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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY A. POE,

Respondent.
_____/

Case No. 84,843
[TFB Case No. 94-31,598 (05A)]

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THE FLORIDA BAR'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JAMES W. KEETER
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 771252

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on March 27, 1995, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated April 25, 1995, will be referred to as "ROR", followed by the referenced page number(s).

The bar's exhibits entered into evidence at the final hearing will be referred to as "Bar Ex.", followed by the exhibit number.

In this brief, the Petition For Modification Of Amended Final Judgment of Dissolution of Marriage And Other Relief filed by Gary A. Poe on December 17, 1992, in Case No. 88-135-CA, In Re: The Marriage Of Linda L. Bergeron and Randall E. Bergeron, Sr. in the Fifth Judicial Circuit Court, Citrus County, Florida, shall be referred to as "the petition" or "the petition for modification".

STATEMENT OF THE CASE

On October 28, 1994, the Fifth Judicial Circuit Grievance Committee "A" found probable cause against the respondent for violating Rules Regulating The Florida Bar **4-1.1, 4-1.2(d), 4-1.7(b), 4-1.8(i), 4-3.1, 4-3.3(a)(2), 4-4.4, 4-8.4(c),** and **4-8.4(d).** On December 13, 1994, the bar filed a formal Complaint against the respondent. On January 3, 1995, the Honorable W.O. Beauchamp, Jr., Circuit Judge in the Eighth Judicial Circuit, was appointed as the referee.

On January 11, 1995, the bar served Requests For Admission on the respondent. On January 13, 1995, the respondent filed his Answer to the bar's Complaint and his Affirmative Defenses. On January 17, 1995, the bar served written Interrogatories on the respondent and on January 24, 1995, filed a reply to the respondent's Affirmative Defenses. On February 27, 1995, the respondent filed his responses to the bar's Requests For Admission and his answers to the bar's Interrogatories.

On March 7, 1995, the bar filed a Notice of Substitute Counsel, substituting James W. Keeter for Jan Wichrowski as bar

counsel. On March 20, 1995, the parties entered a written stipulation to the telephone appearance of the respondent's expert witness, Edward Jackson, at the final hearing scheduled for March 27, 1995. On March 22, 1995, the respondent served written Interrogatories on the bar; the Interrogatories were not answered because they were served only five (5) days before the final hearing.

The final hearing was held on March 27, 1995. The referee heard testimony from the respondent and his expert witness, and received evidence offered by the respondent's counsel and bar counsel. After hearing the evidence, the referee took the case under advisement. Before issuance of the Report of Referee, bar counsel received information that the respondent may have misrepresented certain facts in this disciplinary proceeding concerning his representation of his former client, Randall Bergeron, and in his response to the bar's allegations. Accordingly, on April 21, 1995, the bar filed a Motion For Rehearing to allow additional witness testimony.

The referee issued his Report of Referee on April 25, 1995, and he recommended the respondent be found not guilty of all the

charges. The referee made the same findings of fact in Section II of the report as presented by the bar in paragraphs one through twenty of the Complaint. The referee made supplemental findings of fact in Section III of the report. The referee found the evidence was "insufficient to sustain a disciplinary decision against the Respondent." ROR, p. 5. The referee further recommended that no party be assessed the costs of these proceedings.

On April 26, 1995, the respondent filed a response to the bar's Motion For Rehearing. On May 4, 1995, the bar filed a Reply To Respondent's Response To Motion For Rehearing. On May 5, 1995, the referee issued, without comment, an Order Denying Complainant's Motion For Rehearing.

The Board of Governors of The Florida Bar considered this case at its May, 1995, meeting. The board voted to appeal the referee's recommendation that the respondent be found not guilty. The Florida Bar, through its Board of Governors, believes that the referee's findings of fact are correct, but that the referee's supplemental findings of fact are clearly erroneous based upon the evidence in the record.

The bar filed its Petition For Review with this Court on June 8, 1995, and this brief is filed in support of the bar's Petition.

STATEMENT OF THE FACTS

The following is taken from the Report of Referee dated April 25, 1995, unless otherwise noted.

In 1986, the respondent represented Randall E. Bergeron, Sr. on criminal charges. To secure payment of the respondent's attorney's fees, Randall Bergeron and his wife, Linda, executed a second mortgage on their home in favor of the respondent. On June 16, 1988, a final judgment of dissolution of marriage dissolved the marriage of Linda L. Bergeron and Randall E. Bergeron, Sr. An amended final judgment was entered on April 13, 1989. The final judgments required Linda Bergeron to assume sole responsibility for the first and second mortgages on the marital home and other debt obligations of Randall Bergeron that had been incurred during the marriage. The final judgments also required Randall Bergeron to pay $60.00 per week in child support and an additional $50.00 per month for 100 months "as and for child support." There were no other court documents modifying or altering Randall Bergeron's child support obligations.

On April 10, 1990, Linda Bergeron filed a bankruptcy

petition under Chapter 7 of the United States Bankruptcy Code. She listed Randall Bergeron and the respondent as creditors in the bankruptcy action. During the pendency of the bankruptcy proceedings, the respondent's second mortgage was foreclosed by the mortgagee. Linda Bergeron's debts were discharged by the bankruptcy court on August 6, 1990. Randall Bergeron and the respondent each received notice of the bankruptcy proceedings and the discharge order. At no time did Randall Bergeron or the respondent file an adversary proceeding to determine if the debts owed to them by Linda Bergeron were dischargeable. They also failed to otherwise object to the discharge of the debts Linda Bergeron owed to them.

On December 17, 1992, the respondent served Linda Bergeron with a petition to modify the marital dissolution final judgment. The respondent signed the petition as counsel for Randall Bergeron. The petition alleged that Linda Bergeron was required to assume the first and second mortgages on the marital home and that Randall Bergeron was required to pay fixed regular child support until the minor children of the parties were emancipated. The respondent's petition further alleged that Linda and Randall Bergeron had verbally agreed that the additional $50.00 monthly

payments would not be used for child support, but would be paid to the respondent for his fee debt that had been secured by the second mortgage. The petition alleged that Linda Bergeron had collected the $50.00 monthly payments but had not paid the respondent. According to the petition, Randall Bergeron sought modification of the child support ordered so that the $50.00 monthly payments could be paid directly to the respondent for his attorney's fees. The petition further claimed that Linda Bergeron had breached their agreement to pay the respondent $50.00 per month and, therefore, Randall Bergeron was still indebted to the respondent. Randall Bergeron prayed that, if a money judgment was entertained against Linda Bergeron, future child support payments be offset until the judgment was paid.

Linda Bergeron hired an attorney to file a motion to dismiss the respondent's petition. The grounds for the motion were that Linda Bergeron's debts were discharged by order of the bankruptcy court; that Randall Bergeron and the respondent had each received notice of the discharge order; that the allegations in the petition pertained to debts that had been discharged; and that Randall Bergeron and the respondent were attempting to undermine Linda Bergeron's discharge in bankruptcy. The property

settlement agreement signed by Linda and Randall Bergeron and incorporated into the amended final judgment was clear that Randall Bergeron's $50.00 monthly payment obligation was for child support.

On February 26, 1993, the circuit court dismissed the first two (2) counts of the respondent's petition for modification and reserved jurisdiction to rule on the issue of Linda Bergeron's attorney's fees requested in her motion to dismiss. The only pending count of the respondent's petition concerned Randall Bergeron's children visitation rights.

On January 24, 1994, a hearing was held in the United States Bankruptcy Court, Middle District of Florida, Ocala Division, concerning Linda Bergeron's motion for sanctions against the respondent and Randall Bergeron for willful violation of the permanent injunction imposed by Section 524(a)(2) of the Bankruptcy Code. On February 22, 1994, the bankruptcy court issued its findings of fact and conclusions of law and imposed sanctions against the respondent and Randall Bergeron. The court found that the respondent and Randall Bergeron had attempted to collect debts that had been discharged in Linda Bergeron's

PAGE(s) MISSING

The referee made the above findings of fact which are the same allegations as in paragraphs one through twenty of the bar's Complaint. The referee also made supplemental findings of fact upon which he based a recommendation of not guilty as to all the rule violations alleged. The referee's supplemental findings of fact are set forth below.

Linda Bergeron's debt to the respondent was discharged by order of the bankruptcy court, but the respondent had a duty to represent the interests of his client, Randall Bergeron.

The circuit court maintained "concurrent jurisdiction" with the bankruptcy court. The circuit court was the appropriate forum for matters of child support once the bankruptcy action had terminated. Under Florida law the circuit court has jurisdiction to modify child support during the minority of the children in the event of a determination of a sufficient change in circumstance relative to need and/or ability to pay.

The circuit court rejected the respondent's petition for modification regarding the alleged "double payment" by Randall Bergeron. However, "it was reasonable and not necessarily ill-

advised for the Respondent, on behalf of Mr. Bergeron, to seek to modify 'child support' payments..." The referee specifically found that there was "some evidence" that the child support was intended to go toward payment on the mortgage against the family dwelling (which provided shelter for the minor child), and that there had been a change in circumstances regarding both need and the ability to pay because Linda Bergeron was no longer accountable for the mortgage payment due to the bankruptcy discharge and because Randall Bergeron was responsible for Linda Bergeron's payment obligation to the respondent.

According to the respondent's testimony at the final hearing, he attempted to represent the interest of his client and not necessarily his own interest since he was receiving the note payments from his client.

The respondent's actions were endorsed by an expert bankruptcy attorney and the respondent testified that he consulted with one or more attorneys before filing the state court petition.

ROR, pp. 4-5.

Based upon the aforementioned supplemental findings of fact,

the referee recommended the respondent be found not guilty of all of the rule violations charged in the bar's Complaint. ROR, pp. 5-6.

SUMMARY OF THE ARGUMENT

The Florida Bar does not dispute the referee's findings of fact in Section II of the Report of Referee. The findings accept the facts alleged in Complaint paragraphs one through twenty. The respondent has also admitted the first twenty paragraphs of the Complaint. However, the referee's supplemental findings of fact, as set out in Section III of the report, are erroneous and are not supported by the evidence. The referee's report fails to reconcile the findings of fact in Section II of the Report of Referee with the not guilty recommendation.

The facts of this case and the evidence presented show the respondent is guilty of the misconduct charged. The referee's supplemental findings of fact are essentially ethical conclusions that are not supported by the law or the findings of fact in Section II of the referee's report. The referee's conclusions look behind a state trial court's rulings and, apparently, ignore the order of the bankruptcy court that imposed sanctions on the respondent. The findings or judgments of other courts of law are not necessarily binding on attorney disciplinary proceedings. However, they are at least persuasive, and in some instances, are

conclusive proof of attorney misconduct in disciplinary proceedings.

If the Court finds the respondent guilty of the misconduct charged, then an appropriate discipline must be imposed. Arguments concerning discipline were not presented to the referee in this case because the referee issued his recommendation of "not guilty" before any such arguments were heard. The bar requests that, if the Court overturns the referee's "not guilty" recommendation, this case be remanded to a referee for arguments concerning discipline; or, alternatively, that the Court permit the parties to submit supplemental briefs on the issue of discipline.

ARGUMENT

THE REFEREE MADE CLEARLY ERRONEOUS CONCLUSIONS OF FACT IN THIS CASE WHICH WERE NOT SUPPORTED BY THE EVIDENCE PRESENTED.

The Florida Bar does not dispute the referee's findings of fact in Section II of the Report of Referee. Those findings accept the facts alleged in paragraphs one through twenty of the bar's Complaint. The respondent admitted those facts so they were never at issue during the final hearing. However, the bar disputes the referee's supplemental findings of fact as stated in Section III of the Report of Referee.

> A party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994).*

In this case, the referee's conclusions in his supplemental findings of fact are clearly contradicted by the record evidence.

The supplemental findings of fact in the Report of Referee contain the referee's ethical conclusions and, in most respects, comment upon matters that do not address the issue of whether the

respondent's conduct was unethical under the Rules Regulating The Florida Bar. For example, the supplemental findings in the Report of Referee state that Florida circuit courts have jurisdiction to modify child support "during the minority of the children in the event of determination of a sufficient change in circumstance relative to 'need' and/or 'ability to pay'." The supplemental findings further state that the circuit courts maintain "concurrent jurisdiction" with the bankruptcy court and, in this case, the circuit court was the appropriate forum for matters of child support once the bankruptcy action had terminated. ROR, p. 4.

The supplemental finding regarding "concurrent jurisdiction" incorrectly assumes that the petition concerned only a child support modification action and does not consider the findings of fact in Section II of the Report of Referee that concern the respondent's attempt to collect an attorney's fee that was discharged in bankruptcy. It is undisputed that the respondent held a second mortgage on the Bergerons' home to secure payment of his attorney's fees for representation unrelated to a dissolution of marriage proceeding; it was further undisputed that Linda Bergeron was solely responsible for the second

mortgage to the respondent as a result of the Amended Final Judgment of Dissolution of Marriage (Bar Ex. A), and the second mortgage was foreclosed and the underlying debt discharged by order of the bankruptcy court. Randall Bergeron was not obligated to pay the respondent's attorney's fee as that was Linda Bergeron's responsibility until the discharge.

Despite no legal obligation by Randall Bergeron to pay the respondent's attorney's fee, the petition sought a reduction of child support ($50.00 per month) so that Randall Bergeron would be able to pay this amount to the respondent directly. There has been no evidence presented in this disciplinary proceeding or in the state and federal court proceedings, that shows any legal obligation by Randall Bergeron to pay the respondent's fee debt. The debt was the sole obligation of Linda Bergeron, was secured by a second mortgage and was discharged in bankruptcy. The only evidence of any obligation attributable to Randall Bergeron for payment of the respondent's fee is the respondent's own testimony that Randall Bergeron verbally agreed to help Linda Bergeron pay the fee debt owed to the respondent by paying her an extra $50.00 per month in child support. The state and bankruptcy courts heard the respondent's argument about the purpose and intent of

the $50.00 per month payments and flatly rejected such argument.

The respondent testified that during the Bergerons' divorce proceedings he agreed to accept $50.00 per month for payment of his fee. T, pp. 30-31. According to the respondent's testimony, Linda and Randall Bergeron had agreed that Randall Bergeron would pay an extra $50.00 per month in child support to help Linda Bergeron pay the respondent's fee, a debt which she had assumed. The $50.00 per month payment was supposed to be described as "child support" in the dissolution documents. T, pp. 18-20. The respondent and Randall Bergeron's divorce attorney agreed that the $50.00 payments toward the respondent's second mortgage would not be treated as Randall Bergeron's debt because they doubted he would make any payments on the debt. The payments were to be treated as child support so there would be "contempt power to hold over his head." T, p. 30. Both the state court and the bankruptcy court rejected the respondent's contention that the $50.00 per month payments were intended for debts other than child support. Both courts concluded that the respondent's fee was discharged. T, pp. 34-35, 37-38, 58-59.

The referee's supplemental findings of fact also state that

even though the circuit court rejected the respondent's petition for child support modification which alleged the double payment by Randall Bergeron, "it was reasonable and not necessarily ill-advised for the Respondent, on behalf of Mr. Bergeron, to seek to modify 'child support' payments." ROR, p. 4. This finding is based on the referee's conclusion that there was "some evidence" that the child support was intended for payment on a mortgage against the family dwelling, which provided shelter for the minor child; and that there was a change in circumstances regarding both need and ability to pay since Linda Bergeron was no longer responsible for the mortgage payment due to the bankruptcy discharge and Randall Bergeron "was now called upon to make the payment previously required of Mrs. Bergeron." ROR, p. 4.

However, the respondent's petition did not seek a modification of child support based upon a sufficient change of circumstance, need, or ability to pay. (Bar Ex. B). Count I of the petition sought a $50.00 reduction in child support because Linda Bergeron "fraudulently and pursuant to a fraudulent design, failed to pay monies earmarked for Gary A. Poe, Esquire." Count II of the petition sought money damages because Linda Bergeron allegedly "breached her agreement with Former Husband to pay said

monies to Gary A. Poe, Esquire." During the final hearing, the respondent explained why he filed the petition for modification. He testified that the state court had "concurrent jurisdiction" with the bankruptcy court [T, pp. 37-38], and that the extra $50.00 per month could be viewed as a constructive trust for his benefit [T, pp. 38-39; 50-51]. The respondent's bankruptcy expert also argued the constructive trust theory at the final hearing. T, pp. 82-83; 86-89. However, neither the "concurrent jurisdiction" nor "constructive trust" arguments were mentioned in the respondent's petition. T, p. 51. The respondent's expert discussed the relevance of "concurrent jurisdiction" to an award of attorney's fees, not to modification of child support obligations. T, p. 88. The state court and the bankruptcy court held that the respondent's petition sought the $50.00 per month child support payment to pay the respondent's fee, despite the bankruptcy court's discharge of that fee debt.

The referee's supplemental findings of fact conclude that the petition filing was not unethical because the respondent had a duty to pursue his client's best interests. Further, the respondent's testimony contended that he was attempting to represent the interests of his client and not necessarily his own

interests since he was receiving note payments from Randall Bergeron. ROR, p. 5. While it may have been in Randall Bergeron's best interest to have a reduction in child support payments, the respondent's petition was also self-serving.

The respondent's testimony was equivocal concerning whether or not Randall Bergeron was paying him for a discharged attorney's fee debt. The respondent testified that just before Linda Bergeron's bankruptcy filing, neither she nor Randall Bergeron were paying the respondent's debt, but that Randall Bergeron made some payments thereafter (although the respondent could not remember the amount or frequency). T, p. 47-48. The respondent testified that from August, 1990, when Linda Bergeron received her bankruptcy discharge, through December, 1992, when the respondent filed the petition for modification, he could not recall Randall Bergeron making any payments to him. T, p. 48. According to the respondent, at the time he filed the petition for modification Randall Bergeron was making payments on the debt but he did not know what Mr. Bergeron was making at that time. T, p. 52. It is apparent from the respondent's testimony, he was not receiving consistent, regular payments from either Linda or Randall Bergeron before, and at the time, he filed his petition

for modification. By filing the petition in the circuit court, the respondent sought an order forcing Linda Bergeron to give up a portion of the child support so that the respondent would receive payment on a previously discharged attorney's fees debt.

The referee also stated in the supplemental findings of fact that the respondent's petition was supported by expert opinion. The respondent further testified that he had consulted with several attorneys before filing the petition. The respondent's bankruptcy expert practices primarily in the area of bankruptcy law and routinely receives bankruptcy referrals from the respondent. T, pp. 39-40. The respondent could not recall any other attorneys with whom he discussed the case. T, p. 50. If such discussions were to have an exculpatory effect, an attorney could vaguely refer to approval by other attorneys in order to excuse or mitigate otherwise unethical conduct. There was no evidence presented to the referee that the respondent's petition filing was proper, other than the bankruptcy expert's testimony. In fact, the expert represented the respondent and Randall Bergeron before the bankruptcy court after Linda Bergeron filed her motion for sanctions. The expert's argument before that court was apparently unpersuasive because the court imposed

sanctions by order dated February 22, 1994. T, pp. 38-40, 56-59, 88-90.

The respondent admitted that he received notice of Linda Bergeron's bankruptcy filing. The respondent was listed as a creditor and admitted that status during the final hearing. T, p. 32. The respondent further admitted that he received notice of Linda Bergeron's discharge and that her debt to him was permanently discharged. The respondent testified that he had no legal right to compel Linda Bergeron's payment of his fee. T, p. 52. The respondent failed to contest the permanent discharge or to file an adversarial action during Linda Bergeron's bankruptcy proceeding. The bankruptcy discharge was entered in August, 1990, yet the respondent filed the petition for modification over two years later, on December 17, 1992.

The Fifth Judicial Circuit Court dismissed the first two (2) counts of the respondent's petition with prejudice for want of a legal basis, and the bankruptcy court imposed sanctions. The referee's supplemental findings of fact do not address the respondent's misconduct as determined by the bankruptcy court. The United States Bankruptcy Court, Middle District of Florida,

Ocala Division, IN RE: Linda Lea Bergeron, Debtor, Case No. 90-1357-BKC-3P7, issued Findings of Fact And Conclusions of Law with respect to the respondent and his client. (Bar Ex. D). Because the respondent and Randall Bergeron received appropriate notice, the debts were not excepted from discharge under Section 523(a)(3) of the Bankruptcy Code. Neither the respondent nor Randall Bergeron filed an adversary proceeding so the debts were not excepted from discharge under Section 523(a)(2)(4) or (6). The bankruptcy court further found that the debts were not in the nature of alimony or support and, thus, were not excepted from discharge under Section 523(a)(5). The bankruptcy court found that both the respondent and Randall Bergeron received notice of the bankruptcy filing and the discharge. However, the respondent filed the petition to collect on debts that he knew had been discharged. The respondent willfully and intentionally violated the permanent injunction imposed by Section 524(a)(2) of the Bankruptcy Code. The bankruptcy court sanctioned the respondent and Randall Bergeron for fees and costs in the amount of $1,750.

The supplemental findings of fact in the referee's report are not deferential to the findings of the bankruptcy court. The Rules Regulating The Florida Bar were intended to address the

intentional and willful violation of court orders, such as the respondent's violation of the order of permanent discharge. R. Regulating Fla. Bar 3-4.4 states that findings or judgments of a civil court are not necessarily binding in disciplinary proceedings. However, there are disciplinary proceedings where the findings of other courts or jurisdictions are binding and/or conclusive proof of attorney misconduct. For example, under R. Regulating Fla. Bar 3-7.2(b):

> Determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial of or plea to any crime or offense that is a felony under the laws of this state, or under the laws under which any other court making such determination or entering such judgment exercises its jurisdiction, shall be conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules.

Upon the bar filing a notice with the Supreme Court of Florida of an attorney's felony conviction, and upon service of the notice to the attorney, the attorney is automatically suspended from the practice of law. R. Regulating Fla. Bar 3-7.2(e). Even an acquittal of the attorney on criminal charges does not preclude bar disciplinary action. In *The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991)*, the attorney argued his acquittal on criminal charges should bar the disciplinary proceedings. The Court

stated, "...whether Swickle engaged in criminal misconduct in not at issue here. We are concerned with violations of ethical responsibilities imposed on Swickle as a member of the Bar of this state." *Swickle, 905*. In *The Florida Bar v. Winn, 593 So. 2d 1047 (Fla. 1992)*, the Court declined to hold the disciplinary proceedings in abeyance pending Winn's appeal on federal felony charges. The Court stated it would not "look behind Winn's federal convictions." For the purposes of that case, the Court held those convictions were res judicata.

In many bar disciplinary cases where contempt findings have been made against attorneys by a trial court, the referee and the Supreme Court of Florida have ratified the contempt findings in determining the attorneys' guilt under the Rules Regulating The Florida Bar. In *The Florida Bar v. Jackson, 494 So. 2d 206 (Fla. 1986)*, a criminal court held the attorney in contempt and fined him for refusing to represent his client at a criminal trial that was scheduled during religious holidays. The attorney knew of the scheduled trial but did not timely inform the court he would be unable to appear in court on the religious holidays that fell within the trial period. The referee adopted the criminal court's recitation of the facts and recommended that Jackson be

found guilty of the rules charged. In *The Florida Bar v. Langston, 540 So. 2d 118 (Fla. 1989)*, the attorney was charged with misconduct arising from his divorce proceedings. The referee found that Langston had spent six (6) weeks in jail as a result of contempt orders for various matters, including failing to pay court ordered alimony and child support. However, the referee found that at the time of the final hearing, Langston was no longer in contempt and had satisfied all orders of the court. The referee concluded that although Langston's actions "may not have been correct", he was not, by his conduct, guilty of the rules charged. The Court disagreed and found that:

> It is uncontroverted that respondent was held in contempt and was jailed for a period of approximately six weeks until he purged himself. In the final judgment of dissolution and various orders pertaining to this contempt, the trial judge found, inter alia, that despite his ability to do so, respondent failed to pay temporary alimony and child support as ordered by the court and, contrary to the order of the court, had transferred title to various properties as part of 'a calculated scheme to defraud his wife of alimony and to prevent an equitable distribution of property of this marriage.' These and similar facts of misconduct before the court are not controverted and were accepted by the referee. [*Langston, at 120*].

The findings of the trial court in *Langston*, like the bankruptcy court's findings in the instant matter, were uncontroverted. Moreover, the referee in *Langston* found that despite the findings

of misconduct by the trial court, Langston's conduct did not violate any of the Disciplinary Rules. The Court in *Langston* found that clearly Langston's conduct violated the rules and was not excused because of the conclusions made by the referee.

Similarly, in *The Florida Bar v. Weed, 513 So. 2d 126 (Fla. 1987)*, the attorney was reprimanded by the appellate court for failing to timely file appellate briefs on behalf of clients. In the subsequent bar disciplinary case, the referee found Weed guilty of five (5) of the rules charged and recommended a public reprimand as discipline and a three (3) year period of supervised probation. The bar appealed the discipline recommendation and Weed cross-petitioned for review arguing that the bar lacked jurisdiction to punish him when the appellate court had already publicly reprimanded him. The Court disposed of Weed's cross-petition by finding that the appellate court had jurisdiction to reprimand Weed and had then simply referred the matter to the bar for whatever action it deemed appropriate. The appellate court had only reprimanded Weed and had never found him in contempt. The Court stated that it has "sole jurisdiction to discipline attorneys, but all courts have powers to control them when they become contemptuous or recalcitrant...[t]he fact that the same

misconduct might result in Bar discipline does not involve the principles of double jeopardy or res judicata." [*Weed, at 128*].

Under R. Regulating Fla. Bar 3-4.6:

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

Arguably, the bankruptcy court's findings and its sanctions against the respondent are a final disciplinary adjudication by a court or other disciplinary agency that justifies bar disciplinary action or consideration as conclusive proof of the attorney's misconduct. Certainly, the bankruptcy court's findings in this case, and in any case where a tribunal sanctions an attorney, should be carefully considered.

In a case involving a Securities and Exchange Commission (SEC) suspension order, the Court found that the order was not a final foreign adjudication of discipline under R. Regulating Fla. Bar 3-4.6, which rule states that a final foreign adjudication of discipline is conclusive proof of misconduct in disciplinary

proceedings. *The Florida Bar v. Calvo, 601 So. 2d 1194 (Fla. 1992).* In the subsequent bar disciplinary case, the Court found that the SEC findings could be considered in the disciplinary proceeding even though SEC proceedings have a different standard of review than bar proceedings. The Court found that admission and consideration of the SEC information in The Florida Bar disciplinary proceeding was not reversible error. *The Florida Bar v. Calvo, 630 So. 2d 548 (Fla. 1993).*

The bankruptcy court's imposition of sanctions against the respondent is clear and convincing evidence of the respondent's misconduct. However, the referee essentially disregarded the bankruptcy court's sanctions. In *The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993)*, bar disciplinary proceedings were instituted against the attorney concerning nine (9) counts, involving nine (9) separate clients or advertisements. In one count, Jasperson handled a bankruptcy proceeding on behalf of a client and her husband in order to block the foreclosure sale of their home. Jasperson never met with the client's husband but filed a joint bankruptcy petition in which the client forged her husband's signature to the document. Jasperson then filed a certification with the bankruptcy court which indicated he had

advised both the client and her husband of their rights under the bankruptcy petition. When the client and husband subsequently started dissolution of marriage proceedings, the husband filed a statement in the bankruptcy court alleging that he had not signed the bankruptcy petition and had not authorized his wife to do so on his behalf. The bankruptcy court sanctioned Jasperson for filing the false certification, fined him $500.00 and referred the matter to The Florida Bar. The referee found Jasperson guilty of several rule violations for his conduct in the bankruptcy matter. On appeal, Jasperson argued that the client was acting as an agent for her husband and, consequently, the husband had to be aware of the proceedings. He further argued that there was insufficient evidence to show he violated any disciplinary rules and, if he violated any rules, they were bankruptcy court rules and not rules of the Supreme Court of Florida. The Court found that Jasperson filed a bankruptcy petition on behalf of a client he had never met or advised and that he allowed a forged signature to be filed with the court. Whether Jasperson knew the signature was forged was irrelevant. Further, Jasperson filed a false certification with the bankruptcy court. Under those circumstances, the Court found that the referee properly determined that Jasperson had violated

the rules charged.

The referee in *Jasperson* accepted the bankruptcy court's findings and sanctions concerning Jasperson's conduct, whereas the referee in this case essentially disregarded the respondent's misconduct as determined by the bankruptcy court. In *Jasperson*, the Court imposed discipline upon uncontested facts determined by the bankruptcy court. In the present case, the bankruptcy court unequivocally found the respondent had violated the permanent stay of discharge. Accordingly, the referee's recommendation of not guilty as to the disciplinary rules charged is unwarranted and clearly erroneous.

The disciplinary process is not intended as a forum by which to re-litigate matters that were fully considered by a state court and a bankruptcy court. The referee's supplemental findings of fact essentially disregarded the state court hearing on Linda Bergeron's motion to dismiss the respondent's petition and the resulting order of dismissal with prejudice of all but one count in the petition. Such findings of fact likewise essentially disregarded the bankruptcy court's hearing on Linda Bergeron's motion for sanctions and the resulting order imposing

sanctions. The uncontroverted facts and the evidence presented clearly show the respondent is guilty of the misconduct charged. The referee's recommendation of a not guilty finding should be overturned. If the Court finds the respondent guilty of misconduct, the bar respectfully requests that this case be remanded to a referee for arguments concerning the appropriate discipline to be imposed or, alternatively, that the Court allow the parties to submit supplemental briefs concerning discipline.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will: 1) uphold the referee's findings of fact in Section II of his report; 2) reject the referee's supplemental findings of fact in Section III of the report and the referee's recommendation of a not guilty finding; 3) find the respondent guilty of the charges as set forth in the bar's Complaint; and either remand this case to a referee or order supplemental briefs on the issue of discipline.

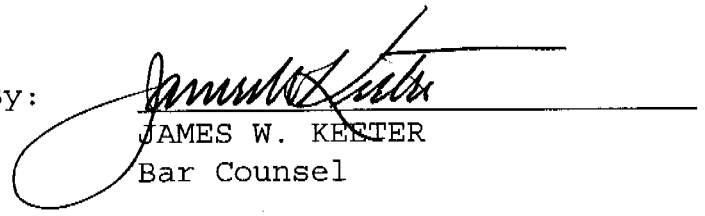
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JAMES W. KEETER
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 771252

By: 

JAMES W. KEETER
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent's counsel, Leonard Klatt, 103 N. Apopka Avenue & Courthouse Square, Inverness, Florida, 34450-4237; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 7th day of July, 1995.

Respectfully submitted,

JAMES W. KEETER
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 84,843
[TFB Case No. 94-31,598 (05A)]

v.

GARY A. POE,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

JAMES W. KEETER
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 771252

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