IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

FREEMAN KING, II,

Respondent.
_____/

Supreme Court No: 84,623

FBN Case No: 94-50,244 (17H)

Appeal from Referee's Recommendation

RESPONDENT'S MAIN BRIEF

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PREFACE

The Parties' will be designated as Respondent and Bar.

The following symbols will be used:

R - Record, followed by page number for transcript of proceedings.

TABLE OF CITATIONS

POINT ONE ON APPEAL

THE REFEREE ERRED IN FINDING THAT THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WAS RETAINED IN DECEMBER, 1992 TO REPRESENT THE CLAIMANT IN THE PENDING SUIT AGAINST CLAIMANT WHERE, AS HERE, THE RESPONDENT, BASED UPON THE OVER WHELMING INDEPENDENT EVIDENCE, WAS HOSPITALIZED FOR THE MOST PART DURING THE MONTH OF DECEMBER, 1992 AND, MORE IMPORTANTLY, THERE WAS NO LEGAL CONSIDERATION OR MUTUALITY OF RECIPROCITY TO SUPPORT AN ALLEGED CONTRACT BETWEEN RESPONDENT AND THE CLAIMANT WHICH WOULD GIVE RISE TO AN ATTORNEY-CLIENT RELATIONSHIP WHICH WOULD SUPPORT DISCIPLINARY ACTIONS AGAINST THE RESPONDENT/ATTORNEY WHO NEVER RECEIVED THE THING BARGAINED FOR, THE $800 RETAINER.

POINT TWO ON APPEAL

THE REFEREE ERRED IN THE RECOMMENDATION OF SANCTIONS HERE WHERE, ASSUMING FIRSTLY TAHT THERE IS A SUFFICIENT FACTUAL BASIS RESPECTING WHETHER THERE WAS IN FACT AN ATTORNEY-CLIENT RELATIONSHIP EXISTING BETWEEN THE ALLEGED CLIENT AND RESPONDENT ATTORNEY, SAME IS UNWARRANTED, EXCESSIVE AND IN VIOLATION OF THE RULES OF THE FLORIDA BAR RELATIVE TO DISCIPLINE.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar filed a Complaint against the Respondent alleging that Respondent violated disciplinary rules 4-1.1 (Failing to provide competent representation to a client), 4-1.3 (Failing to act with reasonsable diligence and promptness in representing a client), and 4-1.4 (a)(b) [Failing to inform client of the status of representation and the duty to explain matters to client]. Respondent was found guilty and a sanction recommended, and Respondent petitioned for review.

The undisputed facts are that Respondent is, and at all times mentioned, was a member of the Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida, that a Complaint was served on Charles Baldwin (Mr. Baldwin) on December 10, 1992, that Respondent was given an extension of time in which to file an Answer to the Complaint by opposing counsel (Mr. Ginsburg, Attorney for Plaintiffs in Complaint against Mr. Baldwin), that Respondent failed to file an Answer to the Complaint on or before January 8, 1993, that on January 21, 1993 Mr. Ginsburg filed and served on Respondent a Motion For Summary Judgment, that in or about January or February, 1993 Respondent was noticed that a hearing on the Motion For Summary Judgment was scheduled for February 22, 1993, that neither Respondent nor Mr. Baldwin appeared at the scheduled hearing on the Motion For Summary Judgment, that on February 22, 1993 the court entered Summary Judgment against Mr. Baldwin, that on June 7, 1993 the court denied Mr. Baldwin's Motion To Vacate the Summary Final

Judgment, and that neither Respondent nor Mr. Baldwin appeared at the noticed deposition scheduled for February 12, 1993. R-7

Next, there are qualified admissions whereby Respondent admits to a relationship between himself and Mr. Baldwin, predating December, 1992, and that he received notice of the deposition, however he no longer provided services to Mr. Baldwin.

The issues raised by the pleadings are that Respondent was not retained by Mr. Baldwin to represent him in a pending law suit filed December 2, 1992, that the extension given to file an Answer by Mr. Ginsburg was not January 8, 1993, that Respondent did not fail to contact, advise or notice Mr. Baldwin pertaining to the matter surrounding the law suit against him. R-7.

More importantly, Respondent contends that due to a serious illness which resulted in his hospitalization on December 2, 1992 he was out of his office for the month of December, 1992, when Mr. Baldwin claims to have retained him to defend against the law suit served upon him December 10, 1992, that he and Mr. Baldwin had, before December, 1992 discussed the same circumstances surrounding the suit against him with Mr. Baldwin being Plaintiff rather than Defendant, that Mr. Baldwin knew Respondent expected a retainer of Eight hundred ($800) Dollars because venue was in Miami, Dade County, Florida but, despite repeated demands for the retainer, Mr. Baldwin did not tender the retainer until February 19, 1993 by way of a check which was dishonored on the date of issuance and tender as well as times thereafter. Consequently, there was no contact between Respondent and Mr. Baldwin and, therefore, no attorney-client relationship.

The relevant testimony before the Referee regarding the issues raised by the pleadings and which were not admitted by Respondent are as follows, to wit:

Mr. Baldwin and Respondent were fraternity brothers, and sometime in November, December, 1992 Mr. Baldwin sought Respondent's services concerning a law suit filed against Mr. Baldwin by Lisa and Newton James who lived in Miami,. Mr. Baldwin's roofing company had made certain roof repairs to the James' property in Miami resulting from a hurricane. R-26. The James' suit was filed December 2, 1992 and sevred upon Mr. Baldwin on December 10, 1992. R-14. When Mr. Baldwin met with Respondent at his office, Respondent, acknowledging that case would take him to South Miami, advised that he would take the case. Mr. Baldwin first discussed this case with Respondent in November, 1993, then met with Respondent again in December, 1992 because he had another case concerning his dental office and the time period for the construction case (James' suit) was running out. He had been served with the James' law suit which he carried to Respondent's office. Respondent did not quote any set figure as a total but did ask for an $800 retainer for both cases, the James' suit and the dental case. Only during this second meeting with Respondent in December, 1992 did Respondent ask for a retainer and advised that he would bill Mr. Baldwin for the balance of his fee. Mr. Baldwin claims he never received a bill from Respondent. R-37-40. As to when and how the $800 retainer requested was paid, Mr. Baldwin, before the only recess taken during these proccedings, testified that he got paid in Miami, came in late in the evening went to bank to deposit the check or try to cash

it but had to deposit it but with the deposit check in hand he presented himself to Respondent's office and after a brief explanation regarding the sufficiency of funds gave Respondent's secretary the check for $800. This was two days after meeting with Respondent in December, 1992, as Mr. Baldwin had explained that Wednesday that he would be paid on Friday and would be by to make a payment on his account after getting paid. R-40-42. This $800 check referred to Mr. Baldwin claims to have given Respondent's secretary is marked in evidence as Bar's number 11, it was dated February 19, 1993. R-42. Mr. Baldwin was adamant that he discussed his case with Respondent in November and December, 1992, then admits that he did not give the $800 retainer check in November or December, 1992 but persisted that he had meetings with Respondent up to Christmas when Respondent got ill and at that time is when he paid the money. R-42-43. However, after the recess Mr. Baldwin, while still on direct examination and after a period of reflection, explained that when he saw Respondent in the beginning of November or December, 1992 he paid Respondent cash money as a retainer for the construction (James's) case, he doesn't recall how much but probably $300-$400, and the $800 check (Bar's number 11 in evidence) involves two different situations. R-43. The two situations Mr. Baldwin claims that the $800 check concerns was more money toward the construction (James') case because Respondent says that its going to take more money because of the distance he's got to travel, plus part of the $800 check was a retainer for the dental office case he was gonna give to the Respondent at the time he was in Respondent's office when he wrote the check. R-44. He further testified that he did not discuss his case with Respondent in January,

1993 only in Novmeber and December, 1992, the last time in December, 1992 just before Christmas he discussed case with one whom he characterizes as Respondent's partner who, in his presence on a speaker phone, contacted Respondent at home. During this phone conversation, Mr. Baldwin claims that Respondent advised that he had called Mr. Ginsburg and explained his medical condition and asked him to delay the case until he return to his office in January, 1993 so that he could respond and Mr. Ginsburg agreed. This call took place near Christmas, 1992. R-45-48. Mr. Baldwin testified that since he had not heard anything from Respondent he presented himself to Respondent's office on February 19, 1993 to discuss taking an appeal from the judgment against him by the James' and he now also had a dental case (the tenant eviction suit). R-51-52.

On cross-examination, Mr. Baldwin testified that Respondent advised him regarding his policy of getting a retainer and wanted more money than he had already paid so he advised Respondent to bill him R-61-62; and that the $800 check was dated the same day tendered to Respondent. R-67.

Mr. Ginsburg testified that his first contact with Respondent was letter dated December 7, 1992 from Respondent's office regarding letters he had sent to Mr. Baldwin on behalf of his clients, Lisa and Newton James, before suit was filed. He responded to Respondent's letter with one of his own dated December 12, 1992 explaining, among other things, that suit had already been filed, that he attempted without success to telephone Respondent and was advised that Respondent was out ill and would be back after January, 1993. It also

noted that Mr. Baldwin had been served with process on December 10, 1992. His next and last discussion with Respondent was January 6, 1993 when Respondent telephoned him. R-14-15. During his telephone conversation with Respondent he advised Respondent, inter alia, that he had moved for default but would not seek judgment on the default and agreed to a two day extension. R-16. Default was entered by the Clerk on January 12, 1993. R-12. He had no further telephone conversations with Respondent R-26, and there was a substitution of counsel in March, 1993. R-29.

Respondent,on the strength of a promise to pay by his fraternity brother, Mr. Baldwin, wrote letters with the expectation of being paid. The letter was sent out without the retainer being paid first simply because Mr. Baldwin was a fraternity brother. R-90. Respondent does not recall any face to face conferences with Mr. Baldwin during February, 1993, he does recall sending out letters dated Janaury 13, 1993, Janaury 25, 1993 and February 4, 1993 to Mr. Baldwin. That the Complaint served on Mr. Baldwin on December 10, 1992 was left at his office in his absence; That he and Mr. Baldwin never had any discussions regarding his tenant eviction (dental office) case; That he received no money from Mr. Baldwin in 1992 nor 1993. R-91-95. Respondent further maintains that he first met Mr. Baldwin, professionally, in October, 1992 when Mr. Baldwin wanted to bring an action against Lisa and Newton James. The matter was next discussed between Respondent and Mr. Baldwin after Mr. Baldwin received written correspondence from the James' attorney, Mr. Ginsburg. Respondent requested a retainer, Mr. Baldwin never paid

anything until the check, marked as Respondent's number 5 in evidence, for $800 on February 19, 1993 which was dishonored by Great Western Bank, the bank on which it was drawn, and he didn't see Mr. Baldwin at all in December, 1992 due to his suffering a ruptured appendix which hospitalized him from December 2, 1992 through December 10, 1992, after which he recovered at home until January, 1993 and then only for limited time because he was still a bit ill with staples left from surgery. R-82-86.

Ms. Cecelia Janice Lynch, secretary to Respondent, corroborated that Respondent, for the most part, was out of his office during the month of December, 1992, that Respondent was out due to ill health and was in fact hospitalized. But, more importantly, she explained Mr. Baldwin gave her no money in December, 1992; That from November, 1992 through February, 1993 she knows only of the $800 check Mr. Baldwin gave in February, 1993 and it was dishonored; That she has reviewed her receipt book and there are no evidences that Mr. Baldwin made any payments for the month of December, 1992; and that she personally mailed out letters to Mr. Baldwin at the address which he provided in their file. R-117-119.

ARGUMENT

POINT ONE ON APPEAL

THE REFEREE ERRED IN FINDING THAT THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT WAS RETAINED IN DECEMBER, 1992 TO REPRESENT THE CLAIMANT IN THE PENDING SUIT AGAINST CLAIMANT WHERE, AS HERE, THE RESPONDENT, BASED UPON THE OVER WHELMING INDEPENDENT EVIDENCE, WAS HOSPITALIZED FOR THE MOST PART DURING THE MONTH OF DECEMBER, 1992 AND, MORE IMPORTANTLY, THERE WAS NO LEGAL CONSIDERATION OR MUTUALITY OF RECIPROCITY TO SUPPORT AN ALLEGED CONTRACT BETWEEN RESPONDENT AND THE CLAIMANT WHICH WOULD GIVE RISE TO AN ATTORNEY-CLIENT RELATIONSHIP WHICH WOULD SUPPORT DISCIPLINARY ACTIONS AGAINST THE RESPONDENT/ATTORNEY WHO NEVER RECEIVED THE THING BARGAINED FOR, THE $800 RETAINER.

The Referee here found Respondent guilty of having been retained in December, 1992 by Mr. Baldwin based upon a letter dated December 7, 1992 generated out of Respondent's office advising that Respondent has been retained by Mr. Baldwin, a telephone conference with opposing counsel, and the subsequently filed answer and counterclaim by Respondent on behalf of Mr. Baldwin on or about January 13, 1993.

It is undisputed that Respondent is, and was at all times here involved, an attorney at law and subject to the disciplinary rules of the Florida Supreme Court. The question here is whether an attorney-client relationship existed between Respondent and Mr. Baldwin which would support a charge that Respondent, who, expecting a retainer, noticed opposing counsel by mail, telephonic conference and an answer containing a counterclaim, that he represents Mr. Baldwin, breached the attorney-client relationship. For all of the following reasons, the circumstances of this case will compel a negative response.

In the creation of the attorney-client relationship, there must be a contract, expressed or implied, and the original contract of employment between attorney and client is subject to the same basic rules as to validity and interpretation as apply to contracts generally, 4 Fla. Jur 2d, Attorneys at Law, Section 223. See also, Reid v. Johnson, 106 So. 2d 624, 627 (Fla. 3DCA 1958).

It is elementary that a consideration is necessary to support a contract. 11 Fla. Jur. 2d, Contracts, Section 56. Kaufman v. Harder, 354, So. 2d 109 (Fla. 3DCA 1978). Technically, consideration is defined as some right, interest, profit, or benefit accruing to one party, or some forebearance, detriment, loss, or responsibility given, suffered, or undertaken by the other; Consideration is the primary element moving the execution of a contract, or, in other words, the inducement of a contract. It is the cause, motive, price, or impelling influence which induces one to enter into a contract. 11 Fla. Jur 2d, Contracts, Section 52. Where there is no mutuality of obligation, the necessary element of consideration is lacking and the "contract" is void. No purported agreement can be valid which binds one part but not the other; in such a case there is a fatal lack of mutuality or reciprocity required to make an agreement bind on any party. Balter v. Pan American Bank of Hialeah, 383 So. 2d 256, 257 (Fla. 3DCA 1980). There must be, in order for there to have existed an attorney-client relationship between Respondent and Mr. Bladwin, consideration given by the both of them.

In this case, the evidence shows that Respondent and Mr. Baldwin, experienced a social relationship as fraternity brothers but,

depending upon whose account is accepted, first met concerning Mr. Baldwin's difficulties with the James' in either October or November, 1992, well before the James' instituted their law suit against Mr. Baldwin and his company on December 2, 1992. Mr. Baldwin testified that the only time he used Respondent professionally was when he was sued by Lisa and Newton James sometime in November, December, 1992; That after he was served with the James' law suit, he carried the summons and complaint to Respondent; That this was his second meeting with Respondent, the first meeting back in November, 1992; That at the first meeting Respondent did not ask for a retainer but during this second meeting with Respondent, at which time he (Mr. Baldwin) has a second case, Respondent asked for a retainer of $800 and would bill Mr. Baldwin for the balance. Respondent, however, on the other hand maintains that he and Mr. Baldwin first met in October, 1992 concerning the James' and their failure to pay Mr. Baldwin for work he had done in Miami, that they next met in November, 1992 because of letters Mr. Baldwin had received from the James' attorney, Mr. Ginsburg, claiming monies due and owing by Mr. Baldwin, that he never conferred with Mr. Baldwin at his office during December, 1992 because he was out of his office during that month, as he was hospitalized December 2, 1992 through December 10, 1992, after which he remained at home until about January 4, 1993, and, more importantly, that Mr. Baldwin never paid anything until the $800 check tendered on February 19, 1993 which was, on the same date, dishonored by the bank on which it was drawn, Great Western Bank. The evidence, therefore, is clear, notwithstanding whose accounting is considered, that Mr. Baldwain bargained for legal counsel and Respondent bargained

for an $800 retainer. The question now presented is what value to be associated with the conflict respecting whether Respondent was retained in December, 1992.

It is the responsibility of the trial judge in the first instance to arrive at a correct factual conclusion, and his conclusions will not be disturbed on appeal, in the absence of a showing that they were not supported by substantial competent evidence. In re: Thompson's Estate, 84 So. 2d 911 (FLa. 1956); or the trial court misapprehends the legal effect of such evidence as a whole. In re: Baldridge's Estate, 74 So. 2d 658 (Fla. 1954); or unless it is clearly against the weight of the evidence. Holland v. Gross, 89 So. 2d 255 (Fla. 1956); or there is a misconception of probative effect of the evidence. In re: Hammermann's Estate, 387 So. 2d 409 (Fla. 4DCA 1980); or if trial court's judgment is manifestly against the weight of evidence, the appellate court is duty bound to reverse such judgment. Zinger v. Gattis, 382 So. 2d 379 (Fla. 5DCA 1980). Here, Respondent unequivocally maintains that he had no contact with Mr. Baldwin in his office during December, 1992 and therefore could not have been retained. Mr. Baldwin, not so certain in his testimony claiming, on the one hand, that he met with Respondent in November and December, 1992 and that is was this second meeting with Respondent which was the first time Respondent had asked for the retainer, and that he did not give the $800 check to Respondent until February 19, 1993; But, on the other hand, he is certain that he met with Respondent near Christmas, 1992. Later in his testimony, Mr. Baldwin explains that he first learned of Respondent's hospitalization from one he characterizes as

Respondent's partner during the latter part of December, 1992. Respondent's letter to Ms. Ginsburg, James' attorney, dated January 13, 1993, marked as the Bar's number 3 in evidence, touches upon Respondent's illness and hospitalization; Mr. Ginsburg's letter dated December 15, 1992, marked as Bar's number 2 in evidence, in response to Respondent's letter, Respondent's number 6 in evidence, dated December 7, 1992, signed by Respondent's secretary, acknowledge's Respondent's absence in his effort to reach Respondent by phone; The unrebutted testimony of Cecelia Lynch that Respondent was out of his office during December, 1992; and Mr. Baldwin's testimony, although offered to rebut, whether he had received any communication from Respondent's office regarding the status of his alleged cases, acknowledges that Respondent was out of his office ill, as he was advised by one he characterizes as Respondent's partner in late December, 1992. The weight of the evidence supports that Respondent was for the most part out of his office during the month of December, 1992. Therefore, there would not have been an opportunity for Respondent and Mr. Baldwin to have met at Respondent's office for Mr. Baldwin to retain him as the suit was filed December 2, 1992, the same date Respondent was hospitalized for a ruptured appendix, Mr. Baldwin was served with the James' law suit on December 10, 1992, the same date Respondent was discharged from the hospital. According to Mr. Ginsburg's letter dated December 15, 1992, he had apparently either before that date or on that date attempted without success to confer with Respondent by phone and was advised of Respondent's absence from his office and would not be back until January, 1993. Accordingly, Mr. Baldwin's uncertainty as to the specific date that he and

Respondent met at Respondent's office in December, 1992 is clearly against the manifest weight of the evidence.

With regards to the amount bargained for as a retainer, again we have diverse accounts. Before the first and only recess taken during the proceedings before the Referee herein, Mr. Baldwin had testified that he was sued by the James' in November or December, 1992; Met with Respondent in his office and Respondent, although commenting that it was in South Miami, would take the case; He first met with Respondent in November, 1992 and again in December, 1992 he met with the Respondent to discuss the James' case as the time was about to run out and needed to discuss his dental office case; He had been served with the summons and complaint in the James' case; The Respondent, during this second meeting, didn't give any set figures as for a total but Respondent asked for $800 retainer for both cases; Only during this second meeting did Respondent as for the $800 retainer; Respondent never asked for any money during his first meeting; The $800 retainer was for both cases and Respondent advised that he would bill for additional services and he never received a bill from Respondent. Again, before the recess, Mr. Baldwin, still on direct examination and responding to whether he paid the requested $800 retainer, testified that he came in late in the evening, had gotten paid down in Miami; That he went directly to the bank to deposit the check or to try to cash it but had to deposit it there; That he drove all the way back to Respondent's office and explained to his secretary "when I wrote out the check", I explained to her, I just left the bank and deposited this money... and I also gave her the check for $800". Later

responding on direct in an effort to pinpoint when the $800 check was allegedly tendered to Respondent, Mr. Baldwin, again in response to an inquiry on direct examination, testified that he tendered the $800 check to Respondent two days after he met with Respondent in December, on a Wednesday, advising Respondent that he wouldn't get paid until Friday and he would be in to make a payment on that account. The check to which he referred is Bar's number 11 in evidence, dated February 19, 1993, which he was shown during his testimony on direct examination. After the recess, however, Mr. Baldwin's testimony regarding his payment of the retainer varies drastically. He now maintains that in the beginning of November or December, 1992 he paid Respondent cash money for the construction service as a retainer, probably $300 or $400; The check for $800 concerns two different situations; The $800 check represents more money towards the construction case because he (Respondent) said that its going to take more money because of the distance that he's got to travel, plus part of this went as retainer towards the dental situation that he was going to give it (the dental situation) to him (Respondent) at the time I was there in February when I wrote this (the $800 check); He gave this accounting, notwithstanding having testified earlier that he had not received a bill from Respondent and Respondent did not give him a total fee amount only that he would bill him. Mr. Baldwin further testified that he did not discuss case with Respondent in January, 1993, his last time was just before Christmas, and that he returned to Respondent's office on February 19, 1993 to discuss appeal of the judgment because he had not heard anything regarding the appeal, and now he has dental case. On cross examination, Mr. Baldwin

testified that Respondent made copies of the dental case which was filed in 1993 and served on him on January 8, 1993, that Respondent's office never advised him of anything by mail, that when Respondent did not give him a specific fee but advised his policy was to get a retainer fee which he had already paid, he told Respondent to bill him, an that the $800 check, the Bar's number 11 in evidence, is dated the same day he tendered it to Respondent. These diverse accountings soley from the lips of Mr. Baldwin relative both his claim of having retained Respondent in December, 1992, and that he paid the requested retainer evidences that he has an utter and total disregard for the truth and can not, in the face of the more probative weight of evidence in this case to the contrary, support a finding of fact that there was legal consideration or a mutuality of reciprocity to support an alleged contract which would give rise to an attorney-client relationship. Consequently, the letter dated December 7, 1995 from Respondent's office which made no reference to the suit that had been filed by the James' but only in response to letters from the James' attorney concerning the same subject matter, the telephone conversation of January 6, 1993 between Respondent and the James' attorney seeking an extension in which to file an answer, as well as the answer and counterclaim filed by Respondent on January 13, 1993, were unilateral acts on the part of Respondent which, without the bargained for retainer, are not alone sufficient to create an attorney-client relationship.

ARGUMENT

POINT TWO ON APPEAL

THE REFEREE ERRED IN THE RECOMMENDATION OF SANCTIONS HERE WHERE, ASSUMING FIRSTLY TAHT THERE IS A SUFFICIENT FACTUAL BASIS RESPECTING WHETHER THERE WAS IN FACT AN ATTORNEY-CLIENT RELATIONSHIP EXISTING BETWEEN THE ALLEGED CLIENT AND RESPONDENT ATTORNEY, SAME IS UNWARRANTED, EXCESSIVE AND IN VIOLATION OF THE RULES OF THE FLORIDA BAR RELATIVE TO DISCIPLINE.

Nothwithstanding that the Bar suggested that a thirty (30) days suspension for what it prerceived as a violation of the rules charged against this Respondent, the Referee, having previously determined that Respondent was guitly, took the matter under advisement of what discipline would be appropriate under all of the circumstances, taking into consideration as well of Respondent's prior disciplinary activities, ultimately recommended a five (5) years suspension from practicing law.

Without question suspension is a sanction authorized by the rules and restrictions upon an attorney's ability to practice law may be imposed only in accordance with the rules and regulations governing the Florida Bar. Gifford v. Payne, 432 So. 2d 38 (Fla. 1983). Rule 3-5(e) of The Florida Bar's Rules of Professional Conduct is the pole star by which suspensions are to be meted out. In its pertinent part, it provides as follows, to wit:

3-5 Types of Discipline :
Rule 3-5.1 (e) Suspension :

"The Respondent may be suspended from the practice of law for a definite period of time or an indefinite period thereafter to be determined by the conditions imposed by the judgment.....No suspension shall be ordered for a specific period of time in excess of 3 years."

Here, the recommendation of the Referee for a definite, specific suspension for a five (5) years period of time clearly violates the mandates of the applicable rule.

More importantly, however, it is generally recognized that the degree of punishment in each case where violatiions of the rules of professional ethics are involved depends entirely on the factual situtation presented by the record in the particular case. The Florida Bar v. Pink, 233 So. 2d 130 (Fla. 1970). It is, in effect, an effort by the court to balance the equities of the circumstances, including giviing due regard to fairness to the attorney. Here, Respodent, as he best describes it, relied upon what he believed to be a special relationship, a fraternity brother who promised but failed to deliver the bargained for consideration ($800 retainer) to assist in a case that would take him from Broward County to Miami, Dade County, Florida, even while recovering from a recent hospitalization for a ruptured appendix Respondent still attempted to assist by filing an answer and counterclaim when it became apparent that Mr. Baldwin, not having responded to the repeated requests for the retainer, would not honor his part of the bargain.

Mr. Ginsburg in his letter dated December 15, 1992, among other things, advises that suit had been filed and Mr. Balldwin had been served. Respondent had not yet returned to work. On January 6, 1993 Respondent sought an extension of time to which Mr. Ginsburg indicates that he agreed with but, having acknowledged in his December 15, 1992 letter to Respondent that he had been advised that Respondent was ill and would not be back in his office until after January, 1993, had nevertheless mailed his motion for default which the Clerk of Court had entered on January 12, 1993. Even though he returned about the first week of January, 1993, Respondent explained that he was still pretty sick, had staples from surgery and was only in the office on a limited basis. Under all these circumstances, it is sugggested that the recommendation is not only illegal but excessive and unwarranted.

CONCLUSION

The Referee's determination that Respondent is guilty of violating the rules of professional ethics charged should be reversed with instructions to the court to determine with some degree of certainty what specific date the retainer was paid in December, 1992, and further declaring the recommended sanctions as void and unenforceable and to be determined, if necessary, after hearing on the specific date the retainer was paid.

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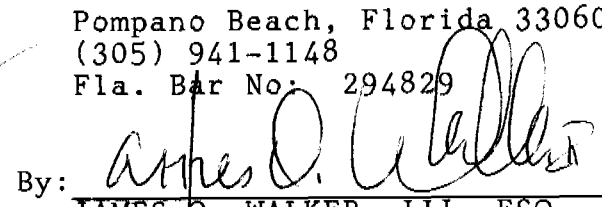
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Main Brief has been furnished to David M. Barnovits, Esq,. Bar Counsel-The Florida Bar Fort Lauderdale office, Suite 835, 5900 North Andrews Avenue, Fort Lauderdale, Florida 33309 by mail/hand delivery, this 24 day of May, 1995.

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