IN THE SUPREME COURT OF FLORIDA

BILLY A. BRAKEFIELD,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.
_____/

Case No. 85,003
TFB No. 94-11,120(6A)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this brief, The Florida Bar, Respondent, will be referred to as "The Florida Bar" or "The Bar". The Petitioner, BILLY A. BRAKEFIELD, will be referred to as "Respondent".

"T" will refer to the transcript of the Final Hearing before the referee in the case styled The Florida Bar v. Brakefield, Supreme Court Case No. 85,003 held on May 30, 1995. "ST" will refer to the transcript of the Sanctions Hearing before the referee held on August 30, 1995.

"RR" will refer to the Report of Referee in Supreme Court Case No. 85,003 dated July 20, 1995. "FRR" will refer to the Final Report of Referee dated October 10, 1995.

"Exh." will refer to exhibits presented at the Final Hearing before the referee.

"Rule" or "Rules" will refer to The Rules Regulating The Florida Bar. "Standard" or "Standard" will refer to the Florida Standards for Imposing Lawyer Sanctions.

"IB" will refer to Respondent's Initial Brief filed with this Court on February 9,1996.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar supplements the facts as presented by the Respondent in his Initial Brief as follows:

Joseph Scarfo and his stepson, Walter Bennetti, owned and operated a business knows as Florida Mailing, Shipping, and Printing Center, and later as Pack and Print, with two locations in Pinellas County, Florida. Bennetti and Scarfo met Respondent when he was a customer of their copying and printing business (T, pp. 6, 69-69).

Respondent represented Scarfo and Bennetti's business in various legal matters, as well as Scarfo and his wife individually.

Multigraphics Case:

Respondent undertook legal representation of Scarfo and Bennetti in a potential breach of contract claim against Multigraphics, a copy machine supplier who had prematurely removed a copy machine from Florida Mailing, Shipping, and Printing Center, thereby causing a loss of income and profit. Respondent obtained the original contract from Scarfo and Bennetti and began an investigation (T, p. 14).

No legal fee was discussed or agreed upon, but Scarfo and Bennetti understood that Respondent's fees and costs in the Multigraphics matter would be paid in part through a barter of their copying, printing, and mailing services (T, pp. 8-9, 69) and that Respondent would collect a contingency fee in the range of 25% to 33% of any recovery (T, pp. 86, 135).

Respondent testified before the referee that his investigation revealed the case against Multigraphics to be weak, and that he informed Scarfo and Bennetti that he was declining the legal representation (T, pp. 14-15,18,177). Both Scarfo and Bennetti testified that the Respondent advised them that their case was strong, particularly since Multigraphics was not registered to do business in the state of Florida (T, pp. 80, 135). Both Scarfo and Bennetti testified that Respondent informed them that he had actually filed suit on their behalf, had held at least one hearing, and had scheduled and rescheduled various depositions (T, pp. 76-80, 130-131).

During December of 1993, Scarfo and Bennetti lost all contact with Respondent. Respondent did not have a business

office and had listed his residence as his record Bar address. Bennetti and Scarfo telephoned Respondent at his home several times and received a recorded message that the Respondent was out of town until January. When Bennetti called in January 1994, Respondent's telephone had been disconnected (T, p. 81). Bennetti then visited Respondent's home on several occasions and left messages on the door. Respondent was not at home and Bennetti's messages remained unanswered (T, pp. 81, 132-134).

Later in January 1994, in an attempt to discover if any hearings or depositions were scheduled which he and his step-father would need to attend, Bennetti went to the Hillsborough and Pinellas County courthouses and discovered that the Respondent had never filed suit against Multigraphics (T, pp. 82-83).

Bennetti and Scarfo then sought the services of another attorney, Dominic Amadio, who also attempted to locate the Respondent through the Pinellas County Bar Association and The Florida Bar. Mr. Amadio had no success in locating the Respondent or obtaining from him Scarfo's original contract with Multigraphics (T, pp. 102-103, 169).

An investigator for The Florida Bar was finally able to locate the Respondent in March of 1994. Respondent was, at that time, living with his parents in Tarpon Springs, Florida (T, p. 66). The Florida Bar then contacted the Respondent through his parents, and requested the return of Scarfo and Bennetti's documents relating to Multigraphics, as well as other documents in the Respondent's possession belonging to Scarfo and Bennetti. Most of the documents were returned, but not until June or July of 1994 (T, pp. 166; RR, p. 3).

Respondent was unable to return all of the documents in Scarfo and Bennetti's files since he had taken the files to Missouri in December 1993, and had failed to return some of those files to Florida (T, pp. 39,66-67).

Corey Case:

One of Scarfo's business locations was at Largo Village Shopping Center. The owner of Largo Village, Richard J. Cory, sued Scarfo in Broward County, Florida, for non-payment of rent (T, p. 87; Exh. #5). Scarfo testified that he withheld rent due to an offensive odor emanating from a pet shop adjacent to their business (T, p. 87).

Respondent undertook the legal representation of Scarfo and filed a Motion for Change of Venue, seeking to move the venue to Pinellas County (Exh. #6). However, the Motion for Change of Venue was not received until after the statutory time period for filing an answer had expired and Cory had filed a Motion for Default. A default was entered against defendant Scarfo on April 26, 1993 (Exh. #7).

Notwithstanding the default, on May 20, 1993, Cory filed a Motion in Opposition to Change of Venue (Exh. #8) and set the motion for hearing on June 3, 1993. Cory, an attorney appearing *pro se*, stated in his motion that he had telephoned the Respondent and urged him to file a Motion to Vacate Default on behalf of his client (Exh. #9). Although the Respondent testified that he did not recall such a conversation, a telephone message was found in Respondent's file which indicated that the telephone conversation had indeed taken place (T, p. 29; Exh #8).

Respondent failed to file a Motion to Set Aside Default, failed to advise his clients of the default and the venue hearing, and failed to appear at the hearing either in person

or telephonically (T, pp. 33-34, 89). The Broward County judge ruled that the Motion for Change of Venue was moot since a default had been entered prior to the filing of the Motion for Change of Venue, and the default had not been vacated (T, p. 34; Exh. #11).

The Broward County court entered a final judgment in favor of Cory and against Scarfo in the amount of $6,067.00, including costs and attorney's fees (T, p. 35; Exh. #12). Scarfo learned of the judgment against him when he received it in the mail (T, pp. 89-90).

During the pendency of the Broward County suit, Cory filed a separate lawsuit in Pinellas County, seeking to evict Scarfo from the business premises. Respondent undertook legal representation of Scarfo in this matter as well, and on June 1, 1993, filed an Answer and Affirmative Defenses on behalf of Scarfo (T, p. 35; Exh. #13).

The eviction proceeding was set for final hearing on June 23, 1993. Approximately 45 minutes prior to the hearing, Respondent telephoned Scarfo and Bennetti and advised that he would not be attending the hearing due to a conflict in his

schedule. Respondent suggested that Bennetti ask the judge for permission to conduct cross-examination of witnesses at the final hearing (T, pp. 92-93).

Upon arriving at the judge's chambers, Bennetti informed the judge that his attorney would not be attending the hearing and requested permission to question witnesses. The Court refused this request since Bennetti was not an attorney, and requested that Bennetti immediately contact the Respondent (T, pp. 43, 93-94).

Bennetti paged the Respondent, and upon Respondent's return telephone call, the hearing was conducted with the Respondent appearing telephonically (T, pp. 93-94). Scarfo and Bennetti had written various letters to Cory detailing the odor problem and suggesting possible solutions. Respondent was unable to introduce any of these documents into evidence on behalf of his client since he was not present at the hearing and the documents were in his possession (T, p. 44). At the conclusion of the hearing, the Court ordered Scarfo to place the back rent into the registry of the Court within five (5) days or judgment would be entered for his eviction (T, p.

94; Exh. #21).

Respondent had no discussion with his client regarding the fees to be paid for his legal representation in either Cory case, nor did Respondent maintain any time records in his file in order to calculate his fees (T, pp. 40, 91). Respondent testified that he intended to calculate his fees on an hourly basis, but stated that he did not recall if he communicated the basis or rate of his fee to his clients (T, p.38).

Scarfo and Bennetti understood that they would owe Respondent a fee, which they assumed would be on an hourly basis. They had no idea of the amount of the fee or the method by which it would be determined (T, p. 92).

Cisco Case:

Scarfo had originally purchased his business from Bernard and Jacqueline Cisco. Scarfo and his wife had agreed to make periodic payments to the Ciscos. When a dispute concerning the payments arose, Cisco filed suit against the Scarfos (T, p. 96).

Once again, Respondent undertook the legal representation

of Scarfo and, once again, Respondent failed to communicate the basis or rate of his fee to his client (T, p. 96). Plaintiff's counsel, Francis R. Lakel, scheduled the depositions of all parties for January 14, 1994, and duly noticed Respondent (T, p. 121; Exh. #16). Respondent failed to notify the Scarfos of the scheduled depositions, failed to appear at the depositions(T, pp.97-98,121,144), and failed to notify opposing counsel that he and his clients would not appear (T, pp. 52-53).

Thereafter, on behalf of his clients, Lakel filed a Motion for Order Compelling Attendance at Deposition and for the award of expenses, including cost of the court reporter and reasonable attorney's fees (T, p. 122; Exh. #16). Lakel scheduled his motion for hearing and served the notice of hearing on the Respondent (T, p. 122).

Once again, the Respondent failed to notify his clients of the scheduled hearing or to appear at the hearing (T, pp. 54-55). As a result, an Order granting the Motion and assessing fees and costs in the amount of $111.00 was entered against the Scarfos on March 17, 1994 (Exh. #18).

During the final hearing before the referee, Respondent acknowledged that he was in error for failing to attend the depositions and hearing (T, p. 178); however, Respondent has failed to reimburse the fees and costs assessed against his clients as a result of his neglect.

Singer Case:

Mr. and Mrs. Scarfo lived in a condominium which was damaged by water leaking from the unit above occupied by Ted Singer. Scarfo obtained estimates for repairs to his condominium, which indicated that cost to repair the damage caused by the water leak was approximately $1,600.00. Scarfo attempted to negotiate a settlement, but Singer was only willing to pay for one-half of the estimated cost of repair, and did so by delivering a check for $800.00 to Scarfo (T, pp. 99-100).

Scarfo discussed the matter with the Respondent and testified before the referee that Respondent had agreed to file suit against Singer for the remaining $800.00 (T, p. 147). Both Scarfo and Bennetti testified that Respondent subsequently advised them that he had filed suit against

Singer on Scarfo's behalf, that the matter had gone before a judge, and that he was only waiting for the judge to sign the final judgment in favor of Scarfo (T, pp. 100-102, 149).

Respondent testified that he only discussed the Singer matter with Scarfo in general terms, never undertook the representation, and never advised Scarfo that suit had been filed (T, pp. 62-63).

The referee made the following recommendations to this Court:

1. That Respondent be found guilty of violating Rule 4-1.1 for failing to provide competent legal representation in the Cory and Cisco matters;

2. That Respondent be found guilty of violating Rule 4-1.3 for failing to act with reasonable diligence and promptness in the Cory and Cisco matters;

3. That Respondent be found guilty of violating Rule 4-1.4(a) for failing to keep his clients reasonably informed about the status and progress, or lack thereof, in the Multigraphics litigation, the Cory litigation, the Cisco litigation, and that Respondent was declining legal

representation in the Singer matter;

4. That Respondent be found guilty of violating Rule 4-1.4(b) for failing to communicate to his clients that he was not undertaking to prosecute the Multigraphics matter and the Singer matter, and by failing to advise his clients that he was not planning to attend hearings in the Cory and Cisco litigations;

5. That Respondent be found guilty of violating Rule 4-1.16(d) for failing to notify his clients that he was terminating any further representation in the Multigraphics matter, the Cisco litigation, and the Singer matter; and

6. That Respondent be found not guilty of violating Rule 4-8.4(c), since the evidence of misrepresentation presented did not rise to the clear and convincing level required in attorney disciplinary proceedings. (RR, pp. 7-9).

The referee recommended that Respondent be suspended from the practice of law for a period of six (6) months, and thereafter until he shall prove rehabilitation; that he be placed on one (1) year probation consecutive to his current term of probation; that prior to reinstatement, he be required

to attend and complete The Florida Bar's Ethics School, and that he be assessed the Bar's costs in these disciplinary proceedings. The referee also recommended that Respondent be required to reimburse the $111.00 to satisfy an order entered by the trial court against his clients as a result of his failure to attend a scheduled deposition on their behalf (FRR, p. 1).

It is The Florida Bar's position that the referee's findings of fact and conclusions of law are supported by clear and convincing evidence in the record and should be upheld. The referee's recommended sanctions are reasonable and warranted and should be upheld.

SUMMARY OF ARGUMENT

The referee's findings of fact and conclusions of law are supported by clear and convincing evidence in the record and should be upheld. The referee based his findings of fact on the testimony of several witnesses as well as numerous documentary exhibits presented by the Bar, and not as Respondent suggests, primarily and almost exclusively on the testimony of Joseph Scarfo.

The Bar presented competent, substantial evidence that Respondent failed to diligently and competently represent his clients, that Respondent abandoned his clients without first withdrawing from representation, that Respondent failed to advise his clients that he was declining representation on some legal matters, and that Respondent failed to protect his clients' interests upon withdrawal.

Respondent failed to appear at a hearing on behalf of his client or to file a motion to vacate a default entered against his client. Respondent failed to personally appear at a second hearing, and his failure to do so prevented his client from introducing pertinent documents. Respondent failed to

appear at a deposition or to notify his clients of the deposition. Respondent then failed to appear at a hearing on plaintiff's motion for sanctions, resulting in Respondent's clients being assessed costs and attorney's fees. Respondent failed to advise his clients that he was declining legal representation in another matter. Upon termination of representation, Respondent failed to timely return to his clients, documents relevant to that representation to which his clients were entitled.

Respondent's neglect of his clients' legal matters was intentional in that Respondent knew, or should have known, that the consequences of his actions would have a detrimental effect on those clients. On several occasions, Respondent failed to take action on his clients' behalf and his clients suffered as a result.

Respondent's contention that undue delay in the disciplinary proceedings was prejudicial to him is totally without merit and unsupported in the record.

The referee's recommended sanctions for the Respondent's misconduct are reasonable and warranted and should be upheld.

I. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE IN THE RECORD AND SHOULD BE UPHELD.

The referee's findings of fact in attorney disciplinary proceedings should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986).

The referee herein listened to testimony and evidence presented by the parties, observed the demeanor of witnesses, and found that Respondent violated Rules 4-1.1, 4-1.3, 4-1.4(a), 4-1.4(b), and 4-1.16(d), Rules Regulating The Florida Bar.

The Respondent takes the position that the evidence presented is legally insufficient to meet the required burden of proof since his testimony conflicts at times with that of his clients, Joseph Scarfo and Walter Bennetti (IB, p. 8). This Court has held that the referee, as fact finder, properly resolves conflicts in the evidence. The Florida Bar v. Hoffer, 383 So. 2d 639, 642 (Fla. 1980).

Because the referee is in a better position to evaluate

the demeanor and credibility of witnesses, the referee's findings of fact in attorney disciplinary proceedings should be upheld so long as those findings are supported by competent, substantial evidence. The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994).

Respondent maintains that "the case is based primarily and almost exclusively on the testimony of Joseph Scarfo" (IB, p. 8). A review of the record herein clearly indicates that the referee's findings were based on the testimony of several witnesses as well as substantial documentary evidence, and not on the testimony of any one person. The referee heard testimony of five witnesses presented by the Bar: the Respondent, Walter Bennetti, Francis R. Lakel, Esq. (opposing counsel in Cisco v. Scarfo), Linda Lyman (Florida Bar employee), and Joseph Scarfo. In addition, the Bar introduced twenty-two (22) documentary exhibits, among which was an order imposing sanctions on Respondent's clients due to Respondent's neglect (Exh. #18).

The Bar presented evidence that Respondent had abandoned his clients without withdrawing as counsel, and that he took

no action to protect his clients' interests. Respondent's telephone was disconnected and he moved without informing his clients of a means of contacting him (T, pp. 81-82). Respondent testified that he planned on moving to Missouri when he visited there in December of 1993 and January of 1994, but that he returned to Florida sometime in late January, 1994 (T, pp. 57-58). Even though Respondent was still representing Scarfo and Bennetti in pending legal matters, Respondent had no communication with them during his stay in Missouri, or at any time thereafter (T, p. 60). Respondent took no further action in any pending legal matters on behalf of Scarfo and Bennetti, failed to withdraw as counsel, and failed to inform his clients that he was ceasing legal representation.

Respondent attempts to mitigate his misconduct by claiming that Scarfo and Bennetti had not paid his legal fee. However, Respondent never billed his clients, and he received copying and mailing services from Scarfo and Bennetti in exchange for at least a portion of his legal services (T, pp. 8-9, 69). As this Court recently held in The Florida Bar v. King, 664 So. 2d 925, 927 (Fla. 1995), while attorneys are

entitled to charge for their services, they cannot simply abandon a case once they have provided services without compensation.

Additionally, Respondent failed to return documents to his clients after he ceased representation, thus preventing them from obtaining other legal counsel to pursue their legal remedies. It was necessary to dispatch a Florida Bar investigator to locate the Respondent after his return from Missouri in order to obtain documents entrusted to him by Scarfo and Bennetti (T, pp. 167-173).

Respondent failed to return all documents provided to him by Scarfo and Bennetti, even after being requested to do so by The Florida Bar. Respondent admitted that he had taken Scarfo and Bennetti's client files to Missouri during December of 1993, and that he was unable to return some of the documents to them since he had left those documents in Missouri (T, pp. 66-67).

Respondent admitted that he failed to personally appear at the final hearing in Cory's Pinellas County eviction proceeding against Scarfo, and that he was unable to introduce

any supporting documentation on behalf of his client since he had the documentation in his possession and did not attend the hearing (T, pp. 46-47).

Respondent attempts to excuse this misconduct by claiming that the matter was moot because Scarfo had already planned to move to another business location, and Scarfo had not deposited the disputed rent into the registry of the court (T, pp. 42-48; IB, pp. 5-6). Scarfo testified, however, that he had no plans to move his business at that time (T, p. 142). Moreover, Scarfo was not ordered to place the disputed funds into the court registry until the conclusion of the final hearing on eviction which Respondent failed to attend (T, pp. 45-46; Exh. #15).

Respondent also attempts to justify his misconduct by claiming that Scarfo's defense to the Cory eviction action was made in bad faith, as a scam on the part of Scarfo to avoid payment of rent (RR, p. 5; IB, p. 5-6). If it were true, as Respondent suggests, that his client raised a defense in bad faith, the Respondent assisted his client with such a defense. By doing so, Respondent would have engaged in unethical

behavior. The Referee addressed this issue as follows:

> "If it was a good faith meritorious defense, Brakefield should have been present in person to provide competent legal representation for his client. If the defense was not meritorious and not raised in good faith, it should not have been raised merely to unnecessarily protract litigation (RR, pp. 5-6).

Respondent further contends that the referee failed to take into consideration that Scarfo had previously been evicted from a business location, and was evicted after the Cory litigation (IB, pp. 5-6).

Respondent fails to understand that the outcome of litigation against his client which is not the subject of the instant case should have no bearing on the referee's findings. It is of no relevance whether Respondent's client had been previously evicted. What is relevant is that Respondent failed to provide diligent and competent representation to that client in the Cory eviction proceedings.

Respondent also admitted that he failed to attend scheduled depositions in Cisco v. Scarfo; that he failed to advise his clients of those depositions; that he failed to advise opposing counsel that he would not be attending the

depositions; and that he failed to attend a hearing on the plaintiff's motion for sanctions. As a direct result, fees and costs were assessed against Respondent's client (Exh. #18).

In contrast to the substantial evidence presented by the Bar, Respondent called no witnesses, and introduced only one exhibit, the final judgment in Cory v. Scarfo (Exh. #21). Respondent offered no plausible reason for his failure to attend a hearing, either in person or telephonically, on the Cory proceeding in Broward County. Respondent offered no plausible reason for his failure to file a Motion to Vacate Default entered against his client in that litigation. Furthermore, Respondent offered no plausible reason for his failure to attend the depositions or a hearing on plaintiff's motion for sanctions in Cisco v. Scarfo.

Respondent alleges that the Report of Referee is incorrect in that the referee erroneously found that Respondent owned and operated a used car lot and did business, presumably legal business, out of this car lot. Respondent states that "a simple check of the Florida Division of Motor Vehicle (sic) (DMV) would reveal that Respondent has never

owned or operated a used car lot." (IB, p. 4).

Respondent's own testimony refutes this allegation. In answer to Bar counsel's question, "How do you know Mr. Bennetti?", Respondent testified as follows:

> "He ran a print shipping pack store in Largo, Florida. I went in to have some copies made and we struck up a conversation. I had a business, I owned a car lot next door or almost next door" (emphasis added) (T, p. 6).

Since Respondent was testifying under oath, the referee properly assumed that Respondent's statement regarding his used car lot was true in the absence of contradictory evidence. Moreover, the referee had no duty to contact the Department of Motor Vehicles to verify the sworn statement of Respondent.

Finally, Respondent argues that the referee failed to consider what he terms "unreasonable delay in disciplinary proceedings resulting in prejudice to Respondent resulting from such delay, such as the normal inability to recall specific conversations two to three years after the fact..." (IB, p. 7). Respondent further requests that both the Report of Referee and the Final Report of Referee be stricken by this

Court as being untimely submitted (IB, p. 10).

Respondent's argument is clearly without merit. There is no indication in the record of an unreasonable delay in the disciplinary proceedings, and Respondent has presented no evidence that he was in any way prejudiced by such alleged delay in the proceedings.

The chronology of events in the instant disciplinary action is as follows: On February 10, 1994, The Florida Bar received Scarfo's sworn Inquiry/Complaint against Respondent. After receiving responses from Respondent and the complainant, Bar counsel forwarded the Inquiry/Complaint to the grievance committee on March 29, 1994. The grievance committee chair appointed an investigating member five (5) days later, on March 29, 1994. On September 15, 1994, the grievance committee held an evidentiary hearing, at which time probable cause was found. On October 15, 1994, the grievance committee voted to find probable cause on an additional rule violation and noticed Respondent of the same. On January 11, 1995, The Florida Bar filed its Complaint with this Court. Respondent filed his Answer on February 13, 1995, and a final hearing

before the referee was held on May 30, 1995. The court reporter mailed a transcript of the final hearing to the referee on June 12, 1995. On July 20, 1995, thirty-eight (38) days later, the referee issued his Report of Referee. On August 30, 1995, a Sanctions Hearing was held, and on September 7, 1995, the court reporter mailed the transcript of that hearing to the referee. On October 10, 1995, the referee issued his Final Report of Referee, incorporating his recommended sanctions.

Respondent maintains that he was prejudiced by his "inability to recall specific conversations two to three years after the fact". Yet, Respondent apparently took no action to refresh his memory of those conversations or of the events which were the subject of this disciplinary proceeding. Respondent testified before the referee that he never contacted Bar counsel prior to the final hearing to review his files (T, p. 32).

Inasmuch as Respondent attempts to raise timeliness of these proceedings as an issue, it should also be noted that Respondent failed to timely file his initial brief in this

cause. Respondent filed his Petition for Review on December 9, 1995, which was docketed by the Clerk of the Supreme Court on December 18, 1995, but Respondent did not file his brief until two (2) months later, on February 9, 1996. Respondent filed his brief only after the Clerk of this Court advised him that if he did not take appropriate action by February 9, 1996, the Court would consider the case without such brief.

In The Florida Bar v. Gland, 453 So. 2d 392 (Fla. 1984), the Bar filed its complaint against Gland on March 25, 1981. A second complaint was filed by the Bar on June 10, 1981, and a third complaint was filed on February 10, 1982. The referee did not issue his report on the consolidated cases until July 15, 1983, over two (2) years after the original complaint was filed.

The Gland court held that while excessive delay in a disciplinary proceeding might be considered in mitigation, dismissal of the complaints would totally frustrate the primary purpose of discipline, namely protection of the public from the misconduct of attorneys. Id. at 393-394.

In The Florida Bar v. Lehrman, 485 So. 2d 1276, 1278

(Fla. 1986), the respondent alleged that the referee's fourteen-month delay in issuing his report was grievously prejudicial. Lehrman, like the Respondent herein, failed to demonstrate any discernible prejudice resulting from such delay. The Lehrman court held that in the absence of such showing, a delay by the referee in filing his report will not invalidate the report.

This Court has held that the party seeking review has the burden of showing that the referee's findings are clearly erroneous or lacking in evidentiary support. The Florida Bar v. McClure, 575 So. 2d 176, 177 (Fla. 1991). Unless that burden is met, the referee's findings will be upheld on review. The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla. 1978).

Respondent has presented no substantive evidence to support his position that the referee's report is clearly erroneous or lacking in evidentiary support. Respondent has also failed to show an unreasonable delay in the disciplinary proceedings or any discernible prejudice resulting from such alleged delay.

The referee's findings of fact and conclusions of law are

supported by clear and convincing evidence in the record and should be upheld.

II. THE REFEREE'S RECOMMENDED SANCTIONS FOR THE RESPONDENT'S MISCONDUCT ARE REASONABLE AND WARRANTED AND SHOULD BE UPHELD.

Bar counsel recommended to the referee that Respondent be suspended from the practice of law for one year for his misconduct in this case (ST, pp. 14-15). However, the Bar chose not to oppose the referee's recommended sanction of a six-month suspension followed by a one-year probation as the recommended sanction appears to be reasonable and warranted, and would require the Respondent to provide proof of rehabilitation prior to reinstatement.

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar counsel, referee, and this Court to determine the appropriate sanction in attorney disciplinary matters. The following Standards apply in the instant case.

Standard 4.12 provides that absent aggravating or mitigating circumstances,

> "suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Respondent admitted that he transported to Missouri,

client files containing certain documents supplied to him by Scarfo and Bennetti, and that he failed to return some of those files to Florida when he returned (T, pp. 66-67). Respondent abandoned the legal representation of Scarfo and Bennetti without notifying them, and without returning their documents. Respondent's clients were injured by Respondent's improper handling of their property when Respondent retained the original Multigraphics contract in his possession, thus preventing his clients from pursuing legal action under that contract. By the time his clients were finally able to secure the contract several months later, they had suffered considerable business losses due to the removal of the copy machine supplied by Multigraphics.

Respondent also failed to return to Scarfo, the original estimates of damage to his condominium caused by the water leak in Singer's unit, thus preventing Scarfo from pursuing this matter.

Standard 4.42 states that absent aggravating or mitigating circumstances,

"suspension is appropriate when (a) a lawyer

knowingly fails to perform services for a client and causes injury or potential injury to a client; or (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Respondent had a duty to expedite his clients' litigation, to bring his clients' meritorious claims, to avoid unreasonable delay, and to take whatever lawful and ethical measures were required to vindicate his client's cause, despite personal inconvenience to himself (comment to Rule 4-1.3).

Respondent testified that he never intended to travel to Broward County to represent Scarfo in the Cory litigation (T, p. 33). Respondent knowingly refused to either travel to Broward County or to seek the Court's permission to appear telephonically at the hearing on Plaintiff's Motion in Opposition to Change of Venue. Respondent knowingly failed to file a motion to vacate the default entered against his client, even though Cory urged him to do so (T, pp. 28-29). As a direct result of Respondent's refusal to act, the Court entered final judgment against Respondent's client (Exh. #18).

Respondent continued to engage in a pattern of misconduct

when he later failed to personally appear at a hearing in Tampa on the Cory v. Scarfo eviction action, thus preventing his client from introducing pertinent documents. Finally, Respondent refused to appear at scheduled depositions or a hearing on plaintiff's motion for sanctions in the Cisco v. Scarfo litigation, thus allowing the imposition of sanctions against his client.

Standard 4.63 provides that absent aggravating or mitigating circumstances,

> "public reprimand is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury to potential injury to a client.

Respondent failed to keep his clients informed of the status and progress, or lack thereof, in the Multigraphics matter (RR, p. 8). Moreover, Respondent may have misled his clients into believing that the Multigraphics suit had been filed and that the litigation was progressing (T, pp. 76-80, 130-131).

Respondent's failure to provide his clients with accurate information in the Multigraphics matter destroyed their legal

position. By the time Scarfo and Bennetti learned that Respondent had taken no action on their behalf, the time limit imposed by the Multigraphics contract in which they were required to take action to enforce that contract had passed (T, pp. 179-181).

Respondent's failure to inform his clients of scheduled depositions or a hearing on sanctions in the Cisco litigation also had disastrous results, with the Scarfos being assessed costs and attorney's fees due to Respondent's neglect (Exh. #18).

Respondent's pattern of non-communication with his clients continued in the Singer matter when Respondent once again failed to inform his clients that he was declining to file suit against Singer or to pursue the legal representation.

Standard 7.2 provides that absent aggravating or mitigating circumstances,

> "suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Respondent had a duty, upon termination of representation, to take steps reasonably practicable to protect his clients' interests, including giving reasonable notice to his clients, allowing time for employment of other counsel, and surrendering papers and property to which his clients were entitled.

The referee found that Respondent had improperly withdrawn from the Multigraphics matter, the Singer matter, and the Cisco litigation (RR, p. 8). Respondent caused injury to his clients when he failed to notify them of his withdrawal so that they could obtain other counsel, and when he failed to timely surrender to his clients, property to which they were entitled.

Standard 9.22 lists several aggravating factors which may justify an increase in the degree of discipline to be imposed. The following aggravating factors apply in the instant case:

(a) prior disciplinary offenses;
(c) a pattern of misconduct;
(d) multiple offenses;
(i) substantial experience in the practice of law; and
(j) indifference to making restitution.

Respondent was admitted to The Florida Bar on November

19, 1976, and has received the following discipline:

> On February 2, 1992, Respondent received an admonishment for failure to act with reasonable diligence and promptness in representing a client. In February of 1991, the Respondent was retained to file a Chapter 7 Bankruptcy petition, but failed to file the petition until June of 1991.
>
> On October 27, 1994, Respondent received a public reprimand and was placed on eighteen-months probation for failure to act with reasonable diligence and competence when representing a client, failure to communicate the basis or rate of fee, and failure to keep a client reasonably informed or to respond to his client's reasonable requests for information. The Respondent was retained to procure step-parent adoptions of his client's two children and failed to carry the matter through to completion. Respondent's neglect and failure to communicate with his client required that client to obtain the services of a second attorney to complete the adoptions.

It is well established that in rendering discipline, this Court deals more harshly with cumulative misconduct than it does with isolated instances of misconduct, and cumulative misconduct of a similar nature warrants an even more severe sanction than might dissimilar misconduct. The Florida Bar v. Greenspahn, 396 So. 2d 182, 183 (Fla. 1981); The Florida Bar v. Bern, 425 So. 2d 526, 528 (Fla. 1983). As previously noted, Respondent was admonished in 1992 for neglecting his

client's legal matters, the very type of misconduct exhibited by Respondent in the instant case.

Standard 9.32 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. Respondent maintains that the referee failed to consider the following mitigating factors: the absence of a dishonest or selfish motive on the part of Respondent; personal problems of Respondent; unreasonable delay in the disciplinary proceedings; and remorse on the part of Respondent (IB, p. 7).

A review of the record indicates, however, that Respondent failed to present any evidence of such mitigation at the Sanctions Hearing. Respondent made no mention until his initial brief of any "personal problems". Respondent has never identified what personal problems he is referring to or stated how those alleged problems adversely affected his judgment during the time he was representing Scarfo and Bennetti.

Respondent has demonstrated no evidence of remorse. Likewise, Respondent has presented no evidence of prejudice caused by any alleged delay in the disciplinary proceedings as

required under The Florida Bar v. Lehrman, *supra*.

Furthermore, Respondent admitted that his prior disciplinary history as presented by Bar counsel at the Sanctions Hearing was true and accurate (ST, p. 19).

The referee's recommended sanction is also supported by the relevant case law:

In The Florida Bar v. Pincus, 327 So. 2d 29 (Fla. 1976), the attorney neglected the interests of certain clients seeking discharge in bankruptcy. As a result, the referee in bankruptcy entered an Order to Show Cause why the clients should not be deemed to have waived discharge. Pincus failed to respond or to appear at the hearing on the Order to Show Cause and the bankruptcy referee disallowed Pincus' clients' discharge in bankruptcy.

In other misconduct similar to that exhibited by the Respondent herein, a default judgment was taken against a client due to Pincus' neglect. In a separate matter, the holder of a promissory note in default engaged Pincus to collect on the note. After Pincus failed to file suit, the client asked for the return of the promissory note and other

papers. Pincus failed to return the documents. Pincus was suspended for one year and required to take a course in legal ethics prior to reinstatement. Id. at 30.

In The Florida Bar v. Hoffer, 383 S. 2d 639 (Fla. 1980) the attorney filed a Petition for Modification of a dissolution of marriage order on behalf of his client, and thereafter failed to appear at the hearing on his petition, failed to notify his client or the presiding judge that he would not be attending, and failed to request a continuance. As a result thereof, the matter was dismissed. This Court found a one-year suspension to be the appropriate discipline for Hoffer's misconduct, with the suspension to run concurrently with a two-year suspension previously imposed for a separate violation. Id. at 859.

Respondent's misconduct is also analogous to that in The Florida Bar v. Hotaling, 470 So. 2d 689, 691 (Fla. 1985), in which the attorney was found guilty of neglecting a legal matter entrusted to her and failing to promptly deliver to her client, property the client was entitled to receive. Hotaling was suspended for eighteen (18) months, required to pass the

entire Bar examination prior to reinstatement, and placed on eighteen (18) months probation thereafter.

In The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993), the attorney undertook representation of a client who alleged that an investment corporation and its principals improperly induced, managed, and ultimately lost his investment. Winderman subsequently undertook representation of several similarly situated parties and filed a Complaint and four Amended Complaints, all of which were dismissed. Although the trial court afforded Winderman the opportunity to file a Fifth Amended Complaint, he failed to do so, and did not take any other action to protect his clients' interests. After the deadline had passed to file the Fifth Amended Complaint, Winderman moved to withdraw as counsel, falsely asserting that his clients had requested that he do so. As did the Respondent herein, Winderman also failed to advise his clients of the actual status of the case or of the defendant's Motion to Dismiss or Motion to Tax Attorney's Fees and Costs, and failed to appear at a hearing on those motions.

Due to Winderman's failure to act, the trial court

dismissed with prejudice, all claims against the defendant corporation, and entered an order taxing fees and costs against Winderman's clients. Winderman was suspended for one year, followed by a one-year probation. Id. at 486.

In The Florida Bar v. Weisser, 526 So. 2d 63, 64 (Fla. 1988), the attorney represented the defendants in civil litigation. Weisser failed to appear for trial and, on the day of trial, filed a Motion for Continuance, but failed to request a hearing on his motion. Weisser's clients, not having been notified of the trial, also failed to appear. The trial proceeded to final judgment with the court entering a judgment against the defendants. Weisser then filed a Notice of Appeal and demanded payment of an additional fee from his clients to handle the appeal. The clients refused to pay the demanded fee and the appeal was dismissed for lack of prosecution.

The Weisser court ruled that Weisser's acts were not the result of negligence, that they were intentional, and the consequences of his acts were clearly predictable. Weisser was suspended for six months for his misconduct. Id. at 64.

Respondent's misconduct herein, especially in the Cory and Cisco litigation, was strikingly similar to that of Weisser. Respondent's failure to appear at hearings in those cases was also intentional. Respondent was aware that the consequences of his failure to appear at those hearings would be detrimental to his clients; nevertheless, he chose that course of action. Additionally, unlike Weisser, Respondent had a previous disciplinary history of like misconduct.

The cases cited by Respondent in his initial brief can be distinguished from the instant case in that those cases involved misconduct of an entirely different nature than the misconduct exhibited herein. In The Florida Bar v. St. Laurent, 617 So. 2d 1055 (Fla. 1993), the attorney converted client funds to his own use. In The Florida Bar v. Forrester, 656 So. 2d 1273 (Fla. 1995), the attorney charged a clearly excessive fee and violated Florida Bar trust accounting rules. In The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993), the attorney engaged in witness tampering. While The Florida Bar v. Daniel, 641 So. 2d 1331 (Fla. 1994) involved an attorney who neglected his clients' legal matters, there is no

evidence of cumulative misconduct in that the events giving rise to the disciplinary proceedings did not occur after Daniel had been disciplined for similar misconduct.

In The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970), this Court defined the objectives of attorney discipline for unethical conduct as follows:

> "First, the judgement must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

It is also important to consider the effect of the dereliction of duty on others as well as the character of the wrongdoers and the likelihood of future disciplinary violations. The Florida Bar v. Moxley, 462 So. 2d 814, 816 (Fla. 1985).

The Respondent has previously received an admonishment, a public reprimand, and eighteen (18) months probation for misconduct similar to that demonstrated in the instant case.

Respondent's previous discipline has apparently been insufficient to impress upon him the importance of diligently and competently representing his clients. Consequently, suspension is required as a next remedial step in encouraging Respondent's rehabilitation. Additionally, a six-month suspension followed by a one-year probation would be consistent with the objectives of attorney discipline as defined in Pahules, *supra*.

CONCLUSION

The referee's findings of fact are supported by clear and convincing evidence in the record. The referee's recommended sanction for Respondent's misconduct is supported by the applicable Standards, the relevant case law, and the cumulative nature of Respondent's misconduct.

The Florida Bar respectfully requests that this Court uphold the referee's findings of fact, conclusions of law, and recommended sanctions, and suspend Respondent from the practice of law for no less than six (6) months; that this Court further impose a one (1) year probation with terms and conditions as recommended by the referee, and that the Bar's costs in this disciplinary proceeding be taxed against the Respondent.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by Airborne Express, No. 4574411170 to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U.S. mail and by U.S. certified mail No. P370043055 to Billy A. Brakefield, Esquire, Respondent, at his record Bar address of 2018 Society Drive, Holiday, FL 34691; a copy by U. S. mail to Ky Koch, Designated Reviewer, 630 Chestnut Street, Clearwater, Florida 34616-5337; and a copy to John T. Berry, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 4th day of March, 1996.

Susan R. Gralla