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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ROBERT A. BOLAND,

Respondent.

_____/

Case No.85,274
TFB Nos.94-11,334(13A)
94-11,335(13A)

ANSWER BRIEF
OF
THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Robert A. Boland, will be referred to as "Respondent".

"TT" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. 85,274 held on November 29, 1995. "SH #1" will refer to the transcript of the sanctions hearing before the Referee in Supreme Court Case No. 85,274 held on July 12, 1996. "SH #2" will refer to the transcript of the sanctions hearing before the Referee in Supreme Court Case No. 85,274 held on September 13, 1996.

The Report of Referee dated January 28, 1997 will be referred to as "RR".

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. 85,274.

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

The Respondent's Initial Brief will be referred to as "IB".

"Answer" will refer to Respondent's Answer to the Bar Complaint.

STATEMENT OF THE CASE

Complainant does not contest Respondent's Statement of the Case, except as noted below. The hearing Respondent refers to in his Brief as a scheduled deposition (IB, p. 1) before the grievance committee was in actuality a probable cause hearing, as he correctly stated before the Referee in the instant case. (TT, p. 382, lines 9-10). Respondent left before testifying at the probable cause hearing. Although Respondent overstated the length of time from the start of the hearing until the time he left, the only testimony on the record is Respondent's testimony saying he left after two hours, or two hours and fifteen minutes of waiting to testify. Respondent represents that he was not notified of the October 19, 1994, hearing. (TT, p. 383, lines 9 - 21). That is incorrect, October 19, 1994, was the day of the probable cause hearing at which Respondent first appeared in the waiting room, and left before testifying.

Respondent alleges that there was an ex parte communication between the Referee and Bar Counsel regarding the findings of fact. (TB, pp. 1,2). Bar counsel telephoned the Referee late the day in question to see if the court had made a decision. (SH #1, pp. 8-9, lines 17-19). The Referee advised Bar counsel that his finding was that Respondent had admitted Count II, and that the burden of

proving the allegations in Count I had been met. There was no discussion of the merits of the case and Bar Counsel was instructed to inform Respondent regarding the Court's findings. (SH #1, p. 8, lines 19-20).

At the sanctions hearing on July 12, 1996, Respondent objected to the Referee's non-issuance of findings of fact prior to the hearing. (SH #1, p. 12, line 21). The Referee granted a continuance and asked that both Respondent and Complainant prepare a proposed report. (SH #1, p. 13, line 13-25).

Respondent correctly notes that at the sanctions hearing, the Referee stated that the Bar had proven the allegations by more than a preponderance of the evidence, (IB, p. 2; SH #2, p. 5, lines 23-25). The Referee had noted in the July sanctions hearing that the Bar had met its burden of proof as to Count I, and that Respondent had admitted Count II. (SH #1, p. 13, lines 4-25). In the Report of Referee, the Referee found that the Bar proved its allegations by clear and convincing evidence. (RR, p. 1).

Respondent has appealed the findings of fact and guilt in Count I, and requested that the case be remanded for a sanctions hearing on Count II only. He has not contested the recommendation of discipline under the Referee's findings, and neither has the Complainant, The Florida Bar.

QTATEWENT OF THE PACTS

On about March 25, 1993, Respondent was contacted by Albert Farinha and advised that Mr. Farinha's daughter, Kathleen Rains, had been ordered in a North Carolina proceeding to provide her children to her husband for visitation in North Carolina within twenty-four (24) hours. The children were in Florida. (TT, p. 286, lines 13-22; TT, p. 288, lines 9-25). On about March 25, 1993, Respondent advised Ms. Rains, through her father, to drive immediately to Florida, and that Respondent would handle the matter, (TT, p. 89, lines 1-19; TT, p. 288, lines 21-23; TT, p. 289, line 25; TT, p. 290, line 14-23), and would get the custody matter transferred to Florida. (TT, p. 289, lines 1 - 10).

On March 26, 1993, Kathy Rains personally contacted Respondent in Florida, and was advised by him that the North Carolina Order compelling her to return to North Carolina within twenty-four (24) hours **was** unrealistic, and that Respondent would get the case transferred to Florida and would take care of the matter. (TT, p. 95, lines 6 - 25; TT, p. 288, lines 12-23). There was no agreement that Respondent would actually appear as counsel in the North Carolina proceeding. (TT, p. 222, lines 12 - 14; TT, p. 359, lines 9-16). Respondent agreed to represent Ms, Rains in transferring

jurisdiction of the custody matter to Florida, and to deal with the Order to return the children to North Carolina. (TT, p. 94, line 21; TT, p. 95, line 5; TT, p. 96, lines 12-16). She believed that the judge would find her in contempt if she did not return the children within twenty-four hours, not that she was in contempt, but could purge that finding. (TT, p. 15 - 24).

Relying on Respondent's representations that he would take care of the matter, Kathleen Rains did not take the children to North Carolina within twenty-four hours. (TT, p. 89, lines 1 - 19; TT, p. 288, lines 18 - 23). As a result of her failure to comply, on or about May 3, 1993, the District Court of North Carolina issued an Order for Ms. Rains' arrest. (TFB Exh. 4; Exh. 7). Ms. Rains testified that she had not seen a North Carolina Order for her arrest entered on May 3, 1993, because it was in a stack of papers she had given Respondent when she retained him, and because Respondent did not advise her that the Order was included among the documents. (TT, p. 98, lines 12 - 23; TFB Exh. 4).

On about April 13, 1993, Ms. Rains paid Respondent $500.00 as a retainer. Respondent cashed the check; he deposited none of it into his trust account. (TFB Exh 3; TT, p. 96, line 24 TT, p. 97, line 16). Respondent agreed to get a restraining order against MS. Rains' husband. (TT, p. 122, lines 9 - 10; TT, p. 126, lines 7 -

11) . It was important to Ms. Rains to have the restraining order fairly quickly, and she did not want a three or four month delay in obtaining it, She was afraid of her husband not only because he was on probation for assault of a minor, but also because of past physical violence he had committed against her, including assault with a knife. (TT, p. 126, line 24 - TT, p. 127, line 9; TT, p. 189, line 20 - TT, p. 191, line 5; TT, p. 476, lines 4 - 11). Ms. Rains advised Respondent that her husband was a monster, a very aggressive and violent man. Respondent viewed her at that time as a little girl who was very, very scared. (TT, p. 126, lines 7 - 9; TT, p. 425, lines 7-21; TT, p. 388, lines 12-13) . However, the petition for a restraining order was not filed until September 21, 1993. (TT, p. 125, lines 11 - 16; TFB Exh. 12).

On about May 20, 1993, Respondent signed and filed a Petition for Dissolution for Ms, Rains. (TFB Exh. 6). When doing so, Respondent was aware that Ms. Rains had not been living in Florida for six months and that, therefore, the residency requirement for jurisdiction had not been met.(TT, p.103, line 6-TT, p. 106, line 12; TT, p. 293, line 21 - TT, p. 294, line 5). Respondent knew that North Carolina had a one-year waiting period after a separation to file for divorce. (TT, p. 449, lines 6 - 13). The separation had been filed in North Carolina on May 21, 1992; the Petition for

Dissolution was filed in Florida May 20, 1993. (TT, p. 452, line 7 - TT, p. 453, line 5). Respondent was trying to establish jurisdiction in Florida before a Petition for Dissolution could be filed in North Carolina. (TT, p. 386, line 9 - TT, p. 388, line 9; TT, p. 432, lines 12-24). Mr. Farinha, Ms. Rains' father, testified that Respondent suggested that no one else would know that Ms, Rains had not been in Florida for six months when the petition was filed. (TT, p. 293, lines 9- TT, p. 294, line 5). Ms. Rains had given Respondent a file of papers relevant to the custody and visitation matters, Among those papers were school records and medical records of the children which indicated that the Florida residency requirement had not been met, (TT, p. 108, line 19 - TT, p. 111, line 8; TT, p. 477, line 3 - 6).

In the Petition for Dissolution, Respondent sought custody of the minor children for Ms. Rains, but did not file the required Affidavit of Status of Minor Child and the affidavit pursuant to Florida Statutes § 61.132, regarding the children's residency.(TT, p. 433, line 19 - TT, p. 434, line 24; TT, p. 453, lines 12 24; TFB Exh. 6).

Respondent testified that he telephoned the Clerk of the Court after the Contempt Order and the Arrest Order were entered in North Carolina. He suggested that he learned the date of the Rains'

separation, so he knew when a Petition for Dissolution could be filed in North Carolina, but that he did not learn about the Arrest Order or the Contempt Order. (TT, p. 454, lines 11 - 22). Respondent failed to obtain the pleadings from the North Carolina case during his representation of Ms. Rains. Respondent did obtain those pleadings in preparation for the final hearing in his disciplinary case. (TT, p. 436, line 7 - TT, p. 438, line 5).

On about July 13, 1993, Ms. Rains was served with a Motion to Change Custody of Minor Children, which had been filed in North Carolina by Ms, Rains' husband on April 26, 1993. A Notice of Hearing, setting the hearing on the custody matter in North Carolina for July 19, 1993, was filed along with the Motion. (TFB Exh 1 - 7).

Respondent advised Ms. Rains and her father, Albert Farinha, that it would be necessary to hire a North Carolina attorney to handle the custody hearing, and he subsequently arranged for North Carolina attorney Sally Scherer to appear on behalf of Ms. Rains, as well as to review the North Carolina files in the action. (TT, p. 35, lines 10 - 37). Ms. Rains gave Respondent a check for $350.00, after Respondent advised Ms. Rains that was the amount Ms. Scherer was charging. The check was specifically for payment of Ms. Scherer's fees, (TT, p. 302, line 12 - p. 304, line 22; R Exh.8).

The original check had "lawyers" as a notation in the lower left hand corner, and after the check cleared the bank, for record keeping purposes, the letters "N.C." were added. (TT, p. 305, lines 8 - 19). Respondent cashed the check on about July 16, 1993, placed none of the money into his client trust account, and instead converted the money to his own use. (R. Exh. 12). No payment was made to Ms. Scherer from these funds or otherwise. (TT, p. 38, lines 18 - 19).

On July 19, 1993, Ms. Scherer attended the custody hearing and obtained a continuance. She dictated a letter to Respondent regarding her actions on behalf of Ms. Rains, (TFB Exh. 10). On about July 20, 1993, Ms. Scherer submitted a bill to Respondent for $325.00 for 2.3 hours of legal work on Ms. Rains behalf, indicating that the bill was unpaid. (TFB Exh. 10; TT, p. 37, lines 18-25). A second payment of $350, was requested by Respondent from Ms, Rains in July, allegedly again for Ms. Scherer's fees. Ms. Rains gave Respondent a check for $350.00, which contained the notation 'NC lawyer and Robert A. Boland." On July 29, 1993, Respondent cashed this check, and converted the money to his own use. (TFB Exh 9; TT, p. 117, lines 4- 20). Respondent was not authorized by his client to apply either of the two $350.00 checks towards his (Respondent's) own fees (TT, p. 115, lines 6 - 9; TT, p. 118, line

3; TT, p. 305 line 22 - TT, p. 307, line 17). Respondent did not place any of the monies received into trust, and in fact, did not have a trust account during this period (TT, p.424, lines 19-22).

Ms. Scherer advised Respondent that Ms. Rains' husband's Motion to Modify Custody was insufficient and subject to dismissal because the factual allegations in the motion were insufficient to warrant modification. In Ms. Scherer's opinion, the petition for modification filed in North Carolina might preclude transferring jurisdiction to Florida, and Ms. Rains might be arrested if she returned to North Carolina. (TT, p. 119, line 17 - TT, p. 120, line 10). Respondent failed to advise Ms. Rains of these facts.

Respondent failed to advise Ms. Rains that he had been asked by her husband to accept service of process on her behalf regarding the North Carolina action because his attorney was having a difficult time effectuating service on her. (TT, p. 124, lines 20 - 125, line 7; TFB Exh 12). Respondent did not agree to accept service, and did not return any calls from the husband's lawyer. Respondent testified that it was obvious he was not going to accept service because the lawyer did not hear from him. (TT, p. 395, lines 1 - 21).

Respondent did not show Ms. Rains, her husband's Motion to Quash Restraining Order, Motion to Dismiss Petition for Dissolution

of Marriage, and Motion for Show-Cause Order for Indirect Criminal Contempt, among other matters. ((TT, p. 134, line 19; TT, p. 136, line 14; TFB Exh 16).

On about September 29, 1993, Ms. Rains' sister-in-law, Jennifer Farinha, was served with legal documents intended for Kathleen Rains, who was unavailable at the place of service. (TT, p. 261, line 17 - TT, p. 262, line 13). The papers included a Notice of Hearing on custody and child support related to the custody proceedings in North Carolina, and the corresponding motion. (TFB Exh 13). At Respondent's direction, these papers were brought to Respondent, and not shown to Kathleen Rains. (TT, p. 369, line 10 - TT, p. 370, line 4). Respondent did not provide a copy of the documents to Ms. Rains. (TT, p. 128, lines 2 - 23).

Respondent drafted an Affidavit in Opposition to Service of Process for execution by Jennifer Farinha. The Affidavit was to be filed by Rains with the North Carolina District Court as part of a Motion contesting adequate service of process. (TT, p. 259, lines 5 - 6; TT, p. 370, lines 9 - 11). Jennifer Farinha telephoned Mr. Farinha, her father-in-law, and advised him that she did not wish to sign the affidavit because of misrepresentations contained in the affidavit. Respondent was informed that Jennifer Farinha did not wish to execute the affidavit because it contained the

misrepresentation that she was Ms. Rains' sister (she was the sister-in-law), and that she did not know Rains' actual residential address. Mr. Farinha testified that he suggested to Respondent that the misrepresentations be changed in pen, Respondent apparently advised Mr. Farinha to tell Jennifer to just sign the affidavit as it was, which she did after receiving the advice. (TFB Exh 14; TT, p. 258, line 16 - TT, p. 261, line 8). Respondent advised that the affidavit be submitted to the Court even though he had been made aware of the two misrepresentations. (TT, p. 259, line 5 - TT, p. 261, line 8; TT, p. 370, line 9 - TT, p. 371, line 4). The Affidavit was submitted to the District Court in North Carolina. However, the North Carolina Court refused to accept the affidavit, perhaps in part, due to the misrepresentations.(TT, p. 371, lines 5 - 16).

The Court awarded custody of the two minor children to Rains' husband, and denied Ms. Rains Motion to Set Aside Custody, (TFB, Exh. 27). Ms. Rains had not been served with the Notice of Hearing on Custody, and in fact was at Disney World at the time of the alleged service in Tampa. (TT, p. 128, line 2 - TT, p. 131, line 4). In spite of the process server's affidavit to the contrary, Kathleen Rains was not personally known to him and he did not personally serve her. (TT, p. 343, line 7 - p. 349, line 6).

On about October 22, 1993, Respondent telephoned Mr. Farinha immediately after a hearing in Tampa, Florida before Judge Pendino, and informed Mr, Farinha that the court had ruled that the husband had custody of the children, and that the husband was coming to get them. Respondent advised Mr. Farinha that Kathy Rains should take the children and leave the state - that she should take a long vacation. (TT, p. 297, line 3 - TT, p. 299, line 20; TT, p. 361, line 12 p. 362, line 20). The following day, Respondent repeated this advice directly to Kathy Rains. (TT, p. 140, line 10 - TT, p. 141, line 11).

Relying on Respondent's advice that she should get out of the state (TT, p. 140, lines 1 - 15), and reportedly also on Respondent's statement that he would take care of the mess, Ms. Rains left the state with the children specifically to prevent the execution of the court order. Respondent did not advise Ms. Rains about the consequences of her actions, which could possibly include loss of visitation. (TT, p.140, lines 10-25). She and Mr. Farinha both testified that Kathy remained out of the state until about Thanksgiving of 1993, when she returned and began living with her father in Tampa, Florida. (TT, p. 231, lines 12 - 17).

On October 23, 1993, Respondent telephoned Mr. Farinha, who reported that police officers had been at the house looking for

Kathy (Ms. Rains) and the children, and had papers to pick them up. (TT, p. 312, lines 16 - 19). Mr. Farinha indicated to Respondent that he had misrepresented to the sheriff's department personnel that the children were headed for North Carolina, to which Respondent responded "smart thinking." (TT, p. 314, lines 2 - 17; TFB Exh. 22).

Respondent further directed Mr. Farinha to tell the sheriff that Respondent knew where Ms. Rains and the children were. When Mr. Farinha reminded Respondent that Respondent did not know where the children were, Respondent replied, 'Oh well, tell him that." (TFB Exh 22; TT, p. 313, line 1 - TT, p. 314, line 24). Respondent testified in the grievance matter that he would then have told the sheriff he could not disclose the information because of attorney-client privilege. (TT, p. 401, lines 7 - 12).

Following her return to Florida with the children, Ms. Rains discharged Respondent. Both she and an attorney she was considering hiring requested from Respondent, the legal documents which Ms. Rains had provided to him. Ms. Rains believed the documents to be critical to her intended efforts to appeal the custody case and other related matters. Among those documents were her son's school records and medical records. Ms. Rains sent Respondent a letter, dated March 13, 1994, requesting her file.

(TFB Exh. 24). Ms, Rains' father also requested the documents from Respondent. The father reported that Respondent told him to go to hell, saying he would never see the documents. (TT, p. 110, lines 9 - 18; TT, p. 364, lines 4 - 5). Respondent did not respond to the requests, and did not answer a letter from Ms. Rains' subsequent counsel requesting the records. (TT, p. 54, lines 1 - TT, p. 58, line 21; TT, p. 65, line 5 - TT, p. 66, line 24; TFB Exh. 29). Respondent failed to turn over the file prior to the proceedings before the referee. On December 1, 1995, the Referee ordered Respondent to produce the file for copying at the office of The Florida Bar by the following week. (TT, p. 470, line 13 - TT, p. 471, line 5; TT, p. 477, lines 3 - 6).

With respect to Count II, Respondent admitted the allegations of the Complaint, (Respondent's Answer). On April 3, 1980, Respondent was convicted of driving under the influence, and his driver's license was revoked for six (6) months. On May 9, 1980, Respondent's driver's license was suspended for three (3) months due his refusal to submit to a breath/urine/blood test. Thereafter, on July 17, 1980, Respondent completed a driver's improvement (DWI) course. On February 5, 1983, Respondent's driver's license was revoked for five (5) years by the Florida Department of Motor Vehicles due to Respondent's classification as

a habitual, traffic violator. On June 18, 1984, Respondent completed his second driver's improvement (DWI) course. On May 29, 1987, Respondent was found guilty of operating a motor vehicle without insurance. (Answer, paragraph 46-51).

Based on Respondent's plea of nolo contendere, on May 26, 1993, Respondent was convicted of the first degree misdemeanor of possession of marijuana, (Answer, paragraph 52).

On March 28, 1994, Respondent driver's license was again suspended for one (1) year for driving with an unlawful blood alcohol level. Respondent pled nolo contendere on July 11, 1994, to a charge of reckless driving and was placed on probation for one (1) year, ordered to attend DUI school, and assessed $1000.00 in fines and costs. (Answer, paragraph 53-54). Respondent has been found guilty on approximately 22 unlawful speeding citations issued between April 1976 and December 1992. Respondent also has been found guilty of driving while his driver's license was canceled/revoked/suspended on five citations issued on the following dates: 02/17/82; 08/20/82; 08/12/83; 09/11/84; and 06/02/92. (Answer, paragraph 55-56) . Respondent has been found guilty of operating a motor vehicle without a tag or valid registration certificate on the following dates: 02/18/84; 06/21/85; 11/10/86; and 11/05/87.

On May 29, 1987, Respondent was found guilty of operating a motor vehicle without insurance. (Answer, paragraph 56-57).

Respondent's driver's license was suspended on 01/15/88, 03/27/90 and 10/08/92 due to Respondent's failure to attend driver's improvement courses after making such election, and again on 05/23/88 for making the election to attend a driver's improvement course when not eligible. Respondent's driver's license was indefinitely suspended on the following dates due to his failure to appear in court on traffic summons: 11/12/87; 04/08/88, 07/06/88; 04/10/90; 06/04/91; 08/27/91; 12/16/91; 10/26/92; and 03/17/93. Respondent's driver's license was also indefinitely suspended 13 times between September 1987 and April 1994 due to his failure to pay traffic penalties. (Answer, paragraph 58-60).

Myer Cohen, Representative of the Florida Lawyers' Assistance Program (FLA) testified before the Referee as an expert witness in addiction. He opined that Respondent probably is an alcoholic, that he may have impaired judgement, and perhaps even organic damage due to prolonged substance abuse. This testimony was based primarily on Respondent's driving record. (TT, p.15, line 13 - TT, p. 17, line 1). Mr. Cohen acknowledged that it is possible that Mr. Boland is not impaired, (TT, p. 30, lines 20 - 25), and that there

are people who have numerous traffic violations who are not alcoholics or drug addicts. (TT, p. 31, lines 20 - 23). Mr. Cohen indicated that an inpatient evaluation would probably be necessary to determine the nature of any alcohol related problem. (TT, p. 22, line 22 - TT, p. 23, line 10; TT, p. 30, lines 20 - 25).

Mr. Cohen testified that Respondent had previously been referred to FLA twice by The Florida Bar, in 1988 and 1989, and again in 1995 after probable cause was found related to the charges in this count. (TT, p. 21 lines 15 - 22; TT, p.22 lines 3-21). Respondent has declined to be evaluated or otherwise participate in the FLA program because he does not believe he is impaired as a lawyer. (TT, p. 22, lines 9 - 12; SH #2, p. 45, lines 20-21).

Respondent states that he is an alcoholic because at times when he drinks, he drinks too much. However, he also claims that his judgment has not been impaired, nor have his memory and cognitive ability. (TT, p. 407, lines 4 - 25; SH #2, p. 45, lines 13 - 21). He reports that he has won 70 of 80 criminal cases, that he never drinks in the morning, and at times does not drink for 30 days at a time just to prove to himself that he can stop drinking. (TT, p. 407, lines 4 - 8; TT, p. 414, lines 1 - 7).

SUMMARY OF ARGUMENT

Respondent's Initial Brief presents several arguments. Respondent alleges; (I) that the Referee applied the incorrect standard of proof in determining Respondent's guilt; (II) that there were procedural violations against Respondent that should be treated as mitigation; (III) that there was no clear and convincing evidence to warrant a finding of guilt as to Count I; and (IV) that the Referee erroneously found aggravation against Respondent.

The Referee applied the correct standard of proof in determining Respondent's guilt. The Referee correctly found that the Bar had established all of its allegations against the Respondent by clear and convincing evidence,

Respondent states that alleged procedural violations should be considered as mitigation. Respondent claims that he was not given an opportunity to be heard at the grievance committee hearing. However, Respondent was not denied the opportunity to testify. He left before it was time for him to testify.

Respondent alleges ex parte communication between the referee and Bar Counsel. There were no ex-parte discussions between Bar counsel and the Referee.

Respondent **alleges** unreasonable delay in the Referee's proceedings. A delay is considered unreasonable only if the

Respondent did not contribute to the delay, and if Respondent can demonstrate specific prejudice resulting from such delay. Respondent has failed to demonstrate any prejudice resulting from the delay.

Respondent argues that there was no clear and convincing evidence to warrant a finding of guilt as to Count I. The record in this matter is replete with evidence upon which the Referee could base his conclusion that Respondent was clearly guilty* The Referee's findings of fact and his recommendation of guilt should be upheld.

Finally, Respondent denies the existence of a dishonest or selfish motive, and claims that such finding by the Referee is erroneous. The Referee properly found that Respondent acted contrary to honesty, trustworthiness, and fitness as a lawyer, and engaged in misrepresentations in order to protect his own financial self interest while he disregarded his client's best interests. He converted money given to him to pay another attorney.

ARGUMENT

ISSUE I: DID THE REFEREE APPLY THE CORRECT STANDARD OF PROOF IN DETERMINING GUILT?

As Respondent notes, at the sanction hearing on September 13, 1995, the Referee stated :

> "I had previously advised counsel and respondent that I was going to rule that the matters as presented by the Bar had in fact been proved by more than a preponderance and we were now going to get together to discuss sanctions." (SH #2, p. 5, line 23 - p. 6, line 1).

The correct standard of proof in Bar proceedings is clear and convincing evidence. The Florida Bar v. McCain, 361 So. 2d. 700 (Fla. 1978). Based on the above statement from the September 13, **1996,** sanctions hearing, Respondent argues that it is clear that the Referee applied the incorrect standard of proof. (IB, p.11). However, noting that there is "more than a preponderance" of evidence is not inconsistent with finding that the allegations were proven by 'clear and convincing" evidence. In the Report Of Referee in the instant case, Circuit Judge Brandt Downey found that the Bar had proven by clear and convincing evidence (emphasis added) the allegations of the complaint in Count I. (RR, p.1). The Circuit Judge also found that Respondent admitted the allegations in Count II (RR, p.5). The correct standard of proof has been applied,

ISSUE II: WERE THERE PROCEDURAL VIOLATIONS WHICH SHOULD BE CONSIDERED AS MITIGATING FACTORS IN DETERMINING DISCIPLINE?

Respondent represents that he was never notified of the probable cause hearing held by the Hillsborough County Grievance Committee after he appeared for a deposition, In his brief, Respondent states that he was subpoenaed for a deposition at which he voluntarily appeared after ineffective service of process. (IB, p.12). This is incorrect. The subpoena required Respondent to attend and give testimony at a hearing before the Thirteenth Judicial Circuit Grievance Committee "A" on October **19, 1994.** Respondent's own testimony was that he did appear at this probable cause hearing. (TT, p. 382, lines 9 - 13). Respondent was not denied the opportunity to appear. Respondent left before he was called to testify. He advised that if the Grievance Committee wanted to bring him back on another Wednesday, he would be happy to come, but he never heard from them. (TT, p. 383, lines 9 - 21).

Respondent did not initiate any action within the Referee proceedings to set aside the complaint based on an alleged failure to provide him with an opportunity to testify on his own behalf before the grievance committee. Neither did he request that the finding of probable cause be set aside.

Respondent alleges that Bar counsel and the Referee engaged in

ex parte communication. (IB, p. 12). Bar counsel called the Referee late on the day in question to see if the court had made a decision yet. (SH #1 p. 8, line 17 - p. 9, line 1). The Referee advised that his finding was that Respondent had admitted Count II, and that the burden of proving the allegations in Count I had been met. (SH # 1, p.8 line 20). There was no discussion of the merits of the case and Bar counsel was instructed to inform Respondent regarding the court's findings. This was done the following morning when Respondent contacted Bar counsel to ask when the findings of fact were expected. (SH # 1, p.8, lines 21-28).

At the first sanctions hearing, Respondent objected that the Referee had not issued his findings of fact, and requested a continuance. (SH # 1, p.6, line 15 - p.8, line 12). The Referee granted the continuance and ordered each party to submit proposed findings of fact. (SH # 1, p. 13, line 23 - p. 14, line 19).

Unreasonable delay in disciplinary proceedings is listed as a mitigating factor under Standard 9.32(i), but only if Respondent has demonstrated specific prejudice resulting from that delay. Respondent has not demonstrated that he was prejudiced by delay. In fact, he had additional time to work towards proving rehabilitation if he wished, and to obtain witnesses on his behalf for the final hearing.

Respondent has provided no evidence of a procedural violation which would constitute a mitigating factor.

ISSUE III: WHETHER THE FINDINGS OF FACT ARE CLEARLY ERRONEOUS OR LACKING IN EVIDENTIARY SUPPORT IN COUNT I?

The standard of proof in Bar disciplinary proceedings is clear and convincing evidence, The Florida Bar v. McClure, 575 So. 2d 176, 177 (Fla. 1991). A referee's finding of fact concerning an attorney's guilt carries a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Puente, 658 So.2d 65, 68 (Fla. 1995); The Florida Bar v. Miele, 605 So. 2d 866, 867 (Fla, 1992).

The questions before this court are 1) whether there is factual support in the record for the Referee's findings of fact; 2) whether those findings of fact support the violations which the Referee found to be committed by Respondent; and 3) whether the discipline recommended is warranted.

Respondent alleges that the entire case against him rests on the credibility of the Farinha family, (IB, p.14). Respondent's request is, in large part, that this Court substitute its judgment on credibility for that of the Referee. However, that would be inappropriate since the Referee heard the live testimony and is better able to assess the demeanor of witnesses and their credibility.

Respondent overstates by saying the entire case rests on

credibility. For example, there is clear evidence that Respondent filed the Petition for Dissolution knowing it contained a false representation that Kathy Rains has resided in Florida for six (6) months, Respondent filed the Petition for Dissolution on behalf of Ms. Rains one day before the cooling off period ended in North Carolina. Respondent himself indicates that it was an emergency because Respondent "wanted to get priority" before the husband filed papers in North Carolina. The school records of the children, which were in Respondent's possession, showed that the children had been in school in Florida less than six (6) months before he filed the petition. Respondent's testimony and the school records support the testimony of Ms. Rains and of her father that Respondent knew that Ms. Rains had not been in Florida long enough to establish residency for the dissolution proceeding.

Respondent failed to timely file for a restraining order against Ms. Rains husband. Respondent claims that Ms. Rains did not want him to file for the restraining order because she did not want the husband to know her address. However, the address was already known to the husband. (TT. p. 389, lines 3-4).

Respondent denies telling Ms. Rains to take the children and flee the state to avoid execution of a court order granting custody to her husband. Respondent suggests that he might have told Ms.

Rains and her father that he would understand if Ms. Rains took the children and fled the state after the court directed that she turn the children over to her husband. However, both Ms. Rains and Mr. Farinha testified that Respondent telephoned them and told Ms. Rains to take the children and leave the state. Respondent also on other occasions advised his client or others to engage in dishonesty. Respondent told Mr. Farinha that Mr. Farinha did the right thing in denying to the sheriff's department that Mr. Farinha knew where the children were. When Mr. Farinha expressed concerns about his misrepresentations, Respondent praised him for what he had done, and advised him to make further misrepresentations to the sheriff's department personnel. Respondent also advised that an affidavit containing false representations be filed with the North Carolina Court, On Jennifer Farinha's affidavit, there were clearly two misrepresentations. Mr. Farinha testified that he brought these misrepresentations to Respondent's attention, but was advised by the Respondent that Jennifer should sign the affidavit anyway. This is consistent with Jennifer Farinha's testimony, She testified that she drew these errors to Mr. Farinha's attention and he said he would "call his lawyer" (Respondent). Mr. Farinha subsequently telephoned Jennifer Farinha and said that Respondent's advice was for Jennifer Farinha to go ahead and sign the affidavit.

Respondent denies he misappropriated money intended to pay another attorney. However, there is clear evidence that he misappropriated those funds. Ms. Scherer testified that she sent her bill for services to Respondent, that Respondent was the one who arranged for her services, and that there was never any indication by the client or her father that they would directly pay her. Respondent's representation that he was later told that the client or her father would directly pay Ms. Scherer is contrary to all of the testimony, except for that of the Respondent. The documentary evidence supporting the allegation that Respondent was given money to be paid to Attorney Scherer includes the bill sent to Respondent for Ms. Scherer's services, and the two checks for $350.00 given to Respondent to pay for Ms. Scherer's services. Ms. Scherer testified that she never received any money from Respondent on behalf of the clients to pay her attorneys fees.

In his Brief, Respondent briefly comments on each of the alleged Rule violations. Regarding Rule 4-1.1 (competence), Respondent states that he filed a valid and competent petition in an emergency manner which benefitted Kathleen Rains. However, in the Petition for Dissolution he filed, he misrepresented that Ms. Rains had resided in Florida for six months. Further, he did not include with the petition, the affidavit required under the Uniform

Child Custody Act regarding the children's residence. Additionally, Respondent took five months to file for a restraining order to protect his client from her physically abusive husband. Respondent also drafted a faulty affidavit for Jennifer Farinha regarding the service of process, and advised that it be executed and signed despite the fact that it contained two material misrepresentations. Respondent's advice on Jennifer Farinha's affidavit resulted in his client, Ms. Rains, being equitably estopped from presenting evidence that would have established that the alleged service of process was faulty. (TFB Exh. 31; TT, p. 242, lines 2 - p. 248, line 9). The evidence presented to the Referee in the instant case demonstrated that the process server had, in fact, not served Ms. Rains, and that the affidavit submitted by that process server to the North Carolina court was false. This was clearly proven by date-stamped photographs from Disney World, along with receipts for purchases. The testimony of Ms. Rains, Albert Farinha, and Jennifer Farinha also proved that Ms. Rains and her children were in Disney World in Orlando, Florida, when the alleged service of process took place.

Respondent contends that he did not violate Rule 4-1.2(d), which prohibits counseling a client to engage in conduct that the lawyer knows is criminal or fraudulent. However, the Referee found

that Respondent encouraged Ms. Farinha to file for the dissolution of marriage in Florida prior to establishing jurisdiction in the state. There was testimony that Respondent told his client that what the courts did not know would not hurt them, Respondent also encouraged Ms. Rains to file the fraudulent affidavit of Jennifer Farinha in the North Carolina proceeding. In addition, Respondent advised his client's father to lie to the sheriff's department, and he advised his client to flee the state to thwart a court order.

Regarding Rule 4-1.3 (lack of diligence), Respondent states that he was requested by Ms. Rains to not immediately serve process (the restraining order) on her husband. The Referee specifically found that there was no agreement between Ms. Rains and Respondent that Respondent would delay obtaining the restraining order. (RR, p. 2). Ms. Rains' husband had held a bayonet to Ms. Rains throat, had inflicted a serious enough injury on her to leave a scar, and was on probation for assault on a juvenile. Respondent acknowledged that Ms. Rains was 'very, very scared" of her husband and wanted a restraining order. (TT, p.388, lines 10 - 13).

Regarding Rule 4-1.4 (a) & (b) , (lack of communication), Respondent denies that his communication with his client was deficient. However, when Jennifer Farinha received the documents intended to be served on Ms. Rains, Respondent advised Mr. Farinha

not to show those documents to Kathleen Rains. Additionally, Respondent did not advise Ms. Rains that there was a custody hearing in North Carolina, that there was an arrest order issued against her, that he had not filed for the restraining order, nor of the potential dire consequences of fleeing Florida in order to avoid turning the children over to the father.

Rule 4-1.16(d) dictates that upon termination of representation, the Respondent had to surrender to the client, the papers and other property of the client to which the client was entitled. Ms. Rains has testified that there were documents in Respondent's possession which were not returned to her in spite of her and her attorney's requests for them. Respondent finally turned some or all of those documents over to Ms. Rains at the hearing before the Referee, more than a year after he ceased to represent Ms. Rains. Respondent did not testify before the Referee that he had claimed any retaining lien on those files.

Regarding Rule 4-8.4(a), Respondent denies that he violated any Rules of Professional Conduct. This denial is addressed through the discussion of other Rule violations.

Respondent contends he did not violate Rule 4-8,4(b) (committing a criminal act that reflects adversely on an attorney's honesty, trustworthiness or fitness as a lawyer); he

denies committing perjury. The fraudulent petition for dissolution containing a false statement of residency, signed by Respondent, belies that fact. Further, Respondent converted money specifically given to him to pay Ms, Rains' North Carolina attorney, which is a criminal act reflecting on his honesty and fitness as an attorney.

With respect to Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), Respondent states that he was not dishonest, and did not misrepresent anything to anybody. Respondent's conduct involving fraud, dishonesty, deceit, or misrepresentation includes the submission of a fraudulent petition for dissolution of marriage signed by Respondent; advising Jennifer Farinha to submit a false affidavit; advising Mr. Farinha to make misrepresentations to the sheriff's department personnel; and misappropriating the money intended for Ms. Rains' North Carolina attorney.

Rule 4-8.4(d) (engaging in conduct that is prejudicial to the administration of justice), Respondent claims that he did nothing prejudicial to the administration of justice. However, he advised a client to flee the state to avoid the execution of a court order, submitted a petition which contained a fraudulent statement regarding residency, and advised his client to submit a false affidavit of her sister-in-law to the North Carolina Court.

Regarding Rule 5-1.1(a) (conversion), Respondent claims that Ms. Rains' North Carolina attorney was to be paid by the Farinhas, and therefore he converted no money. Respondent was not authorized to apply either of the two $350.00 checks to his own use; Respondent did not advise his client or her father of the unpaid bill for services by Attorney Scherer, and the client did not agree to send the money to the North Carolina attorney. The Referee found that the Respondent converted the money that was intended to pay the North Carolina attorney.

ISSUE IV: ARE THE REFEREE'S FINDINGS OF AGGRAVATING FACTORS CLEARLY ERRONEOUS?

Respondent denies the existence of dishonest or selfish motives. The record supports the referee's finding of dishonest and selfish motives. Respondent converted money intended to pay Rains' North Carolina attorney, and wanting another's money is certainly a selfish motive. Respondent also made material misrepresentations on a petition in an attempt to establish jurisdiction in Florida. Had he succeeded, he would have been able to make more fees on the case.

Respondent objects to the Referee finding that Respondent refused to acknowledge the wrongful nature of his conduct. Respondent does, in fact, refuse to acknowledge the wrongful nature, claiming that is because he is innocent. Respondent does not acknowledge that it was wrong to tell his client's father to lie to the sheriff's department, does not express regret about submitting a pleading with a fraudulent jurisdictional statement, and expresses no remorse over converting money intended for another attorney. In Count II, Respondent does not even clearly admit to wrongdoing or express regret when talking about driving on a suspended license, driving without insurance, or his DWI

convictions.

Respondent contends that the Referee incorrectly found Respondent's client to be vulnerable. He contends that the real victim in his client's case was the father (the client's husband). Yet Respondent himself acknowledges that his client was very afraid of her husband because of past physical violence. He described her as a scared little girl. The Referee properly recognized that Ms. Rains **was** vulnerable, given her acknowledged fear of her husband, her fear that she might lose her children, and overall, her highly-emotional state and distress over the proceedings.

Respondent objects to paying the money owed to North Carolina Attorney Scherer because, he claims, the client agreed to pay Ms. Scherer. The Referee found that the client had not agreed to pay Ms. Scherer directly. Thus, the Respondent was properly ordered by the Referee to repay the converted money.

Respondent contends that the Referee's finding that he had refused to obtain alcohol treatment is not meritorious. Respondent has been contacted three (3) times by the Florida Lawyer's Assistance program. However, he has not entered into treatment nor has he begun attending Florida Lawyer's Assistance or any other Alcoholics Anonymous meetings. While Meyer Cohen, director of FLA, advised that inpatient evaluation would be preferable, he did not

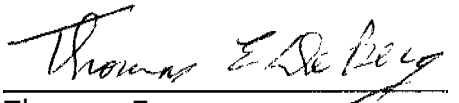
testify that there are no other alternatives available for someone like Respondent.

CONCLUSION

The Referee's findings are not clearly erroneous and therefore should be upheld.

The Respondent does not address the Referee's proposed discipline in light of the Referee's findings of fact. The recommendation of discipline has also not been contested by The Florida Bar. Therefore, this Court should uphold the Referee's recommendation of discipline.

Respectfully submitted,



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CERTIFICATE OF SERVICE.

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief have been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1925; a true and correct copy by U.S. certified mail No. P 370 043 064 and a copy by regular U. S. mail to Robert A. Boland, Esq., Respondent, at his record Bar address of Post Office Box 172431, Tampa, FL 33672-0431; and a copy by regular U. S. mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 07 day of July, 1997.

Thomas E. DeBerg