IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

vs.

ROBERT A. BOLAND

Respondent,

_____/

S.C. CASE NO. 85,274

TFB CASE NOS. 94-11,334(13A)
94-11,335(13A)

INITIAL BRIEF OF RESPONDENT
ROBERT A. BOLAND

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases **Page(s)**

INDEX

The record for the Petition In Review was not indexed consecutively by the Clerk of the Circuit Court. Accordingly the record will be referred to by each page of the various hearings and transcripts themselves. The following codes will be utilized by the Respondent:

TT	Trial Transcripts of November 29, 1996 and December 1, 1996.
SH #1	Sanctions Hearing of July 12, 1996
SH #2	Sanctions Hearing of September 1, 1996
PC	Probable Cause Hearing of October 19, 1994
EX #1	Exhibits list of Florida Bar
NC	Since the Trial Court took judicial notice of the entire North Carolina file, reference will be made by "NC Motion or Order" and the date it occurred.
PT	Pre-Trial Transcript

STATEMENT OF THE CASE

On March 31, 1994 KATHLEEN RAINS filed a complaint against Respondent, Robert A. Boland, Esquire. (Complaint of Fla. Bar). The Respondent filed a written response and the Florida Bar forwarded the case to a probable cause committee. (Answer of Respondent, PC Hearing). A subpoena for deposition was filed and attempted service was left at the Respondent's residence on his front doorstep. (TT page 382). Notwithstanding the lack of effective service, the Respondent attended the scheduled deposition. (TT page 383). After waiting for over two hours to testify the Respondent left word with the Committee that he had to leave the deposition to pick up his girlfriend who was getting off work in a high crime area. (TT page 383). Respondent left word with the Committee that he would voluntarily reappear for another scheduled deposition without a subpoena. (TT page 383). The deposition was never scheduled again. (TT page 383).

On October 19, 1994 the Probable Cause Committee, Hillsborough County Grievance Committed 13A, took additional testimony and found probable cause. (PC 48). The Respondent was not notified of the October 19, 1994 hearing, (TT page 383). This Court appointed the Honorable Brandt C. Downey, III as a referee to hear the case. (Supreme Court Appointment).

On November 29, 1995 and December 1, 1995 the case was heard. (TT 1 and 377). The Respondent admitted each and every allegation in Count 11 of the Complainant's complaint. (Answer of Respondent). The Respondent pleaded several affirmation defenses in Count II as mitigation towards the admitted complaint. (Answer of Respondent), At the conclusion of the trial, Referee Brandt C. Downey III indicated he wanted a transcript. (TT page 495). He also stated that he would issue some written findings of fact by mid-December or the beginning of 1997. (TT page 495).

A Sanctions Hearing was held on July 12, 1996. (SH #1). Two days before this hearing the Respondent called Florida Bar Counsel Tom DeBerg and inquired as to when we could expect the written findings of fact. (SH #1-6, SH #l-S). It was at that moment that Tom DeBerg, Esquire informed the Respondent that he and the Honorable Brandt C. Downey, III had an ex-parte phone conversation. (SH #1-8). The ex-parte phone conversation was initiated by Tom DeBerg, Esquire and Honorable Brandt C. Downey, III indicated to Tom DeBerg, Esquire to

inform the undersigned attorney that the "Respondent was guilty of everything." (SH #1-6, SH #1-8). The Honorable Brandt C. Downey, III never authored any written findings Of fact. (SH #1-13). He directed both the Complainant and the Respondent to file written Finding Of Facts. (SH #1-13). The written Report of Referee is word for word identical to the Complainant's Finding of Facts. (Report of Referee, Complainants Statement of Facts).

The Sanction Hearing on July 12, 1996 was continued to September 13, 1996. (SH #2). At that hearing the Honorable Brandt C. Downey, III indicated that the Florida Bar proved each and every allegation in Count I by more than a preponderance of the evidence. (SH #2). At the conclusion of the hearing Honorable Brandt C. Downey, III indicated he would issue a final Report of Referee within thirty days. (SH #2-50).

On January 28, 1997 the Honorable Brandt C. Downey, III recommended that the Respondent he suspended from the practice of law for two years, followed by two years probation. (Report of Referee). Honorable Brandt C. Downey, III also recommended the Respondent be required to pass the ethics portion of the Florida Bar exam, complete an alcohol rehabilitation program, pay $1,200.00 in restitution and $4,220.74 in costs, (Report of Referee). The Recommendation of Sanctions were not made as to each Count of the Florida Bar Complaint, (Report of Referee). They were made as a general statement and it is unclear if such sanctions apply concurrently to each count. (Report of Referee).

The Board of Governors approved the recommendation of Honorable Brandt C. Downey, III on April 7, 1997. (Board of Governors Recommendation).

This petition for review follows. (Petition for review filed by Respondent).

STATEMENT OF FACTS

COUNT I

The Complainant KATHLEEN RAINS filed a separation complaint in the General Court Of Justice, District Court Division in Wake County, North Carolina, on May 21, 1992, Case No. 92-CVD-8992. Complaint of NC 5/21/92. The Honorable Brandt C. Downey, III took judicial notice of that case in pre-trial proceedings. PT pages 9 & 10. North Carolina Code Section 50.6 requires a separation complaint to be filed one (1) year prior to a divorce action being instituted. TT page 167 lines 1 to 5. This is often referred to as a "cooling off' period which is statutory. TT 167 lines 1-5. Soon after being retained by Kathleen Rains the Respondent Robert A. Boland filed a divorce action on behalf of Kathleen Rains in the Circuit Court of Hillsborough County, Tampa, Florida, Case No, 93-6109. Exhibit #1-6. The Trial Court took judicial notice of that case in pre-trial proceedings. PT pages 9 & 10. The Respondent filed the dissolution action in an emergency matter on May 20, 1993, one day before Mr. Rains was able to file in North Carolina, and invoke jurisdiction of the dissolution there. Exhibit #1-6 and Complaint of NC 5/21/92.

On October 20, 1992 Complainant Kathleen Rains entered into a Consent Order with her husband. (Exhibit #l-l) That order awarded primary custody to the Complainant Kathleen Rains and visitation to her husband, (Exhibit #l-l) Such visitation was to be given to the husband every other weekend from Friday, 6:00 PM to Sunday, 6:00 PM, one evening per week for several hours, two straight weeks during the summer, three days during Easter, Memorial Day weekend, Labor Day weekend and Thanksgiving Day weekend every other year and six days at Christmas. (Exhibit #l-l)

After the husband's Christmas visitation in 1992 the Complainant Kathleen Rains elected to terminate all visitation. (TT page 93, lines 15 to 20, TT page 168, lines 2 to 8), TT page 395,lines 1 to 7). From December 30, 1992 until the children were taken from the Complainant Kathleen Rains on March 8, 1996 by Sheriffs of Hillsborough County, Florida the husband received no visitation. (TT page 190, lines 24 and 25, TT pages 226 to 230). During this period of time the Complainant Kathleen Rains violated the Order of the North Carolina Court as to visitation one hundred thirty four times or days of scheduled visitation. (Exhibit #l-l, #l-2, #1-4, #l-7, #1-18, N.C. Consent Order 10/20/92).

The Complainant Kathleen Rains' reasons for violating the Orders Of the North Carolina Court as to visitation were multiple. (TT page 154, lines 9 to 12, TT page 92-93). Complainant Kathleen Rains stated that she was afraid of her husband because he was violent to her and her children. (TT page 154, lines 9 to 12). She obtained a protective violence order on May 21, 1992 which required supervised visitation with the husband. (N.C. Order 5/21/92) On December 30, 1992, after the husbands six days of Christmas visitation, Complainant Kathleen Rains testified that she and her mother went to see the Chief Judge of the Family Law Division in Wake County, North Carolina. (TT page 92 to 93, TT page 191 to 194) She stated that Judge Bullock was the Chief Judge and he gave her advice even though he was not assigned to her case. (TT page 92 to 93, TT page 191 to 194). There was no notice of hearing to her husband or her husbands attorney Gary Lawrence. (TT page 92 to 93, TT page 191 to 194). There were no court reporters or court personnel present during the meeting, (TT page 92 to 93, TT page 191 to 194). Complainant Kathleen Rains stated that it was the advice of Judge Bullock to willfully violate the Court orders of visitation and later defend her actions at a contempt hearing. (TT page 92 to 93, TT page 191 to 194).

On March 25, a contempt hearing was held and the Complainant Kathleen Rains testified that from December 30, 1992 to the day of the hearing that the children were sick each day of the husbands scheduled visitation. (TT page 92, line 23 to page 93, line 10). The Court did not believe her and so stated in its Order of March 31, 1993. (Exhibit #l-2). The Court found as a factual matter she avoided being home to frustrate her husbands visitation. (Exhibit #l-2). The Court found as a factual matter that Kathleen Rains had moved from her North Carolina apartment without notice to prevent the Defendant/Husband Michael Rains from exercising his visitation. (Exhibit 1-2). The Court further found that her behavior was willful, deliberate and without just cause. (Exhibit 1-2). She was sentenced to thirty days incarceration in the Wake County Jail at the conclusion of the March 25, 1993 hearing. (Exhibit 1-2). Complainant Kathleen Rains testified in this hearing that she did not know she was adjudged to be in contempt and sentenced to thirty days. (TT page 87, lines 22 to 24). This was contradicted by Kathleen Rains' own testimony before the Hillsborough County Bar Grievance Probable Cause Hearing on October 19, 1994 when she indicated she was in contempt of court. (PC heating, page 5, line 20 to page 6, line 8). This is also contrary to the factual findings of the North Carolina Court and its Order of March 31, 1993, (Exhibit #l-2). The North Carolina Court also found her to be in contempt because she moved from North Carolina in February of 1993 without informing the

Wake County Clerk of Superior Court of her current address contrary to paragraph four of the North Carolina Consent Order of October 20, 1992, (Exhibit #1-2). In pre-trial deposition the Complainant Kathleen Rains stated under oath that she drove straight through from North Carolina to Florida on December 30, 1992, (TT page 194, line 20 to page 195, line 10). She recanted this testimony in this hearing by saying she left in February of 1993. (TT page 94, line 2 to 10). From December 30, 1992 to March 8, 1994 the Complainant Kathleen Rains never complied with the Consent Order by giving the Clerk her new address. (Exhibit #1-2).

During the contempt hearing on March 25, 1993 the Complainant Kathleen Rains testified that she was residing in Tiverton, Rhode Island and that the minor child was attending Xavier Cannel School in Tiverton, Rhode Island. (TT page 170, line 1 to 16, TT page 170, line 22 to 25, TT page 172, line 22 to 29, page 173, line 10, TT page 174, line 3 to line 24, Exhibit #1-2). Her testimony was repeated and is contained in the Court Order of March 31, 1992. (Exhibit #1-2). Complainant Kathleen Rains stated in this hearing that she made no such statement. (TT page 162, line 3 to line 15). She stated the Judge was mistaken and the Court Order was in error. (TT page 162, line 3 to line 15). Gary Lawrence, a North Carolina attorney representing Mr. Rains was at the March 25, 1993 hearing. (TT page 169, line 6 to line 21) He testified that the Complainant Kathleen Rains told the Court she was living in Tiverton, Rhode Island and that the minor child was enrolled in school there and that she denied living in Florida. (TT page 170 to page 173). Child support payments were forwarded by the Wake County Clerk to Tiverton, Rhode Island for six months after this hearing. (TT page 159, line 8 to line 15). These payments wee sent by Complainant Kathleen Rains' relatives in Tiverton, Rhode Island to her in Tampa, Florida. (TT page 159, line 8 to line 15). Complainant Kathleen Rains denied making these statements to the Wake County Court on March 25, 1993 and indicating she gave the Tiverton, Rhode Island address as her mailing address and not her resident address. (TT page 162, line 3 to line 15, TT page 90 to 92). The Xavier Cannel School is located in Tampa, Florida and the Complainant Kathleen Rains admitted in this hearing that she was living in Tampa, Florida on March 25, 1993. (TT page 89, line 20 to 22, TT page 90, line 18 to 22).

The Court allowed her to purge her 30 day jail sentence if she would produce the minor children for visitation within 24 hours. (TT Exhibit #1-2). She never purged the contempt and drove immediately to Tampa, Florida. (TT page 88, line 18 to 24). The Complainant Kathleen Rains stated she made that decision after the March 25, 1993 hearing via the Respondent Robert A. Boland's advice. (TT page 89, line 1 to 19). All of the aforementioned facts occurred before

the Complainant Kathleen Rains met or conversed with the Respondent Robert A. Boland. (TT page 89). The Complainant Kathleen Rains testified that she called her father after the March 25, 1993 hearing seeking advice. (TT page 89). Albert Farina, her father, called the Respondent Robert A. Boland and indicated that it was the Respondent Robert A. Boland's advice that the Order indicating the terms of the purge were unrealistic. (TT page 288,1ine 18 to 23). Further, she should disobey the Order and come directly to Tampa, Florida and we could obtain jurisdiction in Florida over the custody matter. (TT page 289). Respondent Robert A. Boland denied talking to Albert Farina on March 25, 1993 and indicated the first time he talked and met with the Farina's was on April 13, 1993 which was the date he first became retained. (TT page 384,1ine 15 to line 20).

Complainant Kathleen Rains testified that she never complied with any of the Orders of the North Carolina Court from March 25, 1993 to October 22, 1993 because of the advice by the Respondent Robert A. Boland. (TT page 288, line 18 to 23, TT page 289, TT page 205, line 25 to page 206, line 3). On October 22, 1993 Circuit Judge Pendino of Hillsborough County dismissed the Petition for Dissolution. (Exhibit #1-20). The Complainant Kathleen Rains and Respondent Robert A. Boland had one phone call conversation after October 22, 1993 and the attorney-client relationship expired. (TT page 227, line 18 to 20).

The Complainant Kathleen Rains never complied with the North Carolina Orders of the District Court in Wake County from October 22, 1993 to March 8, 1994. (TT page 227, line 18 to 20). The Complainant Kathleen Rains stated in this hearing that she didn't return her children to the North Carolina authorities during this period of time because she "didn't know what was going on!" (TT page 227, line 18 to 20).

Robert A. Boland testified he started representing Complainant Kathleen Rains on April 13, 1993. (TT page 384, line 16 to 20). Complainant Kathleen Rains said legal representation started after the March 25, 1993 hearing via a phone call to the Respondent Robert A. Boland through the father, (TT page 89). Respondent Robert A. Boland testified that after he filed the Hillsborough dissolution the Complainant Kathleen Rains requested to not serve her husband for a while because she did not want him to know her whereabouts. (TT 388, line 17-19). In July of 1993 Complainant Kathleen Rains was served process by her husband seeking to change custody of the minor children. (Exhibit #1-7, TT page 391, lines 14-17). She was served after eight unsuccessful attempts by process server Kim Alderman. (Exhibit #l-7, TT page 391, lines 14-17). At that time she became aware of her husbands desire to change custody. (TT page

220,line 22 to page 221, line 24).

The testimony is clear that Respondent Robert A. Boland never indicated to Complainant Kathleen Rains that he would represent her in North Carolina. (TT page 222,line 12 to 14). Respondent Robert A. Boland did arrange for legal counsel to represent the Complainant Kathleen Rams in North Carolina. (TT page 35, line 9 to 25). Respondent Robert A. Boland hired Sally Scherer, Esq. and such effort proved successful as she appeared for a July 19 hearing and canceled the hearing because there was not forty days of pre-hearing notice as required by North Carolina law. (Exhibit #1-10). Respondent Robert A. Boland also asked Sally Scherer to review the file. (TT page 36, line 21 to page 37, line 2).

Respondent Robert A. Boland testified that the letter of July 20, 1993 and various phone calls from Sally Scherer, Esq. is when he first learned of the contempt problems of his client. (TT page 394, line 24 to 395, line 7). Sally Scherer, Esq. was not paid and presently is still owed $325.00. (TT page 38, line 18-20). Respondent Robert A. Boland testified that her original fee was $100.00 and he offered to pay $200.00. (TT page 44, line 2 to 5). Sally Scherer indicated that "was quite possible." (TT page 44, line 2 to 5). Respondent Robert A. Boland said his clients promised that they would wire money to Sally Scherer and that is what he told Sally Scherer. (TT page 393, line 15 to 23). She again stated that was quite possible. (TT page 44, line 9 to 14). Sally Scherer sent one bill for $325.00 to Respondent Robert A. Boland and never attempted to further collect the debt from him. (TT page 45,line 24 to page 46, line 6). Respondent Robert A. Boland testified his clients told him that the bill was paid. (TT page 393, line 15 to 23). Later Mr. Farinha called Sally Scherer and urged her to report the Respondent Robert A, Boland to the Florida Bar regarding the outstanding bill and she did so. (TT page 45, line 8 to 11). Sally Scherer testified Mr. Farinha would do what he could to pay her and never did, (TT page 44, line 20 to 24).

In an effort to make Respondent Robert A. Boland look like he misappropriated money given to him by Complainant Kathleen Rains for Sally Scherer, Esq., members of the Farinha family took a canceled check of $350.00 written to Respondent Robert A. Boland and wrote "N.C." after lawyers in the lower left hand corner as a notation before giving the canceled check to the Florida Bar. (Exhibit #2-12, original check from the custodian of records) (Exhibit #2-13, check presented to Florida Bar from Farenda).

Sally Scherer indicated Complainant Kathleen Rains would have to be served a second time. (TT page 392, line 22 to page 393, line 1). Complainant Kathleen Rains did not get served for

the next 2½ months, although many attempts were made. (Exhibit #1-7). On September 29, 1993, Complainant Kathleen Rains was served with the North Carolina process, setting a hearing for October 11, 1993. (Exhibit #1-15). She never attended the hearing and custody of the minor children were awarded to the husband, (North Carolina Order, October 15, 1993). Complainant Kathleen Rains stated she was never served and later filed a grievance against process server Dana Gilmore. (TT page 210, line 10 to 16). He was exonerated after a one year investigation by Chief Judge Dennis Alvarez of Hillsborough County. (IT page 334, lines 5 to 18). On October 22, 1993 Judge Pendino held an emergency hearing brought by Complainant Kathleen Rains' husband in Tampa, Florida to enforce the North Carolina Change of Custody Order of October 1 I, 1993. (Exhibit 1-20). Judge Pendino found that she was effectively served process, that she was avoiding process and the Orders of the North Carolina Court, (Exhibit 1-20). He dismissed the dissolution and ordered Hillsborough deputies to pick up the minor children, (Exhibit 1-21). The North Carolina Courts took judicial notice of Judge Pendino's determination of service and applied it res judicata there. (Exhibit 1-27). Kathleen Rains attempted to regain custody and introduced into evidence the grievance committee's finding of probable cause, which was denied by the North Carolina Court on August 12, 1994. (Exhibit #l-27).

COUNT II

The Respondent Robert A, Boland admitted all allegations in this complaint. (Florida Bar Complaint). Respondent Robert A. Boland admitted to being an alcoholic in the sense that when he does drink he occasionally drinks too much. (TT page 405, line 13 to page 408, line 4). Respondent Robert A. Boland denied being impaired as a member of the Bar. (Page 407, line 12 to 22). Respondent Robert A. Boland has had two DUI's, one in 1980 and the other in 1994. (Florida Bar Complaint and Answer). The rest of the driving record are primarily speeding violations. (Florida Bar Complaint and Answer).

ISSUES PRESENTED ON APPEAL

ISSUE I DID THE HEARING REFEREE APPLY THE INCORRECT STANDARD OF PROOF IN DETERMINING GUILT?

ISSUE II WERE THE PROCEDURAL VIOLATIONS AGATNST THE RESPONDENT SUCH THAT THEY SHOULD BE TREATED AS A MXTIGATING FACTOR AGAINST THE RESPONDENT.

ISSUE III WAS THERE ENOUGH CLEAR AND CONVINCING EVIDENCE TO WARRANT A FINDING OF GUILT AS TO COUNT I?

ISSUE IV DID THE REFEREE IMPROPERLY ASSUME THE EXISTENCE OF AGGRAVATING FACTORS IN DETERMINING HIS RECOMMENDED SANCTION.

SUMMARY OF ARGUMENT

ISSUE I THE REFEREE APPLIED THE WRONG STANDARD OF PROOF IN DETERMINING GUILT.

ISSUE II THE NONCOMPLIANCE WITH FLORIDA BAR RULE 3-7-6(2)(1) SHOULD COUNT AS A MITIGATING FACTOR FOR THE RESPONDENT.

ISSUE 111 THERE WAS NOT CLEAR AND CONVINCING EVIDENCE TO JUSTIFY A FINDING OF GUILT AS TO COUNT I.

ISSUE IV THE REFEREE APPLIED INCORRECT AGGRAVATING FACTORS IN DETERMINING THE RESPONDENT'S SANCTION.

ARGUMENT

ISSUE I

DID THE HEARING REFEREE APPLY THE INCORRECT STANDARD OF PROOF IN DETERMINING GUILT?

A final hearing was held on November 29, 1995 and December 1, 1995. A Sanction Hearing was scheduled July 12, 1997 and continued to September 13, 1995. During the hearing on September 13, 1995 the Honorable Brandt C. Downey, III stated the following:

> "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 **not** going to get together to discuss sanctions."

It is well settled by this Court that the standard of proof in Bar discipline proceedings is a finding of clear and convincing evidence. The Florida Bar **v.** Quick, 279 So 2d 4 (Fla S. Ct. 1973). Disciplinary actions are quasi-civil and quasi-criminal in character. Although they are not criminal proceedings justifying a standard of proof beyond and to the exclusion of a reasonable doubt; they likewise are not civil proceedings justifying a standard of proof of a preponderance of the evidence.

Bar disciplinary actions are penal in nature and require clear and convincing evidence necessary to sustain a referee's finding of guilt. The Florida Bar vs. Quick, supra.

The record is clear that the referee applied the **wrong** standard of proof. The Respondent's position is that this error requires a remand at the very least. However, Respondent's position is that the record doesn't support a conviction even if the proper standard of proof were to be applied.

ISSUE II

WERE THE PROCEDURAL VIOLATIONS AGAINST THE RESPONDENT SUCH THAT THEY SHOULD BE TREATED AS A MITIGATORY FACTOR AGAINST THE RESPONDENT.

The Respondent voluntarily appeared for a deposition after ineffective service of process was effectuated upon him, i.e. a subpoena was left on the doorstep of his residence. The Respondent voluntarily attended the deposition. The Respondent waited for over two hours and left word he was forced to leave to pick up his girlfriend, who was employed in a high crime neighborhood of Tampa. The deposition was never rescheduled. He was never notified of the probable cause hearing held by the Hillsborough County Grievance Committee. The Respondent was never afforded the opportunity to present his side of the facts either at deposition or before the Committee itself.

After the final hearing was held on November 29, 1995 and December 1, 1995 the referee ordered the transcripts. They were provided on December 14, 1995. Thus, the referee had until January 1, 1997 to write his written finding of facts. Rule 3-7.6(k)(1). In point of fact he never issued his own findings of fact, He engaged in an ex-parte conversation with Florida Bar counsel Tom DeBerg, Esq. two days before a scheduled Sanctions Hearing and told Tom DeBerg, Esq. to call the Respondent to tell him he is "guilty of everything." Then the referee ordered each party to submit a written statement of facts. The report of the referee is a carbon copy of the Florida Bar's Statement of Facts, The report of the referee was thirteen months late according to Rule 3.7-6(k)(1).

The Respondent does not claim harmful error as to any of the aforementioned procedural errors. Nor does he claim harmful error from the totality of the procedural errors. The Florida Bar v. Lehrman, 485 So2d 1276 (1986). The Florida Bar v. Guard, 453 So2d 392 (1984). The Respondent had a fair hearing. The Respondent does contend, however, that the totality of the procedural errors should be taken into consideration as a mitigating factor for the Respondent.

ISSUE III

WAS THERE ENOUGH CLEAR AND CONVINCING EVIDENCE TO WARRANT A FINDING OF GUILT AS TO COUNT I?

The referee never authored his own findings of fact but merely adopted the findings of fact proposed by counsel for the Florida Bar. These findings of fact were never applied to the specific rules the Respondent was alleged to have committed. The Respondent will discuss the facts in a general way as the report of the referee did. The Respondent will then apply the facts to each alleged rule violation. However, the Respondent is confused as to what specific facts gave rise to each and every rule violation.

This Court has stated what clear and convincing evidence is:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. *Walker*, 429 So.2d 797,800 (Fla. 4th DCA 1983). Inquiry Concerning a Judge, 648 So2d 398 (Fla 1994).

The entire case against the Respondent rests on the credibility of the Farinha family; Kathleen Rains Farinha (daughter of Respondent's client); Albert (Father); and Jennifer (daughter-in-law of Albert.) The Respondent submits this family has no credibility. Kathleen Rains violated North Carolina Court Orders from December 30, 1992 to March 8, 1996 when Hillsborough County Sheriffs deputies apprehended her. By Kathleen Rain's own statements and according to her version the Respondent only represented her from March 26, 1993 to October 22, 1993. Her testimony was that the Respondent told her to violate the Orders of the North Carolina Court.

Assuming arguendo that such a preposterous statement is true, Respondent is only responsible for 23 weeks out of a 61 week period, of contempt, She violated the North Carolina Court Orders for months, both before and after the Respondent represented her. She stated she violated the North Carolina Court Orders because Chief Judge Bullock advised her to. This was allegedly done in private without notice of hearing and any parties being present. She never took his advice and filed a Contempt Motion against her husband.

She showed up for her own Contempt Hearing on March 25, 1993 and lied to the Court about her address in Tiverton, Rhode Island and lied to the Court about the children being sick every time visitation was to occur during the past three months.

The Trial Judge didn't believe her and so stated in an Order March 25, 1993. He placed her in contempt and sentenced her to thirty days. She testified before the referee that she didn't know she was in contempt, Unbelievably the referee believed her, Yet she stated otherwise before the Probable Cause Committee,

She stated she did not purge the jail sentence of thirty days by allowing visitation of her children because the Respondent advised her to. The Referee found that it was clear that Respondent never agreed to appear in North Carolina as counsel. Does it make sense that the Respondent would advise a person to violate a North Carolina Court Order when he:

(a) has not been paid;
(b) has never met his client;
(c) has never talked to his client;
(d) has no knowledge of the facts or the judicial record.

After the attorney-client relationship ended on October 22, 1993, she continued to violate the Orders of the North Carolina Court for almost five months. She was effectively served process for a change of custody hearing and elected not to attend. That is the reason she lost custody of her children, notwithstanding the referee's decision that the Respondent was responsible. When asked why she continued to violate the North Carolina Court Orders after October 22, 1993 she

indicated "she didn't know what was going on." This testimony is not precise or explicit and is definitely confusing, exactly contrary to the required standard of proof. ~~Inquiry Concerning a~~ Judge, supra. The clear facts are that Kathleen Rains disobeyed orders, lied, committed perjury, avoided legal process, avoided legal hearings and did whatever she and her advising father felt like doing,

Albert Farinha is also not to be found credible. He testified exactly how his daughter did. Albert Farinha encouraged Sally Scherer to file a grievance against the Respondent after he told her he would do what he could to pay her. He never did pay her. He attempted to get the process server, Dana Gilmore to change his affidavit regarding his daughter's service and when Mr. Gilmore refused he filed an unsuccessful one-year grievance investigation against him. He also illegally tape recorded the Respondent. Finally, either he or his wife took a canceled check given to Respondent with a "lawyers" notation on it and altered it to "lawyers, N.C." to confuse the Florida Bar into believing Respondent misappropriated funds.

The sum total of the evidence is the Respondent's word against the Farinha's word, which doesn't even give rise to a preponderance of evidence against the Respondent. Taken into account the lack of credibility of the Farinhas, her lies and perjury before a Judge, the contempts and the avoiding process, there is overwhelming evidence that the Respondent did not commit the allegations in Count I.

The following arguments will be made applying the facts to each alleged rule violation:

(1) Rule 4-1.1

The Respondent never advised Kathleen Rains to lie, commit perjury, avoid process or violate Orders of the **North** Carolina Court. The Respondent filed a valid and competent Petition For Dissolution and did so in an emergency manner which benefitted Kathleen Rains.

(2) Rule 4–1.2(d))

Same response as (1) supra.

(3) 4.1.3

It was requested by Kathleen Rains not to immediately serve process upon her husband.

(4) 4.1.4

The Respondent kept Kathleen Rains informed of everything and was successful in hiring an attorney in North Carolina who prevailed for her there. Kathleen Rains elected not to attend the hearings in North Carolina and Florida.

(5) 4.1.16(d)

The first $500.00 received was a non-refundable retainer.

The remaining $700.00 received was a more than reasonable fee for the legal hours spent on her behalf. This money was earned when it was received. The Respondent also paid the filing fee of $162.00. The total fee was $1038.00 which was more than a reasonable fee.

(6) 4–8.4(a)

The Respondent violated no rules of professional conduct.

(7) 4–8.4(b)

The Respondent did not commit perjury, nor did he suborn.

(8) 4–8.4(c)

The Respondent was not dishonest and did not misrepresent anything to anybody.

(9) 4–8.4(d)

The Respondent did nothing to prejudice the administration of justice.

(10) 5–1.1(a)

Sally Scherer was to be paid by the Farinha's. Her fee was $325.00 and not $350.00. The latter figure was paid to the Respondent for his assistance in the North Carolina case and his work in the Hillsborough County dissolution.

ISSUE IV

DID THE REFEREE IMPROPERLY ASSUME THE EXISTENCE OF AGGRAVATING FACTORS IN DETERMINING HIS RECOMMENDED SANCTION.

The referee listed "dishonest and selfish motives." The record as a whole doesn't support this. The fee of $1,032.00 was more than a reasonable fee, especially with the conflict of law issues that arose in the dissolution. The Respondent did nothing dishonest or selfish.

The "refusal to acknowledge wrongful nature of his conduct" is not applicable. The Respondent went to trial on Count I because he did not do what is alleged. The Respondent is appealing the findings of the referee because he believes he is innocent, The Respondent tried his very best for Kathleen Rains and will not admit to something that he did not do.

The "vulnerability of the victim" is not applicable. The real victims are the father and the children who didn't see each other for 61 weeks. The Respondent feels he is a victim as well. This entire 61 week episode was a well-planned and calculated effort to thwart the rules of law.

The Farinha's promised to pay Sally Scherer and didn't. The Respondent did not pay the bill because Sally Scherer, Esq. sent the Respondent one bill and never called or wrote after that time period. The Respondent assumed it was paid because his client told him so. The first time the Respondent learned of the unpaid bill was when this grievance commenced. The Respondent does not feel he is obligated to pay this bill but will do so if directed by this Honorable Court.

The "refusal to obtain alcohol treatment" is not meritorious. The Respondent indicated to members of F.L.A. that he would undergo any treatment they desired, but was financially unable to pay the cost of such treatment. That ended all conversations with F.L.A. The Respondent is a competitive and successful trial attorney who feels he is not impaired. He will undergo any treatment if it is not cost prohibitive.

CONCLUSION

The evidence is insufficient to sustain a conviction on any rule violation in Count I. This cause should be remanded to the referee to determine an appropriate sanction for Count II.

Respectfully submitted,

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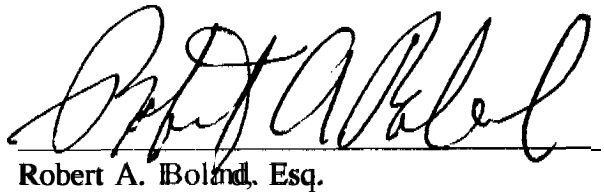
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of this Brief was Hand Delivered to Thomas DeBerg, Esquire on this 13th day of June, 1997.



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