IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

complainant,

vs. Supreme Court Case No. 86,586

K. KRISTINE NOWACKI,

Respondent.
_____/

On Petition for Review of
the Report of a Referee

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND OF THE FACTS

In 1995 The Florida Bar filed a complaint against Respondent alleging violations of the Rules of Professional Conduct in her representation of five clients. In regard to William Ludecker (Count I; Fla. Bar No. 95-31,168(07C)], the Bar alleged that Respondent violated Rule 4-1.3 by failing to act with reasonable diligence and promptness in representing a client; and violated Rule 4-1.4 by failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Bar Complaint at 4, ¶ 11).

In regard to Ann Rogers [Count 11; Fla. Bar No. 95-31,421 (07C)], the Bar alleged that Respondent violated Rule 4-8.4(c) by engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. (Bar Complaint at 5, ¶ 16).

In regard to Franklin Burns [Count 111; Fla. Bar No. 95-31,597 (07C)], it was alleged that Respondent violated Rule 4-1.2(a) by failing to abide by a client's decision concerning the objectives of representation, and failing to consult with the client as to the means by which such objectives are to be pursued; violated Rule 4-1.3 by failing to act with reasonable diligence and promptness in representing a client; violated Rule 4-1.4(a) by failing to keep a client reasonably informed about the status of a

matter and promptly comply with reasonable requests for information; and violated Rule 4-5.1(b) by having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. (Bar Complaint at 7-8 ¶ 22).

In Count IV [Fla. Bar No. 95-31,715 (07C)] and Count V [Fla. Bar No. 95-31,718 (07C)], the Bar alleged that in representing Perry White and Teresa Arrington respectively, Respondent violated Rule 4-1.3 by failing to act with reasonable diligence and promptness in representing a client; and violated Rule 4-1.4 by failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. (Bar Complaint at 9, ¶ 27; at 11, ¶ 32).

On July 9, 1996, a hearing was held before the Honorable Bill Parsons, who had been appointed as referee in the matter. Ann Rogers and Teresa Arrington appeared and testified, as did Respondent. William Ludecker, Franklin Burns and Perry White did not testify, although depositions of Ludecker and White were admitted into evidence. (Tr. 1, 3, 4, 29, 39). The referee issued a report which was entered on November 18, 1996. In the report, the referee recommended that Respondent be found guilty of all rule violations as

charged. He also recommended that Respondent be suspended for no less than 91 days.

Counts 11, III and V involved alleged violations during a period of time when Respondent was undergoing treatment for breast cancer, including two surgeries and radiation treatment. During this period of time Respondent was often not personally available to clients, but she employed associates who handled most of the routine aspects of her practice. Counts III and V arise out of complaints by clients who were upset with their inability to have personal access to Respondent during this period of time.

Since the argument in regard to each issue is highly fact-specific, the facts pertinent to each count will be discussed in conjunction with that count.

SUMMARY OF ARGUMENT

1. The record does not support the referee's finding that Mr. Ludecker's letters continually requested Respondent to take action in his case. In only one letter did Mr. Ludecker unequivocally request that Respondent take any action. Furthermore, Respondent was not charged in the Bar's complaint with failure to take action in regard to a settlement after June of 1994. Thus, Respondent was not provided with sufficient notice of such a violation to satisfy due process. No findings were made by the referee which support his conclusion that Respondent failed to keep Mr. Ludecker informed about the status of his case.

Respondent was not provided with notice that she was charged with failing to provide Mr. Ludecker with a copy of his file. The finding is not supported by record evidence and the lack of notice as to such a charge deprives Respondent of due process. No findings support the referee's conclusion that Respondent failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

2. The evidence before the referee was not sufficient to support a finding as to Count II that Respondent engaged in dishonest conduct. The evidence established only that one paycheck to Ann Rogers bounced, and was later made good, and that Ms. Rogers was not paid for eight disputed hours in her last week of employment in Respondent's office. This evidence was insufficient to establish the element of intent which is required for a determination that an attorney has engaged in dishonest conduct.

3. The factual findings by the referee are in part not supported by the record. Furthermore, the facts as found do not support a conclusion that any rule violations occurred. The record does not support the factual finding that Respondent knew little about her associate, Mark Kwas. It does not support the conclusion that Respondent failed to abide by the client's decision concerning the objectives of representation, because the fact that Mr. Kwas was performing work an the case had no bearing an the objectives of representation and there was no decision by the client

with which Respondent failed to abide. The fact that work on the case was performed by an associate does not constitute part of the "means" by which an objective was to be pursued. Likewise the fact that Mr. Kwas was performing services did not of itself render those services nondiligent or unprompt, regardless of the client's expectations regarding who would be performing those services. There was no basis for concluding that Respondent failed to keep the client reasonably informed or to comply with reasonable requests for information. Apart from Respondent's illness, there was no finding as to any information Respondent failed to provide, and her illness had no bearing on the status of the case. There was no finding or evidence of requests for information by the client. There can be no determination of failure to make reasonable efforts to ensure rule compliance by a subordinate attorney when there is no evidence of a rule violation by the subordinate, and there is no such evidence here. Furthermore, there was no evidence of efforts taken by Respondent to ensure conformity to the rules by the subordinate, so there was no basis for a determination that those efforts were unreasonable.

4. Although the referee concluded as to Count IV that Respondent failed to act with reasonable diligence and promptness in representing Mr. Perry White, there are no findings pertaining to diligence and promptness. The finding that Respondent failed to consult with Mr. White concerning the "serious status of his bankruptcy on his immigration

matter" is contrary to the only evidence presented on the subject. Respondent did not consult with Mr. White about this, but candidly told him she did not know the answer to his questions. The finding that Respondent failed to discuss the client's request for a refund is also unsupported. Mr. White never testified that he asked to speak with Respondent personally about the request. He did speak with Respondent's associate, and was advised that he was not entitled to a refund.

5. The finding that Respondent told Teresa Arrington that Ms. Arrington would be charged to come to Respondent's office to get a letter of protection is clearly erroneous. Ms. Arrington's testimony in this regard was contradictory and inherently incredible. Even if this testimony is accepted as true, it does not support a conclusion that Respondent failed to act with diligence and promptness or that she failed to keep Ms. Arrington reasonably informed about the status of her case. There was no evidence or finding as to any request for information by Ms. Arrington. The conclusion that Respondent failed to comply with such a request is accordingly not supported by the record. The conclusion that Respondent failed to explain the matter to Ms. Arrington to the extent reasonably necessary to permit the client to make an informed decision is also not supported by the record. The findings do not identify, nor could they, any matter which Respondent failed to explain to Ms. Arrington.

6. Any rule violations which may be found to have occurred would not warrant a suspension because Respondent's prior violations did not involve the same or similar conduct. The referee failed to adequately take into consideration the personal crisis in which Respondent had been involved in weighing the mitigating factors.

ARGUMENT

COUNT I - WILLIAM LUDECKER

The referee made the following conclusions in respect to Count I of the Bar's complaint:

> I find clear and convincing evidence that the respondent failed to act with reasonable diligence and promptness in representing Mr. Ludecker and further failed to keep Mr. Ludecker reasanably informed about the status of his case and promptly comply with reasonable requests for information in violation of R. Regulating The Florida Bar 4-1.3 for failing to act with reasonable diligence and promptness in representing a client; and 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and failing to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Mr. Ludecker did not appear before the referee, but his testimony had been taken in a deposition. Respondent's representation of Mr. Ludecker began in March of 1994. (Report of Referee at 2, ¶3). Mr. Ludecker's wife had commenced an action for dissolution of their marriage. At the outset of the case Mr. Ludecker did not want a divorce.

(Tr. 21). Mr. Ludecker had office conferences with Respondent on March 21 and April 7 of 1994. A temporary hearing on the matter was held on May 26, 1994. (Respondent's Ex. 25). In June, Respondent conferred with the wife's counsel about a possible settlement, but the parties were unable to come to terms. (Tr. 146). On June 30 Mr. Ludecker wrote a letter to Respondent complaining that his fee was higher than the fee his wife was paying and also including the statement, in bold letters, "PLEASE GET THE MATTER SETTLED."

On August 9 Mr. Ludecker wrote another letter addressed to both Respondent and the wife's counsel stating that Mr. Ludecker's daughter, who had been living with the wife, had found his wife and another man "in a very passionate embrace on the floor in front of the TV in our home.11 He also stated that his wife had "requested and approved for" his daughter to move in with him.[1] He concluded by stating, "This should go on record with the court and divorce proceedings." A copy of the letter was also sent by Mr. Ludecker to the judge in the case. (Respondent's Ex. 18). At some point thereafter Mr. Ludecker spoke on the telephone with Respondent. Mr. Ludecker could not remember the conversation exactly, but stated that he asked what they could do about child support and she replied that they could not do anything about it at

[1] Mr. Ludecker's wife, however, refused to sign an agreement changing custody. (Ludecker depo. at 14). There is no evidence that Mr. Ludecker ever obtained physical or legal custody of the daughter.

that time. (Tr. 13). A request to have the matter set for trial was submitted on September 29. (Tr. 145). On October 9 Mr. Ludecker discharged Respondent.

One of the rule violations which the referee determined to have been committed was failure to act with reasonable diligence and promptness in representing Mr. Ludecker. The facts specifically found in regard to this conclusion are that "[t]he client's letters to the respondent continually request the respondent to take action in his case" and that "[t]he respondent's own statement of services does not indicate that any further settlement conferences took place subsequent to June, 1994...." (Report of Referee at 4, ¶9).

The record does not support the finding that Mr. Ludecker continually requested Respondent to take action in his case. The overwhelming majority of the letters sent by Mr. Ludecker to Respondent merely provided information which Mr. Ludecker apparently perceived to be pertinent to his case. The June 30 letter did state that he wanted Respondent to get the case settled. This is the only letter in which he specifically requested that any action be taken. The August 9 letter stated that "[t]his should go on record with the court and divorce proceedings," but Mr. Ludecker personally sent a copy of the letter to the judge who had been handling the case. Thus, it certainly was not an express request for Respondent to perform any action on his behalf.

The conclusions as to rule violations apparently were all based on the fact that Respondent's bill to Mr. Ludecker

did "not indicate that any further settlement conferences took place subsequent to June, 1994...." (Report of Referee at 4, ¶ 9). None of the allegations in the Bar's complaint put Respondent on notice that the failure to engage in further settlement conferences after June of 1994 was considered the basis of a rule violation.[2] Furthermore, this was not even raised as a possible problem during the hearing before the referee. The lack of notice that this could constitute a rule violation deprived Respondent of the opportunity to defend against it and accordingly denied her due process of law.

Respondent is aware that a referee may properly report findings of rule violations other than those alleged in the complaint, but this is so only if the allegations otherwise put the Respondent on notice that the facts concerning the unalleged violation are under scrutiny. *See, The Florida Bar v. Vaughn,* 608 So.2d 18 (Fla. 1992). Where the lack of notice effectively denies an attorney accused of rule violations the opportunity to respond, due process is violated. See, *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 654, 105 S. Ct. 2265, 85 L.Ed.2d *652 (1985); In re Ruffalo, 390* U.S. 544,

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[2] The complaint's factual allegations apparently considered by the Bar to support rule violations **were:** discussing matters unrelated to Mr. Ludecker's divorce during office conferences with him (Complaint ¶ 4); appearing at a hearing on Mr. Ludecker's behalf without necessary documents (Id. ¶ 5); failing to return Mr. Ludecker's telephone calls *(Id.* ¶ 6); failing to adequately respond to Mr. Ludecker's written inquiries concerning his case *(Id.* ¶ *7);* and failing to provide Mr. Ludecker with a copy of the court's order requiring him to pay child support *(Id.* ¶ *8).*

551, 88 s. ct. 1222, 20 L.Ed.2d 117 (1968). Here, the referee in effect moved the goal posts after the hearing had been completed. Respondent was not put on notice of the need to explain any activity in the case which may not have been reflected in the billing she submitted to Mr. Ludecker.

The referee also concluded that Respondent failed to keep Mr. Ludecker informed about the status of his case. None of the factual findings made by the referee support this conclusion. Rule 3-7.6(k)(1)(A) of the Rules Regulating the Florida Bar provides that the referee's report shall include "a finding of fact *as to each item of misconduct* of which the Respondent is charged...." (Emphasis supplied). The complaint alleged that Respondent failed to provide Mr. Ludecker with a copy of the circuit court's order requiring him to pay child support. Respondent disputed this (Tr. 153), and the referee did not make any finding as to this item.[3] The "finding" in paragraph 9 of the report in regard to failure to keep Mr. Ludecker reasonably informed about the status of his case is nothing more than a pure legal conclusion, and accordingly does not satisfy the requirements of Rule 3-7.6(k)(1)(A) that there be a finding of fact as to each item of alleged misconduct.

The referee further found that Respondent failed to comply with reasonable requests for information. The referee

[3] Mr. Ludecker testified in his deposition that at some unspecified point in time he mislaid all of his papers pertaining to the case. (Ludecker depo. at 36).

did make a specific finding that Mr. Ludecker's request for a copy of his file was never granted by Respondent. The Bar's complaint, however, did not allege this as an item of misconduct. The complaint did allege generally that Respondent failed to promptly comply with reasonable requests for information, but did not mention a refusal to comply with a request for his file. Rule 3-7.6(g)(1)(B) provides that "[t]he complaint shall set forth ***the particular act or acts of conduct*** for which the attorney is sought to be disciplined." If the Bar intended in its complaint to charge Respondent with failing to comply with a request to provide a copy of the file to Mr. Ludecker, then the Bar failed to comply with the foregoing pleading requirement. In any event, the complaint failed to put Respondent on notice that she had to defend against such a charge.

In this regard it should be noted that Mr. Ludecker never testified that he personally requested Respondent to provide him with a copy of the file. His testimony was that he made this request to Respondent's secretary. (Ludecker depo. at 23). In the absence of any evidence that Respondent was ever made aware of any such request, the finding actually made by the referee is unsupported by the record. In the absence of notice of the need to defend against this claim, the imposition of discipline on the basis of this finding would violate Respondent's right to due process of law.

The complaint also alleged that Respondent failed to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. In his factual findings, the referee did not make any conclusion that this rule had been violated. (Report of Referee at 4, ¶ 9). In his "Rule Violations Found," however, the referee did conclude that Respondent had violated this rule. There are no factual findings pertaining to this charge. There is no finding which identifies any matter which Respondent failed to explain to Mr. Ludecker. Furthermore, there is no finding as to any decision to be made by Mr. Ludecker which required an explanation from Respondent. The findings as to the lack of any indication in the bill as to settlement conferences after June of 1994 and of the failure to provide Mr. Ludecker with a copy of his file, even assuming *arguendo* that they are otherwise proper, nevertheless could not support a conclusion that Respondent failed to explain any matter to the extent necessary to permit Mr. Ludecker to make informed decisions regarding the representation. Those findings are not pertinent to such a charge.

For the foregoing reasons, Respondent was not properly found guilty of any of the rule violations alleged in regard to her representation of Mr. Ludecker.

COUNT II - ANN ROGERS

The referee concluded that Respondent had engaged in "dishonest conduct" on the basis of two incidents pertaining to Respondent's employment of Ms. Rogers as her associate. The referee's conclusion was as follows:

> I find the respondent's conduct in failing to properly reimburse Ms. Rodgers to her last week of employment as well as bouncing a check for her, which was returned twice by the financial institution; involved dishonest conduct in regard to the R. Regulating the Florida Bar 4-8.4(c) as charged.

The facts surrounding these incidents are largely undisputed. The finding — actually a legal conclusion that these incidents constituted "dishonest conduct" — cannot be supported by the record. The first incident chronologically was Respondent's issuance to Ms. Rogers of a paycheck which bounced. Respondent testified that the paycheck bounced because a client's check she had deposited in her own account bounced. She believed the paycheck would be honored at the time she wrote it. After she was notified by her bank that the client's check had bounced, she informed Ms. Rogers to expect that the paycheck would be returned. (Tr. 96). This testimony is uncontradicted. It is undisputed that Respondent made the check good.

To prove that an attorney engaged in dishonest conduct, the Bar must prove the necessary element of intent by clear and convincing evidence. *The Florida Bar v. Cramer,* 643 So.2d 1069 (Fla. 1994). The referee did not find any intent on Respondent's part, and the record would not support any

such finding. Under these circumstances, the referee could not properly conclude that the bouncing of the check constituted "dishonest conduct."[4]

The other event on which the finding of "dishonest conduct" was based was Respondent's failing to properly reimburse Ms. Rogers for her last week of employment. This involved nothing more than a dispute over how many hours Ms. Rogers worked during her last week. Ms. Rogers' last day of employment for Respondent was February 24, 1995. Eighteen days later, on March 14, 1995, Ms. Rogers wrote a letter to The Florida Bar complaining that she had not been paid for her last week. (Tr. 18, 19). Respondent testified that she had a question about the number of hours Ms. Rogers claimed to have worked that week, and that this was the reason for the delay. She testified that Ms. Rogers had taken off the afternoons on Wednesday and Thursday of her last week and Respondent did not feel that she should be paid for those afternoons. (Tr. 97, 98). It also should be noted that in the first week of March of 1995, during the eighteen-day interval between Ms. Rogers's last day of work and the date she filed her complaint with the Bar, Respondent was undergoing her second surgery for breast cancer. (Tr. 116,

[4] In his findings the referee observed that the check was returned twice by Ma. Rogers financial institution. (Report of Referee at 4, ¶12; 5, ¶15). Respondent's uncontradicted testimony was that Ms. Rogers told her this occurred because Ma. Rogers's husband's credit union had a policy of submitting a check twice before returning it. (Tr. 98).In any event, this fact has no bearing on Respondent's intent when issuing the check.

176). On May 10, 1995 Respondent paid Ms. Rogers for her last week, excluding the disputed afternoons. (Tr. 21, 97-98).

The referee's finding in this regard apparently was based solely on Respondent's refusal to pay Ms. Rogers for the two disputed afternoons. (Report of Referee at 5, ¶¶ 13-15). The referee did not conclude that Ms. Rogers in fact worked the disputed afternoons, but instead based his finding on the conclusion that "it was [Respondent's] practice to pay Ms. Rogers for time she did not work." (Id. at ¶14). This amounts to nothing more than a routine civil dispute. It does not come remotely close to supplying the requisite intent, by clear and convincing evidence, that is necessary to conclude an attorney has engaged in "dishonest conduct."

Respondent should not be branded with the stigma of having engaged in dishonest conduct on the basis of this record.

COUNT III - FRANKLIN E. BURNS

The referee found that Respondent had violated four of the Rules of Professional Conduct in her representation of Mr. Burns. His conclusions as to the rule violations were:

> I find the respondent guilty of 4-1.2(a) for failing to abide by a client's decision concerning the objectives of representation and failing to consult with the client as to the means by which they are to be pursued; 4-1.3 for failing to act with reasonable diligence and promptness in dealing with a client; 4-

> 1.4(a) for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information; and 4-5.1(b) for having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(Report of Referee at 6-7, ¶22).

Mr. Burns did not appear at the hearing and his deposition was not taken. Nevertheless, many of the essential facts are not in dispute. On January 23, 1995, Mr. Burns retained "the law office of attorney K. Kristine Nowacki" to represent him in regard to the filing of a Chapter 7 bankruptcy. Mr. Burns met with Respondent personally at that time. He and Respondent signed an employment agreement which provided that the fee was $350, the fee being a nonrefundable retainer. (Respondent's Ex. 6). At that time Mr. Burns paid Respondent $100. (Tr. 107). On February 3, 1995 he paid her $250 and on March 6, 1995 he gave her a check payable to the clerk of the bankruptcy court for the filing fee. (Tr. 107; Bar Ex. 5). Mr. Burns had an appointment to come to Respondent's office on April 11, 1995 to sign the necessary documents. The necessary documents for the bankruptcy filing had been prepared by Respondent's associate. Mr. Burns refused to sign the documents because Respondent was not present, although her associate, Mark Kwas, a member of The Florida Bar, was present. Mr. Burns wanted to see Respondent personally. At this time Respondent was in Halifax Hospital undergoing a

radiation treatment for her breast cancer. (Tr. ***104).*** A dispute developed between Mr. Burns and Mr. Kwas. In his complaint to the Bar, Mr. Burns apparently contended that Mr. Kwas locked him out of the office. Mr. Burns called the police in an attempt to have them make Mr. Kwas refund the fee he had paid.[5]

The factual findings leave some uncertainty as to the precise acts which were considered to be rule violations, but the conclusions of rule violations apparently were made on the basis of "the respondent's acknowledged lack of communication with her clients regarding her wholesale delegation of her cases to a new associate, about whom she apparently knew little about." (Report of Referee at 6, ¶22).

The record does not support the finding that Respondent knew little about Mr. Kwas. It says nothing about how Mr. Kwas was hired or the training which Respondent gave to him. The referee's finding apparently was based on Respondent's statement that she did not know how long Mr. Kwas had been admitted to the Bar at that time, although he had told her he had worked at the public defender's office for three years. (Tr. at 114). The Bar, of course, has the burden of proving rule violations by clear and convincing evidence. ***The*** Florida Bar v. *Marable*, 645 So.2d 438 (Fla. 1994). The

[5] Respondent testified that Mr. Kwas did return to Mr. Burns the money order he had given to her office which was payable to the clerk of the bankruptcy court.

Bar's complaint did not allege anything in regard to Respondent's knowledge, or lack thereof, of Mr. Kwas' qualifications. Mr. Kwas was **not called to testify and** Respondent was not asked anything further about the hiring process or her knowledge of Mr. Kwas' qualifications. Thus, this part of the referee's finding lacks evidentiary support.

Regardless of the extent of Respondent's knowledge of Mr. Kwas' qualifications, the factual findings made by the referee simply do not support the findings of rule violations. In regard to the alleged violation of Rule 4-1.2(a), the findings no not specifically identify "a decision concerning the objectives of the representation"' made by the client with which Respondent failed to abide. If this supposed violation is based on Respondent's delegation of work on the case to Mr. Kwas, it is unwarranted. The "objectives" of representation are "the purposes to be served by legal representation. " **R. REGULATING FLA. BAR 4-1.2** cmt. In this case the "objectives" of the representation were the discharge of Mr. Burns' debts in bankruptcy. Whether actions toward these objectives were performed by an associate rather than Respondent has no bearing on what the objectives in fact were. It very well may be that Mr. Burns wanted to meet with Respondent rather than Mr. Kwas, but this in no sense was the objective of the representation. Accordingly her failure to abide by this "decision" of Mr. Burns cannot form the basis of a violation of Rule 4-1.2(a).

The referee also concluded that Respondent had violated Rule 4-1.2(a) by "failing to consult with the client as to the means by which [the objectives] are to be pursued." Respondent submits that the *means* by which an objective is to be pursued do not include the identity of the attorney in the firm who is to perform various tasks in the course of representation. Some examples of "means" are given in the comment to Rule 4-1.2. These are "technical legal and tactical issues" and "expense to be incurred and concern for third persons who might be adversely affected." There is no suggestion that whether work is performed by an associate falls into this category.

The referee also found a violation of Rule 4-1.3 "for failing to act with reasonable diligence and promptness in dealing with a client." The only finding which relates to diligence and promptness is that "[i]t was unacceptable to Mr. Burns that the Respondent would not be providing him timely personal representation...." There is no finding, however, that Respondent's law office failed to act timely in any manner whatsoever in regard to the representation of Mr. Burns. Thus, this conclusion is unsupported by the record as well.

The next finding is of a violation of Rule 4-1.4(a) "for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information." There is no factual finding that Mr. Burns made any request for information. There cannot be

a failure to comply with a request for information if there is in fact no request for information. Respondent did not advise her clients of her medical situation unless they asked. If they did ask, her associate was instructed to inform them. (Tr. at 115). If the failure to inform Mr. Burns of her medical situation on *her own initiative* constitutes a violation of this rule, then Respondent has indeed violated the rule. Respondent submits, however, that "the status of a matter," as that language is used in the rule, relates to the client's legal situation which is the subject of the representation — not to an attorney's medical situation, so long as the client's legal requirements are being attended to by an attorney employed by the firm.

The final violation found in respect to the representation of Mr. Burns is of Rule 4-5.1(b) "for having direct supervisory authority over another lawyer and failing to make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." There was no finding or evidence that Mr. Kwas violated any of the Rules of Professional Conduct. Respondent submits that she cannot be found to have violated this rule in the absence of a finding of a rule violation by Mr. Kwas.

The comments to Rule 4-5.1 state:

> The measures required to fulfill the responsibility prescribed in subdivisions (a) and (b) can depend on the firm's structure and the nature of its practice. In a small firm, informal supervision and occasional admonition

> ordinarily might be sufficient. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. . . .

The Bar had the burden of showing a violation of this rule, but the record is silent as to the extent of continuing legal education, admonition or other ethical supervision which Mr. Kwas received while employed by Respondent. The record does show that Respondent was in the office at some times during her cancer treatment.[6] Respondent respectfully suggests that the rule does not require the supervising attorney to be looking over the associate's shoulder at all times. Thus, this finding is also insupportable.

COUNT IV - PERRY WHITE

The complaint concerning Mr. Perry White is that Respondent "fail[ed] to act with reasonable diligence and promptness in representing a client" in violation of Rule 4-1.3 and that she "fail[ed] to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information and fail[ed] to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" in violation of Rule 4-1.4.

Mr. White did not appear at the hearing. Mr. White himself testified by deposition that the only basis of the

[6] For example, Respondent conducted the initial interview with Mr. Burns. (Tr. 103).

complaint he made was that he did not receive a refund of the $350 fee he paid to Respondent for her to represent him in filing for bankruptcy.[7] The Attorney Employment Agreement Mr. White signed with Respondent included the following provision:

> I understand this is an employment agreement retaining legal services, which retainer is nonrefundable.

(Respondent's Exhibit 11 at 3). White acknowledged that he had signed the agreement. (White Depo. at 12).

The referee's conclusions as to rule violations were as follows:

> I find that the respondent violated Rule 4-1.3 by failing to act with reasonable diligence and promptness in representing Mr. White and 4-1.4(a) by failing to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information and in failing to explain the matter to the extent reasonably necessary to permit the client to make informed decision regarding the representation.

(Report of Referee at 10). No finding was made that the refusal to refund the fee violated any of the Rules of

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[7] Under questioning by the Bar's counsel, Mr. White testified:

Q Okay. And did anyone from Ms. Nowacki or Ms. Nowacki herself ever tell you at a later date that perhaps you could get your money back?

A No.

Q And that's what your complaint is about, that she kept your $350 and did not do any work for you; is that correct?

Q Yes.

A Anything else?

A No.

(White Depo. at 10).

Professional Conduct. The referee's specific factual findings as to charged rule violations were as follows:

> I find the respondent's failure to consult with the client regarding the serious status of his bankruptcy on his immigration matter, her failure to discuss the client's request for a refund violated rules 4-1.3 and 4-1.4 as charged.

(Report of Referee at 8, ¶26).

In regard to the finding pertaining to the immigration matter, Mr. White testified that he was an illegal alien. (White Depo. at 15). Mr. White's only testimony whatsoever pertaining to consultations with Respondent about the effect of his immigration status on the bankruptcy was as follows:

> [Y]ou know, I had some questions, this was a couple of days after, regarding my legal status which I called and asked her *and she couldn't answer my questions.*
>
> . . . .
>
> I mean, I'm just on the verge of getting my green card. I mean, it's on the table, I'm being truthful, and I didn't want---
>
> Someone had told me if you file bankruptcy you can't get a green card. I mean, and I'm like, it's--I got my A number, everything is, you know, in the hands of immigration, and I didn't want it to affect it. I didn't want to get to the table and they say, "Oh, you filed bankruptcy. You're not going to get it." So *she couldn't answer them questions for me.*

(White Depo. at 16, 17) (emphasis supplied). Thus, according to Mr. White's own testimony, Respondent did in fact consult with him about the problem, but simply was not able to answer his questions. Thus the referee's finding that she

"fail[ed] to consult with" him is unsupported by the record. Certainly Respondent should not be faulted for being unable to provide off-the-cuff answers to questions of this nature.[8]

Mr. White made no claim that he had informed Respondent of his illegal alien status at the initial consultation when he paid a fee for a routine bankruptcy. He did not testify as to what he told Respondent about his immigration status at the subsequent time he claims to have brought the subject up.[9] He made no claim that after Respondent's response he asked her to look further into the matter or that she promised to do so. In any event, by Mr. White's own testimony the issue soon became moot because "a couple of days after" he called and "canceled" the bankruptcy. (white depo. at 16).

The other specific factual finding as to a rule violation was that Respondent "fail[ed] to discuss the client's request for a refund." This finding is also unsupported by the record. Mr. White never even testified that he asked Respondent ***herself*** to discuss the fee refund. He testified that he called several times and spoke with a man in Respondent's office, and was told that he would not get a refund because the fee was a retainer. (White depo. at

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[8] Mr. White never testified with any more specificity as to what his questions were.

[9] At the deposition Mr. White was reluctant to discuss his immigration status, but finally did so under cross-examination. (White depo. at 15).

8). There was no evidence that Respondent had personal knowledge of these calls. Mr. White made no claim that the man he spoke with failed to discuss the request for a refund. Mr. White simply did not like the answer he received. This evidence does not support the finding that Respondent failed to discuss the request for a refund.

COUNT V - TERESA ARRINGTON

This count also involved allegations of violations of Rules 4-1.3 and 4-1.4(a). The referee's conclusions were:

> I find that the respondent violated Rule 4-1.3 by failing to act with reasonable diligence and promptness in representing Ms. Arrington and 4-1.4(a) by failing to keep Ms. Arrington reasonably informed about the status of the matter and promptly comply with a reasonable request for information and in failing to explain the matter to the extent necessary to permit the client to make informed decision regarding the representation.

(Report of Referee at 10-11).

Two factual bases were given by the referee in support of these conclusions. One was "that Ms. Arrington had telephoned the Respondent's office many times requesting to speak with the respondent." The other was that "Ms. Arrington was further displeased because when she telephoned the Respondent's office to request a letter of protection, she was told that there would be a charge for her office visit for this purpose (T 89), and that this conflicted unacceptably with her previous contingent fee contract with the respondent." (Report of Referee at 8-9, ¶29).

Respondent's representation of Ms. Arrington began about November 18, 1994. Ms. Arrington wanted to make a claim in a pending class action case regarding breast implants. On November 18 she and Respondent entered into a contingent fee agreement regarding this claim. (Respondent's Ex. 1). Between December 22, 1994 and February 22, 1995 Ms. Arrington made 14 phone calls to Respondent's office and spoke with Respondent about three times. The remaining times she spoke "with her paralegal and with another man" who she later learned was Respondent's "assistant." (Tr. at 52-53). On January 31, 1995 Respondent sent Ms. Arrington a letter regarding a newsletter she would be receiving pertaining to the class action and also advised of a claim form which had to be filled out for the "current disease program." On February 23, 1995 Respondent sent Ms. Arrington a letter regarding the filing of claims for medical expenses. Both of these letters were signed on Respondent's behalf by Respondent's associate, Ann Rogers. (Respondent's Ex. 4).

On March 10 and 16, 1995, 12.8 and 1.0 minute phone calls were made from Respondent's office to Ms. Arrington.[10] (Respondent's Ex. 2, 3). On April 28, 1995 Ms. Arrington sent Respondent a letter informing her of dissatisfaction with Respondent's services and advising that she did not want Respondent to represent her further. (Bar's Ex. 9).

[10] Respondent testified that her phone logs indicate she made the calls personally. (Tr. 78-79.).

In regard to the charge of failing to act with reasonable diligence and promptness in violation of Rule 4-1.3, the findings do not specifically indicate which of the findings apply to this charge. There is no finding or evidence that Respondent failed to take any action in regard to the breast implant claim in a timely manner. If these findings relate to the alleged failure to return phone calls, the record is insufficient to support them. Ms. Arrington was able to speak with Respondent on about three occasions when she called. On other occasions she spoke with Respondent's associate. Respondent called Ms. Arrington on two occasions in March of 1995. The period in which Ms. Arrington placed calls which were not answered to her satisfaction occurred during the interval between Respondent's two surgeries for breast cancer, a time when Respondent was undergoing radiation treatments and was physically unable to carry a full load of work. Yet on numerous occasions Ms. Arrington was able to discuss her case with an attorney — sometimes Respondent and sometimes her associate. Ms. Arrington testified that the substance of her requests during these phone calls was requesting a letter of protection and wanting to come over to discuss some papers she felt had to be filled out regarding different diseases she had. She did not testify as to any other topic of discussion. The foregoing acts cannot support a conclusion of failing to act with reasonable diligence and promptness in representing the client.

The findings regarding the letter of protection are clearly erroneous, and in any event, the facts as found do not support a conclusion of failure to act with reasonable diligence and promptness. Ms. Arrington gave completely contradictory testimony regarding whether Respondent ever told her she would charge her to obtain a letter of protection. She initially testified that she called Respondent's office trying to get a letter of protection and never got any response. She stated this on two occasions. She also stated that she wanted to go to Respondent's office to fill out some forms regarding diseases she had, but that Respondent told her she would have to charge her for this.[11] She later changed her testimony, however, and

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[11] Under questioning by the Bar's counsel, Jan Wichrowski, Ms. Arrington testified:

> Q. And did you ever inquire of Ms. Nowacki as to whether or not you could obtain a standard letter of protection --
>
> A. I tried that.
>
> Q. -- as in a personal injury case?
>
> A. Yes.
>
> Q. You did?
>
> A. Yes, I tried, yes. *And I never got any response back from her.* I talked more to her paralegal. And they gave me so many runarounds, as the phone bills here will show you here -- excuses.

(Tr. at 47:24-48:10). She further testified:

> Q. What were the reasons for your terminating Ms. Nowacki?
>
> A. Well, I was displeased with how she handled the case. She did not return my phone calls. *When I tried to get the letter of protection from her, I got no response.*

stated that Respondent told her she would have to charge her to get a letter of protection. Her subsequent testimony in regard to the disease form was that there would be no charge for this, but that Respondent told her she did not need to have that done.[12] In view of such contradictions, the Bar

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I requested one time, to come over to her office. I had some papers that had to be filled out about the different diseases that I had. And her response to that was, well, you *can come, but I'll* have *to charge you.*

Well, from my understanding, she was being paid for by the breast litigation people whenever the court -- whenever it was settled. I didn't go.

(Tr. at 49:1-12) (emphasis supplied).

[12] Under redirect examination by the Bar's counsel she testified:

Q. And in regard to your conversation with Ms. Nowacki in regard to filling out certain forms for you --

A. uh-huh.

Q. -- can you tell that conversation, please?

A. *I needed the forms that showed the different diseases that I have, and I asked her if I could come over to have that done.*

Q. Okay. Was this a separate call from the letter of production [sic] call, or at the same time?

A. No. This was a separate time.

Q. Okay. Go ahead, please.

A. Yes. *And she said I didn't really need that done at that particular time, that, you know, I have already had the medical drawn up, and everything. I just did not need to have those papers.*

Q. *And were you told of any charge, possible charges in regard to those forms?*

A. *Not at that time, no ma'am.*

Q. *At another time? At any time?*

failed to carry its burden by clear and convincing evidence, and the referee's finding was clearly erroneous.

Even if the latter version of Ms. Arrington's testimony is accepted as true, a dispute over what work was included within the scope of the contingent fee agreement and what had to be paid for by the client could not constitute a failure to act with reasonable diligence and promptness.

The facts also do not support a conclusion that Respondent failed to keep Ms. Arrington reasonably informed about the status of a matter. The findings do not identify anything in regard to the status of Ms. Arrington's case as to which Respondent failed to keep her informed. Ms. Arrington never testified that any of her calls were inquiries as to the status of the case. Even if it were to be assumed that Respondent outright refused to assist Ms. Arrington with obtaining a letter of protection or with preparing the medical forms to which Ms. Arrington referred, this would not constitute a failure to keep her reasonably informed about the status of the case. The letters which Respondent sent to Ms. Arrington pertained to the status of the case and in fact kept her reasonably informed as to it.

By the same token, given the same assumption, the facts do not establish a failure to promptly comply with reasonable requests for information. There is no finding as

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A. *The only other time I was ever told of another charge was when I asked to come* **over** *to get a letter of protection.*

(Tr. 90:5-91:1)(emphasis supplied).

to any information requested by Ms. Arrington, nor any evidence thereof. As was previously discussed in respect to Count III, there can be no failure to comply with a reasonable request for information until there has in fact been a request for information.

Neither the factual findings nor the Rules Violations Found include a citation to Rule 4-1.4(b), but they conclude that Respondent failed to explain the matter to the extent reasonably necessary to permit the client to make an informed decision regarding the representation. The findings do not identify, nor could they, any matter which Respondent failed to explain or any decision by the client which required more information than was in fact provided. Ms. Arrington never contended that Respondent failed to explain a letter of protection to her. Her complaint alternatively was that Respondent would not talk to her about it or that in talking to her about it, she wanted to charge her to do it. Under neither view was an explanation of anything sought or required.

RECOMMENDED DISCIPLINARY MEASURES

Even if it is assumed that Respondent committed some of the violations charged, the recommended discipline is overly severe and unwarranted. Respondent recognizes that she previously has received two reprimands and that this may properly be considered as an aggravating factor in

determining the discipline to be imposed. The previous violations, however, did not involve acts at all like those charged in this proceeding. Accordingly if Respondent is found to be guilty of any of the acts charged, these would not constitute the **same** or similar misconduct as previous violations. Accordingly, under Standard 8.2, Florida Standards for Imposing Lawyer Sanctions, suspension is not the appropriate sanction.[13]

Furthermore the referee failed to accord sufficient weight to the mitigating factors involved in this case. Counts II, III and V all involve alleged violations which occurred during a **time** frame when Respondent was undergoing a serious medical and personal crisis. Not only was she undergoing surgery and radiation treatment for breast cancer, but she was also having to deal with the fear that her three-year-old son would end up in an orphanage. Just a year before that her husband had been diagnosed with prostate cancer and had undergone a radical prostatectomy. If both Respondent and her husband were to die, neither had any family they could rely on to take care of their child. This coincided with a bout with depression for which Respondent required medication. (Tr. 173-177). Despite her

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[13] Standard 8.2 provides:

> 8.2 Suspension is appropriate when a lawyer has been publicly reprimanded *for the same or similar conduct* and engages in *further similar acts of misconduct* that cause injury or potential injury to a client, the public, the legal system, or the profession.

(Emphasis supplied).

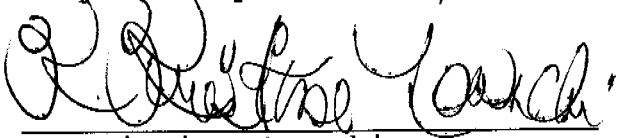
personal problems, Respondent took reasonable efforts to see that her clients were properly represented during this time period by employing associates to help her carry her caseload.

Respondent respectfully suggests that in view of the foregoing factors, any violations which may be determined to have occurred should be treated as minor violations. Respondent recognizes that misconduct ordinarily may not be treated as minor misconduct if the respondent has been disciplined within the past three years. R. REGULATING FLA. BAR 3-5.1(b)(1)(C). Nevertheless, Rule 3-5.1(b)(1) recognizes an exception in "unusual circumstances." Respondent suggests that the facts of this case present such unusual circumstances.

CONCLUSION

This case involves a situation of five complaints having been made to the Bar regarding Respondent within a relatively short period of time. Obviously these clients were dissatisfied. It does not necessarily follow from this, however, that rule violations by Respondent were the cause of their dissatisfaction. Respondent submits that when the record and facts regarding these alleged violations are subjected to close scrutiny, no rule violations will be found.

Respectfully submitted,



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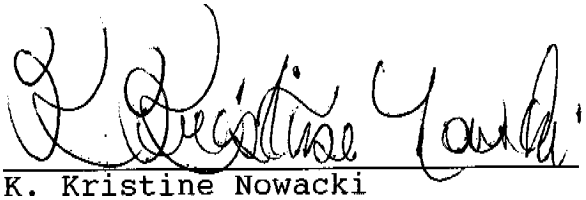
CERTIFICATE OF SERVICE

I BEREBY CERTIFY that a copy of the foregoing Initial Brief of Respondent was served by U.S. mail on Jan Wichrowski, Esq., Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801 and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 19th day of February, 1997.



K. Kristine Nowacki