Referee's recommendation should be upheld.

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT HIS LETTER OF JUNE 25, 1993 DID NOT RELATE TO THE SUBJECT MATTER OF THE REPRESENTATION IS WITHOUT MERIT.

Respondent's first argument is that the referee overlooked that the communication in question did not relate to the foreclosure but rather to a prohibition\mandamus proceeding in the Fourth District Court of Appeal against the trial judge. The bar submits that one, the letter did relate to the foreclosure suit and two, regardless of the formal proceeding referenced the matter involved related to the subject of Mr. Garcia's representation, a prohibited communication under Rule 4-4.2 of the Rules Regulating The Florida Bar.[4]

The language of repondent's June 25, 1993 letter contained strong criticism of Mr. Garcia's handling of the foreclosure case. In addition, repondent argued in the letter that the rule to show cause order barred completion of the foreclosure execution: "... the Order stays all proceedings in your client's foreclosure suit in Broward Circuit Court, Case No. 91-20,20830 (08), which would include completion of execution." (See, Exhibit 5, paragraph 1). The letter speaks for itself. Respondent's argument that the letter did not relate to the foreclosure case is nonsensical.

In any event, respondent's argument that Mr. Garcia's client was not a party to the Fourth District Court of Appeal proceeding misses the issue. The issue is not whether the person in question is a formal party but whether they are represented by counsel in the matter in question. In this regard, the comment to Rule 4-4.2 of the Rules Regulating The Florida Bar states:

> This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

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[4] Respondent incorrectly refers to the rule in question as DR 4-4.2.

Respondent knew that First Nationwide Bank was represented by Mr. Garcia. Respondent's letter of June 25, 1993 made repeated references to First Nationwide Bank as Mr. Garcia'a client. Also, the Fourth District Court of Appeal recognized Mr. Garcia's client as the real party in interest and allowed his firm to appear on their behalf. (T1 51-56). Mr. Garcia was also copied on the original rule to show cause order by the Fourth District Court of Appeal. (T1 57). The purpose of the appellate proceedings did not concern some matter unrelated to the foreclosure case but was rather an attempt to gain the relief that had been denied by Judge Hinckley.

There is no error by the referee on this issue.

II. THE EVIDENCE WAS OVERWHELMING THAT RESPONDENT KNEW THAT GINA SHERMAN WORKED FOR A REPRESENTED PARTY.

The bar agrees with respondent's point that the referee's findings of fact are to be accorded a presumption of correctness and upheld unless clearly erroneous or without support in the record. The Florida Bar v. Hooper, 507 So. 2d 1078 (Fla. 1987); The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986). In this case, the referee found that the evidence was clear and convincing that respondent knowingly communicated with Attorney Garcia's client without his consent.

Perhaps the best evidence of this knowing communication is repondent's letter of June 25, 1993. In paragraph four of this letter, respondent stated that he was copying First Nationwide and Little & Company. He then showed a "cc" to Ray Nerdin from Little & Company and a "cc" to Gina Sherman.

Attorney Garcia testified on direct examination that he often copied his clients on correspondence related to the case. (T1 60).

Furthermore, on cross-examination, Attorney Garcia was asked by respondent to address the issue of how respondent knew the identity of Gina Sherman:

> Q. Mr. Garcia, would you state with specificity how I would know that Gina Sherman was your bank representative in Sacramento, California. I want to know why you believe I knew that. How do you know that I knew that?
>
> A. It is my belief that you knew this from one if not two sources, or perhaps even three. Number one is since I didn't give you the fax number for my client, you had to obtain that fax number in some way.
>
> Assuming that --
>
> THE COURT: One moment. There are two more. What were the other two?
>
> THE WITNESS: The other two would be Mr. Andrew Illes, who had been involved

> in the litigation in the first foreclosure suit, continued to be involved in this suit directly as, quote, legal guardian of his daughter, Amanda, who he could not represent -- he could represent himself but not Amanda -- was well aware of who my client was and you had a relationship with Andrew Illes, and the reason could be that you obtained that information from Mr. Nerdin who would have told you or given you the information to call somebody at First Nationwide, so for these reasons, I believe you knowingly copied my client and intentionally put that information in the letter to bring that to their attention. (T1 126 - 127).

Moreover, Attorney Garcia perhaps best addressed this point when he testified on cross-examination: "If you didn't know who Gina Sherman was, I don't know why you would have written her a letter." (T1 130).

Respondent's differing and inconsistent explanations lend further support to the proposition that he knowingly contacted Attorney Garcia's client. The bar will not belabor all of these inconsistencies but will highlight a few. Although at one point, respondent testified that Mr. Garcia told him to contact Gina Sherman (T2 154-155), a review of the letter in which respondent claims that Garcia told him to contact Gina Sherman shows that respondent's position is without merit. (Exhibit four). Respondent's version that someone at Little & Company whose name he could not recall told him to fax a letter to Gina Sherman was not consistent with respondent's explanations in his letter of June 28, 1993 to Garcia, and his letters of August 31, 1993 and September 15, 1993 to the bar (See, RR 5 - 6) and was contradicted by the testimony of Ralph Little. Finally, all of the above versions are inconsistent with the June 25, 1993 letter itself in which respondent asserted he was "duty-bound" to copy First Nationwide Bank.

Even though respondent could see Gina Sherman's name on the June 16, 1993 from First Nationwide Bank's attorney and even though respondent's own letter of June 25, 1993 stated he was duty-bound to copy First Nationwide Bank, respondent would have the Court believe that respondent

had no idea who Gina Sherman was. Rather, he would have the Court believe that his references to botching the foreclosure suit were directed at an unknown person instead of being a calculated attack on Mr. Garcia targeted to Mr. Garcia's client.

The inescapable conclusion is that respondent not only knowingly communicated with Attorney Garcia's client but that respondent was being less than candid about his actions.

III. THE EVIDENCE ESTABLISHED THAT RESPONDENT KNOWINGLY COMMUNICATED WITH MR. GARCIA'S CLIENT.

Respondent argued that there was no evidence that Gina Sherman had a "managerial responsibility" on behalf of First Nationwide Bank and that she was only identified as Mr. Garcia's "client contact" or "client representative" which did not even necessitate employment with the bank. The bar submits that respondent misconstrues the evidence and also misreads the prohibitions of Rule 4-4.2 of the Rules Regulating The Florida Bar.

First of all, there were numerous references to Gina Sherman throughout the testimony. Mr. Garcia testified that one of the reasons he filed a grievance was due to "a communication by Mr. Nunes directly to my client without my consent." (T1 62, emphasis added). Exhibit 6 in evidence is to the same effect in which Mr. Garcia stated:

> However, next week I will be filing an appropriate grievance with The Florida Bar given that you have knowingly and willfully improperly contacted, without our permission, our firm's client. (Emphasis added).

As to employment, Mr. Garcia testified that: "Gina Sherman was the woman that I had client contact with on behalf of -- one of the women that I had client contact with on behalf of First Nationwide." (T1 59-60). Mr Garcia further testified:

> Q. When Mr. Nunes faxed Gina Sherman a copy of the June 25th, 1993 letter, that has been marked as Exhibit 5, did you believe that Mr. Nunes knew that Gina Sherman was your client representative?
>
> A. No question in my mind.
>
> Q. What is the basis of that belief?
>
> A. Well, number one she had been copied on other correspondence... (T1 63).

The evidence clearly established that Gina Sherman was the person whom Attorney Garcia

dealt with on behalf of First Nationwide Bank and that he regarded her as his client. She was the person designated to receive his correspondence concerning his representation. This is precisely the type of person that opposing counsel is prohibited from communicating with under Rule 4-4.2 of the Rules Regulating The Florida Bar which provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows is represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer.

The language regarding "managerial responsibility" is not in the rule itself but in the comment and is broader than argued by respondent providing:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The bar submits that a fair reading of the evidence shows that Gina Sherman had the responsibility from First Nationwide Bank for dealing with First Nationwide Bank's attorney and given that role, the communication by respondent was improper. The referee's finding that respondent knowingly communicated with Attorney Garcia's client should not be disturbed.

IV. SUMMARY DENIAL OF RESPONDENT'S MOTION FOR REHEARING WAS NOT IMPROPER NOR WAS THERE ERROR IN THE AWARD OF COSTS.

Respondent argues that summary denial of his motion for rehearing was improper. Respondent cites no authority for this proposition. Respondent claims that summary disposition is a due process deprivation and abuse of discretion. The bar submits that respondent's motion for rehearing consisted mainly of a rehash of arguments he had already advanced to the referee and that under the Rules of Discipline, a respondent has no automatic entitlement to further hearing. With respect to oral argument before this Court, the Court has held: "...there is no right to oral argument in a bar discipline proceeding." The Florida Bar v. Winn, 593 So. 2d 1047, 1048 (Fla. 1992).

With respect to costs, the referee originally awarded $1,642.41 which did not include the court reporter charges for the final hearing. Respondent's motion to rehear argued that the costs should have been prorated since only one of two counts was sustained. The referee apparently considered this argument and rejected it and through a Supplemental Order on Costs entered January 9, 1995 awarded the bar a total of $2,927.16 to include the full court reporter charges for the final hearing.

The bar's response to the motion to rehear apparently reached the referee after the orders on the motion to rehear and on the costs issue had already been entered. In the bar's response, the bar stated that more of the bar's overall efforts related to the prosecution of Count I than Count II. The bar also stated that if the referee determined to prorate costs, the bar had no objection to leaving such proration to the discretion of the referee. No error was conceded.

Given that the referee has apparently exercised her discretion to award the full amount, the bar sees no reason to disturb this finding. Under Rule 3-7.6(o)(2):

> The referee shall have discretion to award costs and absent an abuse of discretion the referee's award shall not be reversed.

Respondent can not demonstrate an abuse of discretion. The bar submits that it is difficult if not impossible to try to apportion the costs. Both counts of the Complaint arose from the same underlying proceedings and involved the same parties. Under Rule 3-7.6(o)(3), the referee is entitled to assess the bar's costs if the bar is successful in whole or in part:

> When the bar is successful in whole or in part, the referee may assess the bar's costs unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

The bar submits that this matter is basically a non-issue and certainly not a matter which requires a rehearing as requested by respondent. The bar, in its response to the Motion to Rehear, took the position that the matter did not merit a further hearing, and the bar maintains that position.

V. THE RECOMMENDED DISCIPLINE IS APPROPRIATE.

Respondent's argument on the level of discipline basically regurgitates his arguments that he should not be found guilty. In addition, he reiterates his continuing personal attacks on Mr. Garcia.[5] The bar submits that the discipline is appropriate.

The referee was satisfied that the recommended discipline was necessary to meet the Court's criteria for lawyer discipline as set forth in The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970): fairness to society, fairness to the respondent and the requisite deterrent effect.

The bar submits that the referee's proposed discipline was in accord with Florida Standards For Imposing Lawyer Sanctions 6.32 which provides:

> Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

As to prior case law, in The Florida Bar v. Shapiro, 413 So. 2d 1184 (Fla. 1982), this Court found a 91 day suspension and passage of the ethics portion of the bar exam to be appropriate for improper communication with an adverse party coupled with other significant misconduct. In The Florida Bar v. Hooper, 507 2d 1078 (Fla. 1987) this Court found a 90 day suspension to be appropriate for communicating with a representative of a corporation without consent of the corporation's counsel as well as other serious violations.

In the instant case, the respondent received only a ten day suspension as opposed to the 91 days in Shapiro, supra and the 90 days in Hooper, supra. Additionally, respondent is to receive a public reprimand on readmission and 18 months of supervised probation during which time he is to pass the ethics portion of the bar exam. In addition to one serious rule violation, the Referee in this matter also found three aggravating factors: Florida Standards For Imposing Lawyer Sanctions

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[5]For example on page 13 of his brief, respondent states: "Should not Mr. Garcia's name be in this caption instead of Petitioner's?" This type of comment is further illustration of respondent's refusal to acknowledge the wrongful nature of his conduct.

9.22(f) submission of false evidence, false statements or other deceptive practices during the disciplinary proceeding; (g) refusal to acknowledge wrongful nature of conduct; and (i) substantial experience in the practice of law.

The bar contends that submission of false evidence, false statements or other deceptive practices during the disciplinary proceeding, in particular, warrants serious and significant discipline. This court should not countenance falsehood or deception. Lessening the referee's proposed discipline under the circumstances of this case would not sufficiently protect the public's interest nor have the requisite deterrent effect.

CONCLUSION

The respondent can not demonstrate that the referee's findings are clearly erroneous or lacking in evidentiary support.

WHEREFORE, The Florida Bar requests this Court to uphold the Referee's findings and approve the Referee's recommended discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Christopher T. Mancino, Esq., Law Offices of David Smith Nunes, Esq. at 3017 North Andrews Avenue, Fort Lauderdale, FL 33309, by hand delivery on this 21st day of April, 1995.

RONNA FRIEDMAN YOUNG