IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RALPH LORENZO FLOWERS,

Respondent.
_____/

Case No. 85,757
[TFB Case Nos. 95-30,713 (19B) and 95-30,360 (19B)]

**THE FLORIDA BAR'S ANSWER BRIEF**

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## SYMBOLS AND REFERENCES

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

The transcript of the final hearing held on July 28, 1995, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated October 4, 1995, will be referred to as "RR", followed by the cited page number(s).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

## STATEMENT OF THE CASE AND FACTS

The bar has no objection to the respondent's statement of the case in pages two and three of his initial brief. However, the respondent's statement of the facts, beginning on page 4 of his brief, do not comport with the findings of fact made by the referee in his October 4, 1995, report. Therefore, the following facts are taken directly from the referee's report:

### As To Count I

Shirley Frances-Lopez ("Frances-Lopez") was referred to and sought the legal assistance of the respondent for her immigration case in the Summer of 1991. Frances-Lopez went to 601 North 7th Street, Ft. Pierce, St. Lucie County, Florida, and met with L. Stanley Brown, an immigration consultant. The address of 601 North 7th Street contains the law offices of the respondent, an office for L. Stanley Brown, and two offices for Charles W. Cherry, out of which he operates the Florida Courier, a weekly newspaper. The only sign identifying the building is painted in white capital letters on a red door and states:

601
LAW OFFICES OF
RALPH L. FLOWERS
407-461-2711

There is a side entrance to the building which leads to a hallway behind the respondent's offices. The side entrance is blocked by a chain-link fence but otherwise appears accessible from the street.

Frances-Lopez believed that L. Stanley Brown worked with the respondent and that the respondent would be handling her immigration case. In June, 1991, Frances-Lopez paid $500.00 to L. Stanley Brown, the receipt of which L. Stanley Brown acknowledges, and believed her payment was for the respondent's representation. L. Stanley Brown arranged to have Frances-Lopez and others transported from Ft. Pierce to Tampa, Florida, to register with the immigration office. A money order was written on July 1, 1991, by Frances-Lopez to pay an additional $250.00 to L. Stanley Brown. L. Stanley Brown testified, but produced no exhibits, that additional appointments were made with Frances-Lopez to prepare her for the immigration hearing in 1991. The respondent acknowledged that he identified Frances-Lopez as his client to the United States Department of Justice, Immigration and Naturalization, that he received a notice of a scheduled appointment for Frances-Lopez and passed it on to L. Stanley

Brown, but that he did not meed with Frances-Lopez, and denies representing her and receiving money from her.

The referee found that the evidence established that Frances-Lopez believed she was represented by the respondent in this immigration matter, that $750.00 was paid to L. Stanley Brown for those services, some services were performed and others were not, and that the respondent violated the Rules Regulating The Florida Bar as charged. The referee further found that, although the respondent contended that Frances-Lopez was never a client, had never met with him, had paid no money directly to him, and had not received any legal representation from him, he nonetheless allowed a condition to exist whereby Frances-Lopez reasonably believed she was receiving legal representation from the respondent. The referee visited the respondent's office during a recess at the final hearing. L. Stanley Brown maintains an office which is accessible only after entering the front door of offices marked, "Law Offices of Ralph L. Flowers". After entering the respondent's reception area which is staffed by the respondent's secretary, a client of Mr. Brown would then enter through an unmarked door in an alcove to a hallway leading to the

office of L. Stanley Brown, which is marked only by a faded stick-on letter "O". Therefore, the referee found that although the means exist, there was no effort made to distinguish the respondent's offices from that of his tenant, the immigration consultant L. Stanley Brown. The testimony compelled the referee to find Frances-Lopez a client in fact of the respondent.

As To Count II

The respondent represented Carrie Jacobs-Scott ("Jacobs-Scott") in 1987 as a co-guardian for three minor children of Jacobs-Scott's deceased sister in Guardianship Case No. 87-658-CP in the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. The respondent failed to file annual accountings on behalf of Jacobs-Scott for the minor children in the years 1989, 1990 and 1991. The respondent did not respond to the Order To Show Cause served upon Jacobs-Scott and on March 27, 1992, she was removed as co-guardian for the wards. Attorney Kevin Hendrickson was court appointed as guardian ad litem to review the guardianship. His investigation established that the guardianship funds had not been mismanaged and Jacobs-Scott was reappointed as sole guardian for the two remaining wards.

Guardianship funds were expended to compensate Mr. Hendrickson's work. Jacobs-Scott repeatedly contacted the respondent regarding the orders to show cause she received in the guardianship case but the respondent failed to file proper accountings and to properly communicate with and advise Jacobs-Scott in the matter. The referee found the evidence was clear and convincing that the respondent violated the Rules Regulating The Florida Bar as charged.

## SUMMARY OF THE ARGUMENT

The respondent seeks review of the referee's recommended discipline of a 91 day suspension on the basis that the referee failed to consider all the mitigating circumstances. Apparently, the respondent believes the referee failed to apply the mitigating factors with respect to his misconduct in Count II regarding the guardianship matter. However, mitigating evidence was presented to and considered by the referee and the respondent has failed to show the referee's recommendation of a 91 day suspension was erroneous or unwarranted.

It is within the discretion of the referee to recommend restitution as part of a disciplinary sanction. Restitution is not dependent upon whether or not a respondent actually received the funds in question. The referee made a specific finding that the recipient of the proposed restitution was, in fact, a client of the respondent's. There was no abuse of discretion and the restitution recommended by the referee is warranted in this case.

## ARGUMENT

### POINT I

**THE REFEREE'S RECOMMENDATION OF SUSPENSION FOR 91 DAYS CONSIDERS ALL THE MITIGATING CIRCUMSTANCES.**

During the final hearing on July 28, 1995, the respondent testified, in substantial detail, about his serious health problems that began in or around June, 1989. It is apparent, and the bar does not dispute, that the respondent had a life-threatening affliction and was hospitalized for a considerable period of time. (T, pp. 136-138). The respondent also testified that his wife had a heart condition and underwent a bypass operation during the time of the respondent's illness which resulted in her death on July 24, 1990. (T, pp.138-139). However, the respondent testified that in regard to his representation of Carrie Jacobs-Scott in the guardianship matter, his health problems did not affect his ability to represent his client. (T, pp. 143-145). When the respondent's counsel offered to introduce medical documentation in relation to the respondent's testimony about his health problems, the referee did not accept the offered evidence because it would not be relevant as the respondent had testified that his health had nothing to do

with his representation in the guardianship matter. (T, p. 146).

The mitigating factors under the Florida Standards For Imposing Lawyer Sanctions include Standard 9.32(c) personal and emotional problems; and 9.32(h) physical or mental disability or impairment. It is clear that the respondent presented mitigating evidence of his physical problems during the period of his representation in the guardianship matter and mitigating evidence of his personal problems related to the death of his wife. Even if logic dictates that such tragic circumstances would tend to adversely affect one's ability to perform work related functions, the respondent testified that he did not feel these problems affected his ability to represent his clients. However, it is apparent the referee considered this mitigating evidence because he included in his report of referee, at page 5, where he stated:

> Respondent (sic) hospitalized with debilitating illness June through October 1989 and convalesced through July 1990. Respondents (sic) wife Mary died July 24, 1990, during heart surgery. Mary had a long-standing heart condition and received her first bypass operation in 1984.

The referee also apparently considered the respondent's prior disciplinary history in making his recommendation which is an aggravating factor under Standard 9.22(a). The referee listed on

page 5 of his report the respondent's disciplinary record which consists of three prior occasions where the respondent received discipline.

The respondent admits in his initial brief that he was extremely dilatory in the administration of the guardianship and that he failed to respond to orders of the probate court. He compares his misconduct to that of The Florida Bar v. Collier, 385 So. 2d 95 (Fla. 1980) in which the attorney received a 60 day suspension for being extremely dilatory in the administration of an estate and failing to respond to orders of the probate court. However, the referee's recommendation of a 91 day suspension in this case is not solely concerning the guardianship matter as the respondent was also found guilty in Count I regarding the immigration matter. The 91 day suspension recommendation coincides with other bar disciplinary cases involving neglect of an estate matter and other violations.

In The Florida Bar v. Crowder, 585 So. 2d 935 (Fla. 1991), the attorney received a six month suspension for writing unauthorized checks to himself from the account of an estate for which he served as personal representative and for neglecting the

affairs of the estate. The referee made the six month suspension recommendation because the attorney's cumulative misconduct in handling the funds and the affairs of the estate amounted to serious professional violations. In making that recommendation, the referee considered the mitigating evidence of the attorney's advanced age, his 38½ years as a member of the bar, and his prior record.

In The Florida Bar v. Kates, 387 So. 2d 947 (Fla. 1980), the attorney received a 91 day suspension for neglect in advising and assisting a client who failed to perform her duties as executrix of an estate resulting in her removal as personal representative and the loss of her fee for administering the estate. The attorney was also found guilty of failing to properly account for trust moneys concerning the same client as in the estate matter. The attorney had previously received a disciplinary suspension of 90 days for neglecting a client's legal matter.

It is clear that in this case, the referee's findings of fact were based on competent, substantial evidence and in making his disciplinary recommendation, the referee considered the

mitigating and aggravating evidence present. The respondent has failed to show the referee's recommendation of a 91 day suspension is erroneous or unjustified under the circumstances.

## POINT II

**THE REFEREE DID NOT ERR IN RECOMMENDING SHIRLEY FRANCES-LOPEZ BE REPAID $750.00.**

In seeking review of the referee's recommendation that he pay $750.00 in restitution to Shirley Frances-Lopez, the respondent appears to dispute the referee's finding that Frances-Lopez was a client in fact of the respondent. A referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986). In reaching his findings of fact, the referee consistently refers to the testimony and documentary evidence presented at the final hearing which led him to conclude Frances-Lopez was a client in fact of the respondent. Clearly, the referee's finding in that regard is supported by the record.

The respondent suggests that Frances-Lopez's affidavit, submitted by the bar into evidence at the final hearing (BarEx.1) in lieu of her live testimony, was motivated by her desire to get her money back. However, the referee considered not only Frances-Lopez's affidavit, but the testimony of the respondent and L. Stanley Brown as well as the other documentary evidence

submitted. The referee found that evidence established that Frances-Lopez believed she was represented by the respondent in the immigration matter, that $750.00 was paid to L. Stanley Brown for those services, and that some of the services were performed and others were not. (RR, p. 2). It is apparent the referee found Frances-Lopez's affidavit to be competent and not solely based on a monetary factor.

The respondent further suggests in his initial brief that, because the respondent never received the $750.00 Frances-Lopez paid to L. Stanley Brown, he should not be required to pay restitution to her as recommended by the referee. Whether the respondent ever received the funds in question is not the point. It was the referee's specific finding that Frances-Lopez was recommended to and sought the services of the respondent and that in paying L. Stanley Brown she was paying the respondent for his services. This was because the respondent allowed a situation to exist whereby a person seeking immigration assistance and meeting with L. Stanley Brown could reasonably expect and believe that he or she was receiving representation by the respondent. Had the respondent not allowed this situation to exist, perhaps Frances-Lopez would not have paid $750.00 for services she did not

receive.

In The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994), a case similar to the instant matter, the attorney received a 90 day suspension for failing to adequately supervise his paralegal's handling of a client's immigration matter. A couple sought the attorney's immigration services and the attorney allowed his paralegal to handle the matter with assurances he was overseeing the paralegal's work. Without the attorney's knowledge, the couple paid funds directly to the paralegal over a period of time but never received the immigration services for which they had hired the attorney. The paralegal kept the couple's funds and did not turn the funds over to the attorney. The attorney was required to pay restitution to the couple for the funds they paid to the paralegal. The Court found that whether the attorney ever received the money was not at issue as the attorney was responsible for the conduct of his nonlawyer employee and must reimburse the clients. In the case at hand, the referee found the respondent was the responsible party, not L. Stanley Brown or Frances-Lopez and, therefore, the respondent should be required to pay restitution.

Pursuant to R. Regulating Fla. Bar 3-5.1(i), a referee is permitted to order restitution "if the disciplinary order finds that the respondent has received a clearly excessive, illegal, or prohibited fee or that the respondent has converted trust funds or property." While the referee did not specifically find the respondent guilty of an excessive fee, that is essentially what occurred in this case. Frances-Lopez paid $750.00 for legal services she believed were to be provided by the respondent, but she did not receive the benefit for which she paid. The Court has upheld a referee's recommendation of restitution where an attorney has charged a clearly excessive fee. The Florida Bar v. Della-Donna, 583 So. 2d 307 (Fla. 1989).

The respondent does not seek review of the referee's recommendation of restitution with respect to the guardianship matter in Count II of the bar's Complaint. Therefore, the respondent recognizes that restitution is permitted in bar disciplinary proceedings. Restitution as to Count I is no less warranted than in Count II, particularly when it was the referee's finding that the respondent was responsible for Frances-Lopez's payment of fees to L. Stanley Brown. The respondent has not shown the referee's recommendation of

restitution to Shirley Frances-Lopez to be erroneous.

## CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's recommendation of a 91 day suspension and restitution to Shirley Frances-Lopez in the amount of $750.00 and find that the recommended discipline and restitution are appropriate and warranted under the circumstances of this case.

Respectfully submitted,

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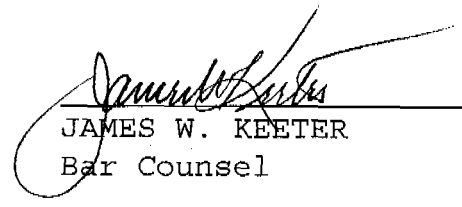
By: 

JAMES W. KEETER
Bar Counsel

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent's counsel, Michael Jeffries, Post Office Box 1270, Ft. Pierce, Florida, 34954; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 1ST day of February, 1996.

Respectfully submitted,

James W. Keeter
Bar Counsel

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**APPENDIX TO COMPLAINANT'S ANSWER BRIEF**

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