087 FILED
SID J. WHITE
NOV 13 1995
CLERK, SUPREME COURT
By
Chief Deputy Clerk
12/8

IN THE SUPREME COURT OF FLORIDA

(TFB **File** Nos. 94-00728-03, 94-00933-03, **and** 94-01105-03)

THE FLORIDA BAR,

Complainant, Respondent,

vs. Case Nos. **84,493** and **85,243**

ROBERT JOHN SCHRAMM, ESQ.,

Respondent, Petitioner.
_____/

INITIAL BRIEF IN SUPPORT OF ROBERT JOHN SCHRAMM, ESQ.'S PETITION FOK REVIEW OF REFEREES REPORT AND RECOMMENDATION

On direct review to this honorable court from the recommeiidation of the ~~Referee~~ Hon. John E. Crusoe, Circuit Judge, Rendered in **TFB** File Nos. **94-00728-03, 94-00933-03,** and **94-01105-03,** on July **24, 1995.**

Baya Harrison, III, Esq.
Counsel for Respondent/Petitioner,
Robert John Schramm, Esq.
Post Office Box **656**
Monticello, FL **32345-0656**
(904)997-8469
Fla. **Bar** No. **099568**

TABLE OF CONTENTS

TABLE OF CITATIONS

Others

PRELIMINARY STATEMENT

Since this is a case which is reviewed automatically by thc supreme court per the provisions of Rule 3-7.7(a)(2), Rules Regulating the Florida Bar, there is no index to the record for review. The documents which were submitted to the referee are included in and make up the record here. Thus, we note the following:

Kobert John Schramm, Esq., an attorney at law and member of the Florida Bar, was the respondent in the proceedings before the Third Judicial Circuit Grievance Committee and the referee. Technically he is the petitioner here. For clarity and to avoid confusion, he will be referred to as "Mr. Schramm."

The Florida Bar was the complainant in the proceedings below. It will be referred to **as** "the Florida Bar" or "the Bar."

Hon. John E. Crusoe, Circuit Judge, was the referee appointed by this honorable court to, inter alia, conduct a hearing regarding the charges of lawyer misconduct and submit findings of fact and a recommendation as to disposition. He is referred to herein as "Judge Crusoe" or "the referee." Judge Crusoe submitted a Report of Referee dated July 24, 1995. It will be referred to here as such followcd by an appropriate page number. The transcript of the hearing before Judge Crusoe held on June 30, 1995 is also a part of this record. It will be referred to as "TR" followed by an appropriate page number.

Relevant to the facts and circumstances in TFB File No. 94-00728-03 is the transcript of a February 28, 1994 hearing before Hon Paul S. Bryan, Circuit Judge, in the Taylor County Circuit Court Case of **Fleming v. Fleming,** Case No. 93-173-CA. That transcript will be referred to as the "Fleming Hearing Transcript " followed by an appropriate page number.

The Grievance Committee of the Third Judicial Circuit of Florida held a hearing on January 20, 1995 regarding TFB File No. 94-01105-03. The transcript of

that proceeding will be referred to as "the Grievance Committee Hearing Transcript" followed by an appropriate page nuinber.

Various gleadings filed in the cause will be referred to by name and page number.

All emphasis in bold letters is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND OF THE FACTS

The Nature af the Case and Statement on Jurisdiction

This is a petition for review of the report and recommendation of the referee in a lawyer disciplinary case instituted by The Florida Bar. Robert John Schramm, Esq., an attorney at law and member of the Florida Bar, petitioner, seeks relief from the referee's report and recommendation per the provisions of Rules 3-7.7(1) and (2), Rules Regulating the Florida Har. ïhis honorable court has jurisdiction per thc aforementioned rules and Article V, Section 15, Florida C'onstitution (1972).

Course of Proceedings Below

The undersigned was not retained until several months prior to the hearing before the referee, thus I may not be exactly correct regarding the course of the proceedings below. However, what follows is a reasonably accurate chronology of the relevant events in this case.

On or about October 11, 1994, the Bar filed a two count complaint against Mr. Schramm in TFB File Nos. 94-00933-03 (referred to sometimes as "the recusal matter") and 94-00728-03 (the matter before Judge Hale Stancil). These TFB File Nos. became Supreme Court Case No. 84,493. (See the original complaint, page 1-6.) Mr. Shramm personally answered these charges in a response dated October 31, 1994. Later on, the essential allegations of this complaint were admitted. (See transcript of Hearing before Referee, pages 5,6.)

On February 24, 1995, the Bar filed a supplemental complaint in TFB File No. 94-01105-03 regarding Mr. Schramm's representation of one Barbie Powell. (See the Bar's supplementai complaint dated February 24, 1995.) That TFB File No. eventually became Supreme Court Case No. 85,243. The supplemental complaint followed a Third Judicia1 Circuit Grievance Committee hearing held on January 20, 1995. The committee made a finding of probable cause that Mr. Schramm had violated Rules 4-1.3, 4-1.4(a) and 4-1.4(b), Rules Regulating the Florida Bar, regarding

the matter. (See the Grievance Committee Hearing transcript, page 86.) Through counsel, Mr. Cchramm answered this complaint in a pleading dated June 22, 1995 (later amended) in which most of the factual allegations of the complaint were admitted. On October 31, 1994, the Hon. Philip Padovano, Chief Judge of the Cecond Judicial Circuit of Florida, per an order dated October 13, 1994 from this honorable court, assigned Hon. John E. Crusoe, Circuit Judge, to serve as referee in the proceedings and to conduct a hearing per the provisions of Rule 3-7.6(k), Rules Regulating the Florida Bar. On March 23, 1995, per an agreement between the parties, Judge Crusoe consolidated Supreme Court Case Nos. 84,493 and 85,243. On June 30, 1995, the consolidated matters came on for hearing before the referee. After the presentation of testimony (mostly mitigation testimony), the Bar and Mr. Cchramm, via counsel, submitted written Closing Arguments. The written Closing Argument of the Bar is an important aspect of this request for review and will be refereed to as the Bar's "Closing Argument."

Disposition in the Lower Tribunal (before the Referee)

On July 24, 1995, the referee filed his report with this honorable court. In so doing, the referee recommended that Mr. Cchramm he suspended from the practice of law for 91 days -- and indefinitely thereafter until the respondent proves rehabilitation, pays the costs of the proceedings and makes restitution unto Ms. Barbie Powell in the amount of $180.00. (Report of Referee, pages, 7,8.)

On September 22, 1995, The Board of Governors of the Florida Bar met and considered the referee's recommendation. (There is a letter from the Board of Governors dated September 22, 1995 to this effect in thic file.) On or about October 6, 1995, Mr. Schramm timely filed his petition for review of the referee's recommendation in this honorable court.

Statement of the Facts
TFB No. 94-933-03 (The Recusal Incident in Fleming v. Fleming)

In this case, Mr. Schramm, following the instructions (see the February 28, **1994** Fleming Hearing Transcript, pages 11,12) of his client, Mr. Ronald Alan Fleming, filed a motion (eventually signed by Mr. Fleming) to recuse the trial judge, Hon. Paul S. Bryan, in the Taylor County, Florida case of **Fleming v. Fleming,** Case No. 93-173-CA. (Report of Referee, page 1.) Mr. Fleming contendcd that the trial judge had at one time shared office space with the brother of Michael Smith, Esq., opposing counsel. (See the Fleming Hearing Transcript, pages 11, 15/16.) The motion as originally filed was legally deficient but Mr. Schramm was allowed by the court to attempt to correct those legal deficiencies. (See the Bar's Answers to Requests for Admissions dated October 11, **1994,** page **2.)** Thereafter, the court granted the motion. (Id.) After the judge granted the motion ("...the Motion for Disqualification is granted..." see the Fleming Hearing Transcript, page 24) and the hearing was concluded, Mr. Schramm -- in what was clearly an aside -- untruthfully stated that he had corroborated his client's claim with other attorneys. Specifically, Mr. Schramm incorrectly stated:

> "Well, I apologize, Judge. I did make an effort to verify that from other sources who told me the same thing. In fact, practicing -- **a** few attorneys."

Ibid. at pages 25, **26.)** Mr. Schramm made no misrepresentation to Judge Bryan before the court made its ruling. (Fleming Hearing Transcript, pages 5-25.)

The referee determined that Mr. Schramm had violated the following provisions of the Rules Regulating the Florida **Bar** regarding this incident:

¶ 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice),

¶ 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal),

¶ 4-3.3(b) (the duties stated in paragraph (a) continue beyond the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6),

¶ 4-4.1(a) (in the course of representing a client a lawyer shall not knowingly make a false statement of tnaterial fact or law to a third person),

¶ 4-4.(1)(b) (in the course of representing a client a lawyer shall not knowingly fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a crimina1 or fraudulent act by a client, unless disclosure is prohibited by rule 4-1.6),

¶ 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another),

¶ 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation),

¶ 4-8.4(d) (a lawyer shall not engage in conduct in connection with the yractice of law that is prejudicial to the administration of justice, etc.).

TFB 94-00728-03 (The Matter before Judge Stancil)

Mr. Schramm represented Ms. Kathi Evans in a custody modification petition in Circuit Case No. 85-574-CA, in the Fifth Judicial Circuit of Florida. (Report of Referee, page **2.)** **A** hearing was scheduled for January 31, 1994. Mr. Cchramm sought to continue the hearing and in the process of resolving that issue had a telephone conversation with the circuit judge handling the case, Hon. Hale R. Stancil. (Report of Referee, page **2.)** Mr. Schramm falsely told the judge that he (Mr. Schramm) had a scheduling conflict due to another hearing which had been set for that same date. (Report of Referee, page *3.)*

We note parenthetically in this regard that in his report at page **3,** the referee states:

"Respondent lied to Judge Stancil during a subsequent telephone conversation regarding the Motion for Continuance."

This we believe is incorrect and not supported by the record. (See Transcript of Hearing before Referee, page 11.) The Bar did not allege this in its comylaint. (See the Bar's Comylaint of October 11, 1994, page 4.) However, we hasten to acknowledge that Mr. Cchramm followed up his telephone conversation with Judge Stancil with a written motion for continuance -- and in that motion (attached to the Bar's complaint of October 11, 1994) he mdkes the same incorrect contention regarding the supposed scheduling conflict). Mr. Cchramm also wrote Judge Stancil a letter shortly after he spoke with him admitting his misstatement. (Transcript of Hearing before Referee, pages 11,12.)

The referee determined that Mr. Cchramm had violated the following provisions of the Rules Regulating the Florida Bar as to this incident:

¶ 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty **and** justice),

¶ 4-3.3(a)(1) (a lawyer shall not knowingly **make a** false statement of material fact or law to a tribunal),

¶ 4-3.3(b) (the duties stated in paragraph **(a)** continue beyond the conclusion of the proceedings and apply even if compliance requires disclosure of information otherwise protected by rule 4-1.6),

¶ 4-3.3(d) (in an ex parte proceeding, a lawyer shall inform the tribunal of all material facts know(n) to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse),

¶ 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do *so*, or do so through the acts of anotherj,

¶ 4-8.(4)(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness of **a** lawyer in other respects)

¶ 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation),

¶ 4-8.4(d) (a lawyer shall not engage in conduct which is prejudicial to the administration of justice, etc.).

TFB 94-1105-03 (The Barbie Powell Matter)

Mr. Schramm was retained to represent Ms. Barbie R. Powell in a foreclosure action on April **22** or 26, 1994 in Madison County, Florida Circuit Court Case No. 94-201-CA. (Report of Referee, page 3, Transcript of Hearing Before Referee, page 13.) The final hearing in the case was set for June 2, 1994. (Report of Referee, page **3.) At** the time, Mr. Cchramm was representing the defendant (he was court appointed) in a first degree murder case, **State v. Reddington,** Taylor County Circuit Court Case No. 93-139-CF (Report of Referee, page 4), wherein the state was seeking the death penalty. Mr. Schramm got caught up in the murder case (the trial commenced on May 31, 1994 and continued through June *3,* 1994), did not file a notice of appearance in Ms. Powell's behalf and did not attend the June 2, 1994 final hearing in that case. (Report of Referee, pages 4,5.)

Ms. Nita Davis, Mr. Schramm's secretary, testified that upon inctructions from Mr. Schramm, she called the office of Thomas Ctone, Esq., the mortgage holder's attorney, on Ms. Powell's behalf three times -- twice on June 1 and once on June 2, 1994 (see Respondent's **Ex.** 1 in evidence in the hearing before the referee -- his telephone logs -- which confirm the calls), in an effort to advise Mr. Stone that Mr. Schramm was unavailable due to the murder trial. (Transcript of Hearing before Referee, pages R111-115.) She noted that at one point she was told by someone in Mr. Stone's office that the Powell hearing would be continued. (Transcript of Hearing before Referee, page 114.) Apparently Ms. Davis was misinformed, the

cause went forward on June 2 as scheduled and a foreclosure judgment was rendered against Ms. Powell. (Report of Referee, page **4.)**

The referee determined that Mr. Schramm had violated the following provisions of the Rules Regulating the Florida Bar regarding this incident:

¶ Rule **4-1.3** (a lawyer shall act with reasonable diligence and promptness in representing a client)

¶ Rule 4-1.4(a) (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information), and

¶ 4-1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

While we cannot take issue with the referee's findings of fact regarding this matter, certain mitigating factors have to be pointed out.

It is crystal clear from the record that **before** Ms. Barbie R. Powell employed Mr. Schramm, she was engaged in an utterly bogus, fraudulent and illegal attempt to cheat Milliron Realty, the mortgage holder, out of the moneys owed on the mortgage. The "money order" she tendered (Respondent's Ex. **3** in evidence at the hearing before the referee) dated March 10, 1995, is phony on its face. Ms. Powell admitted that when she first presented it, the realty company advised her that it was totally unacceptable. (Transcript **of** Hearing before Referee, page 64.) Mr. Ctone verified (Respondent's **Ex.** 2 in evidence at the hearing before the referee) that the "money order" **was** presented to two different banking institutions both of which advised that it was not legal tender. Nevertheless, on April 1, 1994, Ms. Powell wrote the mortgage holder accusing it of violating the "Uniform Commercial Code," and **of** making "...harassing phone calls...," averred that the mortgage holder could be subject to fines "...of $250,000.00 and/or ten (10) years, or both..." and insisted that

the mortgage holder could not decline to accept the "money order" as full payment for the mortgage debt. (Respondent's Ex. 7 in evidence in hearing before referee.)

On April 27, 1995, Ms. Powell went behind Mr. Schramm's back and wrote Milliron Realty another letter claiming that "...the people have been conducting an investigation as to your activities..," accused Milliron of violating the "Foreign Agent Registration and Propaganda Act..." and threatened Milliron by stating that "...**you as an unregistered foreign agent may be shot on sight.**" Ms. Powell used additional intimidation and extortion tactics by suggesting that she would present her grievances to a "Grand Jury" and seek damages against the mortgage holder. (Respondent's Ex. **6** in evidence in hearing before referee.)

It is clear that Ms. Powell hired Mr. Schramm -- not because she needed legal representation to advise her in the premises -- but in hopes of further intimidating the mortgage holder. This is especially true when it is remembered that Ms. Powell testified that she was seeking restitution from Mr. Schramm via the Bar proceedings. (In other words, tiaving failed to bilk the mortgage holder out of $25,000.00, she hoped to collect that amount from Mr. Schramm.)

Finally regarding this matter, we ask the court to consider the letter from Mr. Schramm's cardiologist, P. S. Krishnamurthy, M. D. (Respondent's Ex. 8 in evidence in hearing before referee.) The doctor relates that Mr. Schramm has been on rather heavy medication due to a heart conditicn. The medication can cause rather serious side efiects including forgetfulness. This may explain why Mr. Schramm did not contact opposing counsel in the Powell case personally during the Reddington murder trial referenced above.

SUMMARY OF THE ARGUMENT

The referee's recommendation of **a** 91 days suspension from the practicc of law and proof of rehabilitation before Mr. Schramm may resume his practice is **erroneous** and **unjustified** under the facts and circumstances of this case and within the context of Rule 3-7.7(c)(5), Rules Regulating the Florida Par. Thus, the Supreme Court should not accept the recommendation and instead impose a suspension of less than 90 days.

Mr. Schramm deserves relief because it is absolutely clear from the record (as we shall show below) that Mr. Schramm was denied an independent analysis of the facts and circumstances of thc case by the referee at least as far as the conclusions of law and recommendations to this honorable court are concerned. Instead, the referee erroneously adopted **in toto** the **exact** recomniendation of the Bar as set out in the Bar's Closing Argument -- even when that recommendation was based on utterly mistaken and incorrect determinations regarding the rules regulating the Florida Bar that Mr. Schramm supposedly violated. (Compare the referee's conclusions as to the rules regulating the Florida Bar which Mr. Schramm supposedly violated and his recommendations (Report of Referee, pages 6-8) as to sanctions -- with the Bar's findings and recommendations in this regard as set out in The Florida Bar's Closing Argument, pages 5, 11, 21-23. They are the same.)

The best example of this is in regard to TFB 94-00728-03 (the matter before Judge Stancil), wherein the referee erroneously determined that Mr. Schrainm had violated Rule 4-8.(4)(b) (a lawyer shall not commit a **criminal act** that reflects adversely on the lawyer's honesty, trustworthiness or fitness of a lawyer in other respects), Rules Regulating the Florida Bar. (Report of Referee, page 7.) The referee made this utterly mistaken determination despite the fact that the Bar did not even charge Mr. Schram with the commission of a criminal act (see the 10/11/94 Complaint filed by the Florida Bar, pages 3,4) -- Mr. Schramm never acknowledged

that he had committed a crime -- and there were no facts presented at the final hearing whatsoever to even **infer** that a criminal act had been zommitted. This conclusion could only have come from the referee's improper reliance upon and adoption of the Bar's error plagued written Closing Argument which was presented to the referee at the conclusion of the proceedings below. In that Glosing Argument, the Bar absolutely incorrectly claimed that Mr. Schramm **had committed a crime** (The Bar's Closing Argument, page 5) **-- when he absolutely had not.** We are certain that when the Bar submits its answer brief in this case, it will admit its error in this regard and retract the incorrect contention -- but that won't help Mr. Cchramm unless the sanctions imposed **are** reduced. This false and belated claim -- of the commission of a crime -- was not only wrong -- it was the clearly most serious made against Mr. Schramm and, we submit, tipped the scnles so as to cause the referee to believe that a more than 90 days suspension was in order. Had this kind of incorrect assertion been made by the prosecuting authority in a civil or criminal trial -- the defendant/respondent would certainly have been entitled to a new trial.

In addition to making a terrible mistake by claiming in its written closing argument that Mr. Schramm had committed a crime, the Bar in its Closing Argument to the referee incorrectly understated and mischararacterized the facts in decisions handed down by this honorable court in support of its request for a 91 days plus suspension. It is clear that the referee relied upon these understatements and characterizations in arriving at exactly the same recommendatioii. In law and fact, those decisions -- and the decisions cited below along with the mitigation presented -- support a finding **of** a punishment much less than that recommended by the Bar and adopted by the referee.

Thus this honorable court should not adopt the referee's recommendation as to sanctions -- and instead impose sanctions which do not exceed **a** 90 days suspension from the practice of law.

ARGUMENT

The referee's recommendation of a 91 days suspension from the practice of law and proof of rehabilitation bcfore Mr. Schramm may resume his practice is **erroneous** and **unjustified** under the facts and circumstances of this case and w i t h the context of Rule 3-7.7(c)(5), Rules Regulating the Florida Bar. ï'hus, the Supreme Court should not accept the recommendation and instead impose **a** siispension of less than 90 days, for the reasons set out below.

A. With regard to TFB 94-00728-03, the referee erroneously determined that Mr. Schramm had violated Rule 4-8.(4)(b) **(a** lawyer shall not commit a **criminal a d** that reflects adversely on the lawyer's honesty, trustworthiness or fitness of a lawyer in other respects), Rules Regulating 'the Florida Bar.

B. In addition to making a terrible mistake by claiming in its written closing argument that Mr. Schramm had committed a crime, the Bar incorrectly represented to the referee that decisions of this honorable court called for **a** suspension of more than 90 days. The ïeferee erroneously relied upon the Bar's representations as to what those cited cases stood for -- and erroneously agreed with the Bar.

C. The mitigating evidence regarding Mr. Schramm supports a determination that a more than 90 days suspension would be unjust.

Rule 3-7.7(c)(5), Rules Regulating the Florida Bar, provides tliat "(u)pon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reversed is **erroneous,** unlawful or **unjustified.**" The referee report is clearly erroneous because in TFB 94-00728-03, the referee determined that Mr. **Schramm** "...has admitted through his pleadings that he has violated ..4-8.4(b) (a lawyer shall not commit a criminal act..." (Report of Referee, pages 6,7.) Please recall that in this matter, Mr. Schramm represented Ms. Kathi Evans in a custody modification petition in Circuit Case No. 85-574-CA, in the Fifth Judicial Circuit of Florida. (Report of Referee, page 2) **A** hearing was scheduled for January 31, 1994. Mr. Schramm sought to continue the hearing and in the process of resolving that issue had a telephone conversation with the circuit judge handling the case, Hon. Hale R. Stancil. (Report **of** Referee, page 2.) Mr. Schramm falsely told the judge that he (Mr. Schramm) had **a** scheduling conflict due to another hearing which

had been set for that same date. (Report of Referee, page **3.)** The Bar did **not** charge Mr. Schramm with the commission of a **criminal act.** (See the Bar's complaint dated October 11, 1994, Count II, pages **3** and **4.)** In his findings of **fact,** the referee did **not** find that **Mi.** Schramm committed a criminal act. (The Report of Referee, pages 2,3.) There is no contention that Mr. Schramm was under oath when he talked with Judge Stancil. (The Bar admits that he wasn't, see the Bar's Closing Argument, page 15.) Mr. Schramm answered the Bar's complaint and did not admit facts or circumstances which would constitute a criminal act, (See Mr. Schramm's answer to the complaint dated October 31, 1994, pages 1,2.) Thus, it is clear that this most serious finding by the referee (that Mr. Schramm had committed a criminal act) was totally **erroneous.** The referee's erroneous conclusion had to be due to the fact that the Bar, in its written closing argument submitted to the referee, made the very same prejudicial error. That is, the Bar in its written closing argument at pages 4,5 stated

> "(r)espondent has admitted through his pleadings that he has violated ... 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects..."

This prejudicial error by the Bar and erroneous adoption of the error by the referee should be reason enough to reject the referee's recommendation of a more than 90 days suspension. Among other things, it suggests that the referee did not make an independent finding and recommendation -- but relied too much on the mistaken representations of the Bar. That is not just.

In State v. Nowitzke, 572 So. 2d 1346 (Fla. 1990), the supreme court reversed the defendant's conviction because the prosecuting authority presented evidence to the jury which he knew was not relevant, cross examined witnesses in front of the triers of fact in such a way as to ellicit improper responses and made comments to the jury in closing argument which were not correct. The prosecuting attorney was later found to have violated the rules regulating the Florida **Bar.** See **The Florida**

Bar v. Schaub, 618 So. 2d 202 (Fla. 1993). This court's ruling in **Nowitzke**, supra, is consistent with **a** defendant's rights under Rules 1.530, Florida Rules of Civil Procedure, and 3.580, Florida Rules of Crimina1 Procedure, to reconsideration where improper or incorrect closing arguments taint the decision of the trier(s) of fact. **Under no circumstances do we suggest that Bar counsel violated rules regulating the Florida Bar here** -- for the belated contention (via the Closing Argument) was obviously an honest mistake. But because the referee relied upon and adopted this mistaken conclusion as his own -- the sanctions recommended are ill founded and should be rejected as such by this honorable court.

B. In addition to making a terrible mistake by claiming in its written closing argument that Mr. Schramm had committed a crime, the Bar incorrectly represented to the referee that decisions **of** this honorable court called for a suspension of more than 90 days. The referee erroneously relied upon the Bar's representations as to what those cited cases stood for -- and erroneously agreed with the Bar.

In the Florida Bar's written closing argument submitted to the referee, it cited cases which the referee apparently relied upon in erroneously determining that a 91 days suspension (with **a** requirement of a showing of rehabilitation before reinstatement) was in order before Mr. Schramm might again practice law. Set out below is

¶ a careful analysis of the Supreme Court decisions cited by the Bar which we contend will show that reliance upon them by the referee was **erroneous** (because they are not applicable on their facts), -- as well as

¶ a review of cases decided by the Florida Supreme Court which clearly show that the sanctions imposed upon Mr. Schramm by the referee were **unjustified**.

We hope that this honorable court after considering the analysis which follows will agree that a crippling 91 days period of suspension (with a rehabilitation requirement) from the practice of law is not justified in this case.

In itc written argument to the referee, the Bar atteinpted to compare Mr. Schramm's conduct in this case with the conduct of the respondent in **The Florida Bar v. Kickliter, 559** So. **2d 1123** (Fla. 1990). In this regard, the Bar incorrectly claimed that "(s)urely the Respondent's actions in lying to Judge Stancil regarding his calendar conflict constitutec fraud on i-he court." (The Bar's Closing Argument, page 17.) However, the facts in the two cases are different in kind. In **Kickliter,** the respondent was retained to prepare a new will for a client. The client died before the new will could be executed. Kickliter "...forged his client's signature on the new will. He had two of his employees witness the forged signature, and Kickliter, himself, notarized the self-authenticating clause. He then submitted the forged will for probate." **Kickliter,** supra, 5S9 So.2d **a** t 1123. Kickliter was later convicted of "...forgery, uttering **a** forged instrument, and taking a false acknowledgement, all third degree felonies." Id. The Bar charged Kickliter with a violation of Rules **3-4.4** (commssion of a felony), **4-3.1** (bringing a frivilous proceeding), **4-3.4(a)** (altering a document), **4-3.4(b)** (fabricating evidence) and **4-8.4(b)** (committing a crimina1 act involving dishonesty). Clearly Kickliter's conduct was terribly egregious and not comparable with Mr. Schramm's **by** any stretch of the imagination.

In Florida Bar v. Oxner, 431 So.2d **983, 985** (Fla. **1983)** relied upon by the Bar (without setting out the material facts) attorney Oxner was suspended for 60 days for "...making bold face lies..." to the trial judge in order to obtain a continuance and other wrongdoing. Justice Atkins dissented determining that a 60 days suspension was too severe and that a public reprimand was in order. This case is quite relevant because Oxner's conduct consisted of a whole series of direct lies, half-truths and distortions made to the **trial** judge in an effort to cover up his failure to attend **a** pre-**trial** hearing. That is, Oxner's conduct was miich worse that Mr. Schramm's and he (Oxner) was suspended for only 60 days.

In **The Florida Bar v. Andercon,** 538 So.2d 852 (Fla. 1989), a decision ignored by the Bar, the referee and court found that the respondents "...**not only misrepresented the fads to the district court but failed to correct the misrepresentritions even when they were brought to their attention.**" **Anderson,** supra, 538 So.2d at 854. One lawyer got a 30 days suspension -- the other a public reprimand. **Ibid.** Mr. Schramm's conduct was not nearly as egregious as the lawyers in **Anderson** -- and Mr. Cchramm fessed **up** to his misstatements.

In The **Florida Bar v. Schaub,** 618 **Co.** 202,203,204 (Fla. 1993), the lawyer was found to have violated a whole host of Bar rules including 4-3.3(a)(1), **knowingly making a false statement of material fact or law to a tribunal.** The attorney was suspended for 30 days.

In **The Florida Bar v. Salnik,** 599 So.2d 101 (Fla. 1992), another decision relied upon by the Florida Bar, the lawyer who represented a landlord in a dispute with a tenant sneaked into the judge's chambers while the judge was out, stole his rubber name stamp, applied the stamp to a proposed final order, mailed the "order" to the tenant in an attempt to intimidate him and then "went on to attempt to cover up his guilt by lying to the judge when he was confronted with the forgery and attempting to disguise his hand writing during the Bar's investigation." **Salnik,** supra, 599 So.2d at 103. There is just no way that Mr. Schramm's conduct can be compared to Salnik's.

Bar Counsel also relied upon the case of **The Florida Bar v. Merwin,** 636 So. 2d 717 (Fla. 1994) for tlie proposition that the respondent was disbarred for lying to a judge after he faileà to attend a scheduled hearing. (The Bar's Closing Argument, page 15.) But the Bar failed to set out the facts of the case including the fact that Merwin had been iscued "...two prior public reprimands..." which involved the very serious offenses of illegal conduct involving moral turpitude and conduct involving fraud and deceit. (Mr. Schramm has never been sanctioned by the Bar or

his own client, totally abandoned her case and **lied (presumably under oath) during the disciplinary proceedings themselves.**

In **The Florida Bar v. Barley, 541** So.2d 606 (Fla. 1989), another decision not refereticed by the Bar, the attorney who represented the wife in a divorce proceeding received $200,000 as **a** part of the divorce settlement which was supposed to be put into a trust held by three trustees. Instead, he drafted a trust agreement naming himself as sole trustee. He then convinced his client to loan him $47,500 from the trust but provided her with no written evidence of or security for the loan. When the ex-husband died and his estate refused to honor other provisions of the settlement agreement, Mr Barley, without his client's consent, withdrew moneys from the trust to cover part of his fee for seeking to enforce and then modiiy the originai settlement agreement. Whcn the client settled with her late husband's estate, the attorney deducted some $61,000 from the settlement agreement for his fees, contingent and otherwise.

Mr. Barley was found guilty of engaging in conduct that adversely reflects on fitness to practice law, charging an excessive fee, charging a contingent fee in a domestic relations matter, accepting employment without full disclosure and conflict of interest. **He was suspended from the practice of law for 60 days.**

The supreme court condemns lack of candor with clients just aboiit as much as with a judge. Cee for example **The Florida Bar v. Black,** 602 So.2d 1298 (Fla. 1992) where the lawyer "...took advantage of an unsophisticated client..." in the process of borrowing money from him and "promised to pay the client a usurious rate of interest (but) never informed the client of the illegality of the transaction... " **Black,** supra, 602 So.2d at 1298. The referee determined that Mr. Black "had a selfish motive." **Id.** Black was suspended for 60 days. In the case at bar, there is no indication that any of Mr. Schramm's wrongful acts benefited him financially or were done out of personal selfishness.

In **The Florida Bar v. Poplack,** 599 So.2d 116 (Fla. 1992), a 60 dayc suspension was ordered when the lawyer lied **repeatedly** to a police officer **during the course of an official investigation.** The Bar cited this case in its Closing Argument (at pages 15/16)but it failed to describe how egregious the lawyer's conduct actually was. Poplack was arrested and charged with the third degree felony of grand theft auto. In that case, the Bar sought a 91 days suspension since the misconduct involved "...lying..." and the court determined that "...(o)nly the police officer's timely intervention prevented Poplack and the other individual from successfully stealing the car." **Poplack,** supra, 599 So.2d at 117,119.

The Bar cited **The Florida Bar v. Lancaster, 448** So.2d 1019 (Fla. **1984)** and **The Florida Bar v. Colclough,** 561 So.2d **1147** (Fla. **1990)** in support of its 91 days suspension request in **Poplack ,** just as it cited those cases in the proceedings before the referee. (See the Bar's Closing Argument, pages 15/36.) But those cases involved planned, aggravated efforts to commit **fraud** and "...the instant case does not involve an attempt to perpetrate a fraud on the court or a false statement made while under oath." **Poplack,** supra, 599 So.2d at 118, 119.

What Mr. Schramm did is very serious but it was not fraud -- and not deserving of the kind of penalty (more than **a** 90 days suspension) which the Har seeks. The facts in **Lancaster** and **Colclough** prove our point.

In **Colclough,** the errant lawyer took advantage of the fact that opposing counsel was out **of** town and had an ex parte communication with an unsuspecting trial judge regarding a hearing on a motion to stay execution on a previously entered money judgment. Two lawyers who were standing in for opposing counsel (who had filed a motion to stay execution of the judgment) were told by Colclough that "...he had another matter with the judge." **Colclough,** supra, 561 So.2d at **1149.** After Coclough's private meeting with the court, the hearing on the motion to stay execution began. At that time, Colclough "represented to the

Court that the sum for execution was $28,018.00, rather than $23,352.00, because he had obtained a Money Judgment against Mr. Hustin for costs in the amount of $4,666.50." **Id.** That was a lie since Colclough's motion to tax costs was still pending. When one of the substitute lawyers questioned him, Colclough

> "fraudulently represented to Ms. Craig, Ms. Mansfield and Judge Bryson that a hearing on costs had already been held, that a Money Judgment had already been obtained, and that the Cost Hearing scheduled for September 24, 1986, was for something else." **Id**

As a result of Colclough's misrepresentations, the aforementioned costs were added to the previous judgment and a order setting a supersedeas bond at the amount of the judgment plus the aforementioned "costs" and other charges was entered. Colclough thereafter submitted an amended notice of hearing regarding the motion to stay execution of the judgment to make it appear that there actually had been a hearing on that motion. Once opposing counsel returned to town and Colclough's skullduggery was found out, the trial court set aside the order on costs and Bar proceedings were initiated.

There is no way that Mr. Schramm's conduct can be compared to the mountain of manipulation, lies, deceit and fraud engaged in by attorney Colclough. In this regard, Colclough was susyended "...from the practice of law for six months..." **Colclough,** supra, 561 So.2d at 1150.

In **The Florida Bar v. Lancaster,** 448 So.2d 1019 (Fla. 1984), the lawyer's conduct was even more deceitful than attorney Colclough's. Lancaster altered an identification number on a boat. In an cffort to avoid detection for his criminal acts (he ultimately plead no contest to two criminal offenses in the matter), he "...lied (to the state attorney's office) about his knowledge of this alteration." **Lancaster,** supra, 448 So.2d at 1020,1021. He also tampered with a witness (a Mr. Gramlich) as indicated by the transcript of a tape recorded conversation Lancaster had with the witness wherein, according to the court, "Lancaster told Cramlich that they had to

stick together and keep tlieir stories straight." **Lancaster,** supra, **448** So.2d at 1021. Also, according to Cramlich, "I ancaster wanted him to accompany Lancaster to West Virginia to try to convince the person from whom Gramlich bought the boat to refrain from providing any information to the authorities." **Lancaster,** supra, **448** So.2d at 1022. Despite the tape recording, during the Bar proceedings, "Lancaster denied having any intention to tamper with any yersons who were to be witnesses against lum. **Id.**

Fraud is more than lying. In the cases cited herein -- for cxample in **Salnik, Merwin, Lancaster and Colclough,** supra **--** it itivolved self-serving, often complicated often financially rewarding **schemes** wherein a lawyer repeatedly misrcpresented and twisted the facts in order to benefit himself personally. When one considers the fact that in TFB No. 94-933-03 (the recusal incident) Mr. Schramm made no misrepresentations to the judge whatsoever until after the judge entered his ruling -- there is simply no way that Mr. Schramm can be put in the same category with those lawyers.

In **The Florida Bar v. Carswell,** 624 So.2d 259 (Fla. 1993), the lawyer, during his campaign for Jefferson County, Florida judge, was caught red handed on audio tape tampering with a witness to his (the lawyer's) efforts to violate the elcction laws regarding voter registration. In yarticular, the lawyer was trying to get a witness to lie to the Florida Department of Law Enforcement which was investigating the lawyer. The lawyer even threatened to get the witness in trouble if he (the witness) did not lie for him. After very favorable plea bargaining, the lawyer was able to plead to **a** misdemeanor and fined. The facts in that case were most egregious. Yct that lawyer was suspended by the Supreme Court for only **6** months -- and the referee's recommendation was for even less. Finally in this regard, the Florida Bar recommended a one year suspension in that case.

In **The Flonda Bar v. Bajoczky,** 558 So.2d 1022,1023(Fla. 1990), the attorney

helped himself (to pay for his attorney's fees) to $4,000.00 from settlement proceeds which, per the terms of the settlement, were to go to third parties. The referee determined that this constituted "...conduct involving **misrepresentation** in violation of Disciplinary Rule 1-102(A)(4) of the Code of Professional Responsibility." The attorney was sanctioned with **a** public reprimand.

In **The Florida Bar v. Miele,** 605 So.2d 866 (Fla. 1992), the lawyer who was paid by his clients to contest certain property assessments -- lied to his clients by telling them that they had not been awarded attorney's fees as a part of the judgment -- when in fact they had. Thus, Miele kept the fees his clients paid him directly -- plus the award of attorney's fees. He was punished with a public reprimand.

C. The mitigating evidence regarding Mr. Schramm supports a determination that **a** more than 90 days suspension would be unjust.

The unrefuted mitigating evidence presented to the referee clearly demonstrates that Mr. Schramm should not be suspended f rom the practice of law for more than 90 days. **A** synopsis of that testimony is set out below.

Hon. James Roy Bean was elevated to the third judicia1 circuit bench via appointment from Governor Lawton Chiles on February 7, 1994. (TR71) For more than 16 years before that (1977-1994), Judge Bean served as an assistant state attorney with the Taylor County branch of State Attomey Jerry Blair's office. (TR70) As both judge and prosecutor, Judge Bean has been personally aware of Bob Schramm's conduct as **a** lawyer due to Mr. Schramm's active criminal/civil law practice in Perry. (TR70) Judge Hean tectified that in all the years that Bob practiced against or before him -- in both the criminal and civil areas of the law -- he never knew Bob to do anything whatsoever which smacked of misconduct. (TR72) On the contrary, Judge Bean testified that Mr. Schramm has always been totally candid, honest and forthright -- with him and, as far as he knows, all other menibers of the Bar and

judiciary. He has never before known Mr. Schramm to be less than completely honest with the courts or him personally. (TR70-73)

Hon. Royce Agner, Senior Circuit Judge, testified on Mr. Schramm's behalf. He acknowledged that he had never known Mr. Cchramm to make a false statement to him. (TR101-103)

Conrad Bishop, Esq., has had an active civil and criminal law practice in Perry since 1978. Among other things, he is the attorney for the Taylor County Board of County Commissioners. (TR88,89) He has handled cases against Mr. Schramm too many times to remember. (TR89,90) Mr. Bishop stated that Bob Schramm has never done anything other than practice law in a competent, honest and honorable manner. (TR90-92) He knows of no instance where Mr. Schramm said or did anything that would constitute being dishonest with a judge. (TR 90-92)

Ms. Angela Ball has been practicing law in Perry since 1990. She serves as a part-time assistant public defender and is the Taylor County school board attorney. Her letter (part of Respondent's Composite ex. 8) in support of Bob Schramm is part of this record. Her comments are in line with those of Judges Bean and Xgner --and Mr. Bishop. Che has confidence in Mr. Schramrn and no reason to doubt his honesty.

The point we make here is that the wrongs committed by Mr. Schramm in the cases at bar -- especiaily as they relate to being less than candid with the court -- must be put into context:

¶ 24 years of lawyer conduct attested to by the most respected members of the local Bar and Bench as being above reproach -- especially when it comes to honesty and forthrightness with the court --

y contrasted with a very brief six nionth period (January-June, 1994) of time wherein the misconduct occurred.

¶ The referee apparently ignored or discounted Mr. Schramm's quarter century of honorable Bar membership -- but the consistently outstanding record cannot be ignored -- and it should form a significant basis for mitigation in this case.

¶ This is so because the acts of wrongdoing were clearly the exception to the general rule. There is no pattern of wrongdoing here -- the pattern is of 24 years of absolute honesty when appearing before members of the judiciary and steady competence in the rendition of legal services to his clients.

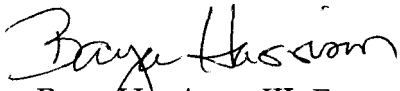
The referee also apparentiy gave little consideration to the testimony froin community leaders in Perry who know Bob Schramm well. It is clear from their tectimony that Mr. Schramm has for over two decades been a modest, hard working, effective -- and most iniportantly generous person who has done a great deal for others -- for his church, the youth (through the soccer and baseball programs, the Perry Kiwanis Club, the Boy Scouts, etc.) of the community, the city government of Perry (Mr. Schramm has been city attorney for many years) -- and for his clients as well. His reputation for honesty and fair dealing with these people is outstanding. **(TR78-83, 92,93, 104-109, 122-126)**

CONCLUSION

For all of the reasons set out above, the Supreme Court is requested not to follow the reconimendations regarding sanctions as provided by the referee in this case. Instead, this honorable court is requested to suspend Mr. Schramm from the practice of law for less than 90 days, not require proof of rehabilitation or any other

condition precedent to practicing law after the less than 90 days period has expired and grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

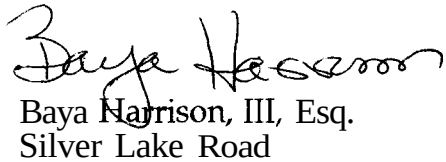


Baya Harrison, III, Esq.
PO Box 656
Monticello, FL **32345-0656**
904/997-8469
Fla. Bar **No. 099568**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing initial brief of Robert John Schramm, Esq., respondent below, yetitioner here, has been furnished John McCarthy, Esq., Counsel for ïhe Florida Bar, 650 Apalacnee Parkway, Tallahassee, FL **32399-2300,** by hand delivery this 13th day of November, **1995.**

Recpectfully Submitted,



Baya Harrison, III, Esq.
Silver Lake Road
PO **Box 656**
Monticeilo, FL **32345-0656**
904/997-8469
Fla. **Bar No. 099568**