047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID LAWRENCE SOLOMON,

Respondent.
_____/

Supreme Court Case Nos. 86,914
87,667
88,762

FILED 9/5
SID J. WHITE
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SUPREME COURT
Chief Deputy Clerk

ANSWER BRIEF

AND INITIAL BRIEF ON

CROSS PETITION FOR REVIEW

OF

THE FLORIDA BAR

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Symbols and References

"RR" will refer to the Report of Referee in Supreme Court Case **Nos.** 86,914, 87,667 and 88,762 executed on January 2, 1997.

"TRI" will refer to the transcript of the evidentiary hearing held on August 21-23, 1996 in Supreme Court Case Nos. 86,914 and 87,667.

"TRII" will refer to the transcript of the evidentiary hearing held on December 4 and 9, 1996 in Supreme Court **Case No. 88,762.**

"TRIII" will refer to the transcript of the disciplinary hearing held on December 13, 1996 in Case Nos. 86,914, 87,667 and **88,762.**

"TRIV" will refer to the transcript of the motion hearing held on January 6, 1997 in Supreme Court Case Nos. 86,914, 87,667 and 88,762.

"TFBI and Resp.I Exh. #" will refer to exhibits submitted by The Florida Bar and Respondent and admitted into evidence at the evidentiary hearing held in Supreme Court Case Nos. 86,914 and **87,667.**

"TFBII and Resp.II Exh. #" will refer to exhibits submitted by The Florida Bar and Respondent and admitted into evidence at the evidentiary hearing held in Supreme Court **Case No. 88,762.**

"TFBIII and Resp.III Exh. #" will refer to the exhibits submitted by The Florida Bar and Respondent and admitted into evidence at the disciplinary hearing held in Supreme Court Case Nos. 86,914, 87,667 and 88,762.

"Rule or Rules" will refer to The Rules Regulating The Florida Bar.

"Standard or Standards" will refer to The Florida Standards for Imposing Lawyer Discipline.

Statement of the Case and Facts

Statement of the Facts

The Florida Bar does not challange the findings of fact made by the referee in his Report of Referee dated and executed on January 2, 1997, all of which are supported by the record with the exception of the facts surrounding Respondent's inclusion of language referring to 'sexual assault privilege" as noted below. However, The Florida Bar does not agree with the referee's application of the facts to the rules in certain of the counts.

In his initial brief, Respondent challenges the findings of fact on pages 10 and 11 of the report of referee regarding the 'sexual assault privilege". The Florida Bar agrees that the referee struck the testimony in Supreme Court Case No. 87,667 pertaining to the 'sexual assault privilege" language in the documents filed by Respondent with the Second District Court of Appeal in Keene v. Nudera, 661 So. 2d 40 (Fla. 2 DCA 1995).

Respondent's recitation of 'facts" in his initial brief contains numerous errors, omissions and opinions which are improperly placed in the statement of facts. The following addresses certain of improprieties in Respondent's brief.

On page 1, third sentence, Respondent states a "fact" in these matters, that "(m)any indigent clients are difficult to

locate in time to file necessary documents without motioning for extensions of time". Respondent cites his own testimony for this proposition, which is pure opinion, not "fact", and should be stricken and/or not considered by the Court.

On page 2, ¶ 1, Respondent's purported "summary" of the Complaints in these matters is inaccurate and inappropriate opinion and should be stricken and/or not considered by the Court.

On page 2, ¶ 2, Respondent improperly refers to a previous unrelated Complaint and claims it was relitigated in the instant proceedings. Respondent further quotes the unrelated report of referee in his recitation of facts. Respondent then accurately states that the referee denied his motion to dismiss and/or strike certain paragraphs of the Bar's Complaint in the instant matters. The previous unrelated disciplinary matter is irrelevant to the instant disciplinary matters and, further, Respondent did not petition for review of the referee's denial of his motion to dismiss and/or strike. Therefore, Respondent's injection of the matter in his brief and insertion of a copy of this court's order in the previous matter and a partial copy of the report of referee in Tab No.1 of Respondent's brief is improper and should be stricken and/or not considered by the

Court.

The balance of the recitation of facts by Respondent on pages 3-13 of the initial brief is replete with improper opinions and misstatements.

Statement of the Case

Supreme Court Case No. 86,914

The Florida Bar filed a Complaint with this Court on or about November 28, 1995 after the grievance committee finding of probable cause.

On or about December 19, 1995, the Honorable Donald Castor, Hillsborough County Judge, was appointed as referee. An Amended Complaint was filed with the referee on or about March 6, 1996. On or about May 16, 1996, Respondent filed an Answer to the Amended Complaint. On or about May 22, 1996, Respondent filed an Amended Answer. On the same date, Respondent's Motion to Continue the final hearing scheduled for June 13, 14 and 17, 1996 was granted by the referee. Final Hearing was rescheduled for August 21-23, 1996. Between March 13, 1996 and August 19, 1996, various motion hearings were held.

Supreme Court Case No. 87,667

The Florida Bar filed a Complaint with this Court on or about March 27, 1996 after the grievance committee finding of

probable cause.

On or about April 8, 1996, the Honorable Donald Castor, Hillsborough County Judge, was assigned as referee in the matter. Final Hearing was scheduled for June 13, 14 and 17, 1996 (to be heard with Supreme Court Case No. 86,914). On or about May 16, 1996, Respondent filed an Answer to the Complaint. By order dated May 22, 1996, Respondent's motion to continue was granted by the referee and the matter was rescheduled to August 21-23, 1996 (to be heard with Supreme Court Case No. 86,914).

Supreme Court Case No. 88,762

The Florida Bar filed a complaint with this Court on or about August 16, 1996 after the grievance committee finding of probable cause. By order dated September 3, 1996, the Honorable Donald Castor, Hillsborough County Judge, was appointed as referee. On or about September 13, 1996, The Florida Bar filed a Motion to Consolidate. On or about September 20, 1996, The Florida Bar filed an Amended Complaint.

On October 4, 1996, a hearing was held on the Motion to Consolidate. Respondent objected to the consolidation and the motion was denied on that date. A motion to dismiss and to strike filed by Respondent on or about October 30, 1996 was denied by the referee at a hearing held on November 15, 1996.

Respondent filed an Answer and Affirmative Defenses to the Complaint on or about November 20, 1996. A final hearing in the matter was held on December 4 and 9, 1996.

Consolidated Matters

Upon stipulation of counsel, the three (3) Supreme Court cases were consolidated. After the referee announced his findings of fact and guilt on all three cases, a disciplinary hearing was held on December 13, 1996. The referee recommended a ninety-one (91) day suspension to be followed by a two (2) year probation with conditions.

On or about December 24, 1996, Respondent filed a Motion for Rehearing which was denied by the referee by order dated January 2, 1997. On January 2, 1997, the referee executed his Report of Referee on all three cases. A hearing on Respondent's request for reconsideration and apportionment of costs was held on January 6, 1997. The referee denied the request in an order dated January 6, 1997. Respondent then filed numerous motions and documents with this Court between February 13, 1997 and April 1, 1997, all of which were denied and/or stricken by this Court's order dated April 14, 1997. On or about April 7, 1997, Respondent filed a petition for review of the referee's report. The Florida Bar filed a cross petition for review on or about

April 9, 1997.

On or about June 23, 1997, Respondent filed his initial brief on petition for review.

On or about July 3, 1997, Respondent filed an "Errata Sheet" for his initial brief and a "Motion to File" requesting that this Court accept various documents attached to his brief which were not a part of the record before the referee. The Florida Bar has filed responses to both documents.

Summary of the Argument

The referee's findings of fact carry a presumption of correctness and are fully supported by the record in these matters with the exception of the facts related to 'sexual assault privilege" on pages 10 and 11 of the Report of Referee in the Keene matter (Case No. 87,667).

The referee erred in requiring that either actual or potential harm be shown as a substantive element of incompetence and/or lack of diligence under the Rules Regulating The Florida Bar.

The referee appropriately recommended that the costs of The Florida Bar are reasonable and should be taxed upon Respondent.

The referee appropriately found that Respondent be disciplined with a rehabilitative suspension based on the supported findings of fact, the case law and standards for discipline, and the evidence produced at the disciplinary hearing which showed that Respondent has not been rehabilitated.

Argument

I. THE REFEREE'S FINDINGS OF FACT ARE SUBSTANTIALLY SUPPORTED IN THE RECORD.

A. The referee's findings of fact in Counts I-VI of Case No. 86,914 are fully supported in the record and show that Respondent was incompetent and lacked diligence.

B. The referee's findings of fact in Case No. 87,667 are fully supported in the record, with the exception of the facts related to the "Sexual Assault Privilege" on pages 10 and 11 of the Report of Referee which were stricken by the referee, and show that Respondent was incompetent and lacked diligence.

C. The referee's findings of fact in Case No. 88,762 are fully supported in the record and show that Respondent was incompetent and lacked diligence.

D. The referee improperly required that either actual or potential harm be shown as substantive element of incompetence and/or lack of diligence.

II. THE REFEREE'S FINDING TEAT THE COSTS OF THE FLORIDA BAR ARE REASONABLE AND TAXABLE TO RESPONDENT IS NOT AN ABUSE OF DISCRETION AND SHOULD BP: UPHELD.

III. THE REFEREE'S RECOMMENDATION OF A REHABILITATIVE SUSPENSION IS FULLY SUPPORTED BY THE FACTS. CASE LAW, FLORIDA STANDARDS FOR IMPOSING LAWYER DISCIPLINE, AND THE RECORD OF THE DISCIPLINARY HEARING AND SHOULD BE UPHELD.

Argument

I. THE REFEREE'S FINDINGS OF FACT ARE SUBSTANTIALLY SUPPORTED IN THE RECORD.

A. The referee's findings of fact in Counts I-VI of Case No. 86,914 are fully supported in the record and show that Respondent wasincompetent and lacked d' ' gence.

A referee's findings of fact carry a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. (The Florida Bar v. Berman, 659 So. 2d 1049, 1050 (Fla. 1995)).

The following argument will extensively reference facts in the record which support the conclusion that Respondent violated Rules Regulating The Florida Bar related to competence and diligence.

Count I - Complaint of John N. Jenkins - TFR No. 94-11,299(6E) Poole v. C.F. Industries, Inc.

The referee found and the record shows that during the jury trial held in Poole v. CF Industries, Inc. in July 1990, Respondent made 'numerous legal errors, more serious of which appear to be, one, mentioning in front of the jury that an earlier trial had been held in the same case, and secondly, also in the presence of the jury, improperly inquiring of the defendant corporation's principal witness regarding striking a

potential juror." (RR at 2).

The record shows that the "numerous errors" referenced by the referee **also** include the following: Respondent improperly referred to the previous trial held in the Poole matter in front of the jury two times (TRI at 37 lines 8-22; TRI at 39 lines 17-25; and TFBI Exh. #ID); Respondent communicated with a witness who was currently testifying regarding substantive matters after the rule of sequestration was invoked (TFBI Exh. #IE and TRI at 40 11. 15-25, TRI at 41 lines 1-25 and TRI at 42 lines 1-8); Respondent provided incorrect information to an expert witness (TFBI Exh. #IF and TRI at 45 lines 15-25 and TRI at 46 lines 1-15); Respondent requested that the trial judge instruct him on how to impeach a witness by introducing a document (TFBI Exh. #G; TRI at 49 lines 19-23 and TRI at 50 lines 1-8) and; Respondent propounded a clearly improper cross examination question to a witness regarding why a potential juror was stricken from the venire (TFBI Exh. #IH; TRI at 51 lines 8-25 and TRI at 52 lines 1-25). After this misconduct by Respondent in the 1990 Poole trial, Circuit Judge J. Rogers Padgett granted a mistrial motion made by opposing counsel and stated, on the record, that he had never seen "a more incompetent job in the courtroom" (TFBI Exh.# IH).

Respondent appealed Judge Padgett's subsequent granting of a directed verdict of dismissal of the Poole case. Respondent's initial brief contained outrageous comments stating that he found it "amusing" that opposing counsel's name (Jenkins) was the same as a party in a cited case who was convicted of burglary and assault with intent to commit rape with a deadly weapon (TFBI Exh. #II and TRI at 58 lines 1-25).

Judge Padgett testified regarding specific improper conduct by Respondent during the pendency of the matter and that Respondent lacked the knowledge, skill, thoroughness and preparation required of an attorney. Further, Respondent's pleadings and conduct in the courtroom fell below the minimum standards required of an attorney (TRI at 126 lines 1-25 and TRI at 127 lines 1-6).

After remand, Judge Padgett recused himself from the Poole matter and any other matters involving Respondent. The judge testified that "(m)y opinion of his competency was so low that he just had no credibility". After being asked if his opinion was a "close call", the judge stated "(n)o, absolutely not. No." (TRI at 142 lines 22-25).

Upon the recusal of Judge Padgett, the Poole matter was reassigned to Circuit Judge Ficcarotta. As the referee stated in

his report, "Respondent then filed numerous pleadings which were irregularly styled dealing with the setting of the **trial date and** filed a petition for certiorari from the Second District Court of Appeal (2DCA) claiming that he failed to obtain the requested thirty (30) days notice of a trial date" (RR at 2)). The record shows that Respondent was ordered by Judge Ficcarrotta to file a written notice of trial. When opposing counsel tried to set the trial after Respondent failed or refused to produce the notice, Respondent filed a petition for writ of certiorari claiming that he did not receive the required thirty (30) day written notice of trial under Florida Rules of Civil Procedure 1.440(c) (TRI at 63 lines 1-25 through TRI at 69 lines 1-11 and TFBI Exh. ##IJ, IK and IL). However, the record is clear that it was Respondent's failure to produce the written notice of trial that resulted in the written notice being less than thirty (30) days prior to the trial.

Respondent's petition for writ of certiorari was filed without payment of the filing fee or proof of insolvency (RR at 2). In an order dated June 8, 1993, the 2DCA stated that because the petition was filed without the filing fee or proof of insolvency, **it was** subject to dismissal if the filing fee or proof of insolvency was not forwarded on or before twenty days

from the date of the order (TFBI Exh. #IN). By order dated July 2, 1993, the Court dismissed the petition for Respondent's failure to comply with the June 8, 1993 order (TFBI Exh. #IO). Respondent did not file any document with the Court to advise that he was withdrawing the petition (TRI at 76 lines 7-25).

On or about June 14, 1993, Respondent filed a document with the trial court titled "RESPECTFUL REQUEST FOR BLIND ROTATION TO ANOTHER DIVISION" (TFBI Exh. #IM). The document appears to request that the trial judge recuse himself. The document was improperly styled, did not conform to the requirements of Rule 2.160, Florida Rules of Judicial Administration, and was never scheduled for hearing (TRI at 77 lines 20-25 through TRI at 81 lines 1-11 and TRI at 150 lines 10-25, TRI at 151 lines 1-10).

Non-binding arbitration was ordered by Judge Ficcarrotta. The arbitrators found that the defendants were liable and damages were in the amount of $50,000.00. Respondent then filed a document with the trial court disclosing the finding of liability and the amount of the award to the judge in contravention of §44.103(8) Florida Statutes. Respondent further requested that the court adopt the finding of liability and that a trial be conducted on damages only (TRI at 83 lines 1-25 and TRI at 84 lines 1-25).

A third trial in the Poole matter was held in February 1994. Although the trial was ultimately completed with a defense verdict, John Jenkins and Judge Ficcarrotta testified regarding specific improper conduct by Respondent during pendency of the Poole matter. Respondent improperly stated, in front of the jury, that he had personal knowledge that a witness was lying (TFBI Exh.# IP). Judge Ficcarrotta testified that during the trial Respondent asked him for help in asking questions of a witness and that there were a "large number" of objections made by opposing counsel of which a "vast majority" were sustained (TRI at 152 lines 13-25 and TRI at 153 lines 1-23).

Judge Ficcarrotta further testified that, based on his review of documents filed with the court by Respondent and his observations of Respondent during hearings and at trial, his opinion is that Respondent did not possess the minimum knowledge, skill, thoroughness and preparation required of a Florida Lawyer (TRI at 154 lines 14-25 and TRI at 155 lines 1-12). After the trial was concluded, the judge requested that Respondent be reported to The Florida Bar due to Respondent's "inability to represent someone in a courtroom effectively". The judge testified that he had never reported a lawyer before and that his opinion of Respondent's incompetence was not a 'close call" (TRI

at 155 lines 13-25 and TRI at 156 lines 1-21).

John Jenkins, the opposing counsel of Respondent during the entire pendency of the Poole matter, testified that Respondent lacked the minimum fundamental knowledge, skill, thoroughness and preparation in drafting and filing of pleadings and court documents and in his trial practice (TRI at 90 lines 20-25 through TRI at 93 lines 1-18).

Further evidence of Respondent's incompetence and lack of diligence is shown by the two (2) Second District Court of Appeal Court Orders which were admitted into evidence at the evidentiary hearing in this disciplinary matter.

By order dated November 30, 1994, the Court dismissed the Poole case because Respondent failed to timely file a brief that was due or request an additional extension by November 17, 1994, the date the brief was due. The Court further stated that:

> "(i)n this case and in numerous other cases, appellant's attorney has repeatedly ignored the requirements of the Florida Rules of Appellate Procedure. He has been warned that failure to follow the rules will result in sanction. Accordingly, this case is dismissed. The appellant may move for reinstatement within the time allowed for rehearing, but such motion will not be considered unless it is accompanied by a brief in full compliance with the applicable rules of procedure. A copy of this order shall be sent to The Florida Bar. David

> Solomon is instructed to provide a copy of this order to Clyde Richard Poole and Cynthia Lynn Poole".

(TFBI Exh. #IQ).

By order dated December 15, 1994, the Court granted Respondent's request for extension of time. The extension was granted notwithstanding the fact that Respondent failed to file a brief with his motion for reconsideration. The Court granted the extension "(t)o avoid possible prejudice to Clyde R. Poole and Cynthia Lynn Poole" (TFBI Exh. #IR).

The above facts show clearly and convincingly that Respondent's conduct violated Rules 4-1.1 and 4-1.3.

Count II - TFB No. 95-10,269(6E) - (Polk v. State of Florida Department of Transportation et al)

The referee's report found that there were 'numerous inaccuracies or mistakes made by Respondent in the course of his legal argument as to the facts in the record on appeal. The referee finds that while such practice reflects carelessness, and it places an unnecessary and time consuming burden on the appellate court in continuing to deal with such issues. In the absence of any intentional misrepresentation by Respondent, such practice does not rise to the level of incompetency as contemplated by the Bar rule on diligence " (RR at 4,5) (emphasis

added).

The referee erroneously required that an 'intentional misrepresentation" be found before an attorney violates Rule 4-1.3 (diligence). This Court has stated that there is no requirement of a showing of intentional misrepresentation in client neglect matters (The Florida Rar v. Whitaker, 596 So. 2d 672 (Fla. 1992). This same reasoning applies to matters involving incompetence.

The record shows that Respondent violated both Rules 4-1.1 (competence) and 4-1.3 (diligence) based on his assertions of fact without any basis in the record in his initial brief, his misstatements regarding the trial court's summary judgment order, and his requests for extension of time to file briefs in the appeal. Respondent also filed a document requesting judgment on the pleadings based on the purported failure of two of the defendants to file responsive documents in the appeal (TFBI Exh.#II L). Bruce Walkley, the opposing counsel in the matter, testified that the requested judgment on the pleadings was improperly filed because the notice of appeal did not include the two defendants (TRII at 229 lines 17-25 through TRII at 231 lines 1-9).

Count III - TFR No. 95-10,617 (6E) - (Breen v. Huntley-Jiffy Stores)

Respondent filed a lawsuit on behalf of his client, Ms. Breen, regarding an alleged stabbing which occurred in Duval County, Florida. Respondent failed or refused to answer or object to interrogatories filed by the defendant Southern Bell (TFBI Exh. #III D). Defendants filed a motion to transfer venue which was granted by the trial court by order dated November 27, 1991 (TFBI Exh.#III H).

Respondent appealed the order transferring venue. By correspondence dated January 6, 1992, Respondent was advised by Court Clerk, William A. Haddad, that his notice of appeal was filed without the required filing fee or proof of insolvency. Respondent was advised that failure to comply with the correspondence on or before January 13, 1992 would cause the notice to be subject to dismissal (TFB III Exh. #III L).

Respondent subsequently filed a motion for extension of time to file his initial brief on or about March 6, 1992 requesting until June 2, 1992 to file the initial brief (TFBI Exh. #III O). Respondent cited "PERSONAL FAMILY REASONS THAT WILL TAKE HIM OVERSEAS FOR MOST OF THE MONTH OF APRIL" as the reason for the request for extension. The request was granted over the

objection of opposing counsel.

Respondent filed a document on or about July 10, 1992 titled "STABBING VICTIM'S REQUEST FOR AN EXTENSION OF TIME IN WHICH TO FILE HER REPLY BRIEF UNTIL THURSDAY, SEPTEMBER 10, 1992" (TFBI Exh. #III Q).

Respondent's reason for requesting the extension of sixty (60) days from the date of the motion to file his reply brief was that "STABBING VICTIM'S COUNSEL HAS FAMILY MATTERS OVERSEAS IN THE MONTH OF AUGUST". The extension was granted over the objection of opposing counsel (TFBI Exh. #III R). By order dated November 25, 1992, the Second District Court of Appeal (2DCA) reversed the initial order transferring venue (TFBI Exh. #III S).

After remand, the motion to transfer venue was heard by Circuit Judge James Whittemore, who rendered a Second Order Transferring Venue to Duval County on April 7, 1993. Judge Whittemore subsequently issued an order without a hearing, which denied Respondent's Motion for Rehearing and stated that the motion "presents no new material information upon which the Court could alter its decision" (TFBI Exh. #III T).

Respondent then appealed the second venue transfer order on or about July 7, 1994 (TFBI Exh. #III U). Respondent filed the appeal without a filing fee or proof of insolvency. By order

dated July 13, 1994, the 2DCA required Respondent to forward the required filing fee or order of insolvency on or before twenty days from the date of the order and that the appeal would be subject to dismissal without further notice (TFBI Exh.#III W). On or about July 19, 1994, Respondent requested an extension of time to "tender filing fee and file initial brief" until August 31, 1994 but gave no reason for his need for an extension of time (TFBI Exh.#III Y).

By order dated August 16, 1994, the 2DCA denied the motion for extension of time and dismissed the appeal stating that the appeal was untimely under Manna Provisions Co. v. Blume, 417 so. 2d 832 (Fla. 1 DCA 1982) (TFBI Exh.#III Z). Manna Provisions states that a motion for rehearing of an interlocutory order does not toll the time for filing a notice of appeal. Respondent admitted that he failed to file the notice of appeal within the required time and that he was unaware that the motion for hearing did not toll the period for filing a notice of appeal (TFBI Exh.#III aa).

Judge Whittemore was qualified as an expert in trial practice at the final hearing and testified that Respondent did not meet the minimum standards required of an attorney for competence in his pleadings and court documents (TRI at 185 lines

27-25 through TRI at 188 lines 1-12).

The referee found that Respondent should have either timely transferred the case to Duval County or timely filed the notice of appeal of the second order transferring venue and that the failure to timely file the second appeal and the subsequent dismissal 'clearly damaged" Respondent's client, thereby violating Rules 4-1.1 and 4-1.3 (RR at 6).

The evidence in the record regarding this count shows clearly and convincingly that Respondent did not meet minimum standards for competence and diligence under the Rules Regulating The Florida Bar. Respondent's failure to grasp fundamental procedural principles, such as the nature and effect of an interlocutory appeal based on venue, repeated requests for extensions of time, failure to forward either filing fees or proof of insolvency with his notices of appeal show a lack of competence and diligence.

Count IV - TFB No. 95-10,618(6E) - (Keene v. Burdines)

The referee found that Respondent did not violate the Rules Regulating The Florida Bar regarding certain assertions made by him in his initial brief on appeal. The Bar's position is that the record supports a finding of a violation of Rule 4-1.1.

Count V - TFR No. 95-10,619(6E) - (Hurst **v. Yamaha. et al**)

Respondent filed a notice of appeal on behalf of the plaintiff, Hurst and again failed or refused to remit the filing fee or proof of insolvency (RR at 7). By order dated March 30, 1994, the Second District Court of Appeal (2DCA) required Respondent to either pay the filing fee or show proof of insolvency within twenty (20) days or the appeal would be subject to being stricken. Respondent then requested an additional forty-five (45) days to comply with the order, which the Court denied by order dated May 9, 1994 and dismissed the appeal (TFBI Exh. #VA and VB) .

On or about May 18, 1994, Respondent filed a 'RESPECTFUL REQUEST FOR RECONSIDERATION OF MAY 4, 1994 DISMISSAL FOR FAILURE TO HAVE ORDER OF INSOLVENCY ENTERED OR TENDER FILING FEE" (TFBI Exh.#VC). In the 'request", Respondent indicates that he has not yet attempted to obtain an order of insolvency (see ¶ 7 TFBI Exh. #VC). Respondent tendered the filing fee at that time. Respondent also filed a 'respectful request" for an extension of time to file the initial brief "until thirty (30) days after the record on **appeal is prepared"** (TFBI Exh. ##V C and E).

By order dated May 25, 1994, the Court reinstated the **appeal.** By order dated June 3, 1994, the Court denied the motion

for extension of time to file the initial brief until 30 days after the record is prepared because there was no showing that the record was requested (TFBI Exh.##V D and F).

The referee cited the above facts and found that "while such conduct by Respondent places an unnecessary and time consuming burden upon the appellate court as well as adverse counsel, standing alone such practice does not rise to the level of incompetence or lack of diligence as contemplated by the Bar rules".

The Bar would submit that the above evidence shows that Respondent lacks the minimum fundamental skills and knowledge of a competent practitioner and failed to diligently pursue the appeal, causing the legal system to be unduly burdened and the appeal to be delayed.

Count VI - TFR No. 95-10,621(6E) - (Finley v. Villanti)

In 1991, Respondent filed pleadings attempting to reopen the estate of Frederick Ball, which was discharged in 1986, in an apparent attempt to file a personal injury lawsuit against the estate regarding an incident which allegedly occurred in 1990. The trial court denied the request to reopen the estate on June 14, 1991 and denied Respondent's motion for rehearing on July 16, 1991. Respondent filed a notice of appeal of the trial court's

denial of his request to reopen the estate (TFBI Exh. #VI B). By order dated March 24, 1993, the Second District Court of Appeal filed a per curiam order affirming the trial court's denial of the subsequent administration (TFBI Exh. #VI A). By order dated July 13, 1993, the trial court granted defendant's motion to enforce mandate and closed the matter (TFBI Exh. #VI C). The trial court subsequently denied Respondent's motion for rehearing.

Respondent then filed a notice of appeal of the denial of the motion for rehearing (TFBI Exh. #VI D). Defendant's counsel filed a motion to dismiss the notice of appeal, and Respondent voluntarily dismissed the appeal (TFBI Exh. #IV E and F).

The referee adopted defendant's counsel's arguments in paragraph 12 of the motion to dismiss that the 'notice of an appeal on October 4, 1993, constituted a gross and systematic abuse of the appellate process by not only creating a continued waste of judicial time, but also imposing unnecessary time upon the appellee in order to respond to the abuse of the rules" (RR at 8).

The referee, however, recommended that Respondent be found not guilty and made reference to the fact that defendant's counsel did not pursue sanctions against Respondent and the fact

that Respondent voluntarily withdrew the notice of appeal after being 'apprised of possible monetary sanctions" in defendant's motion to dismiss.

The record clearly and convincingly establishes that Respondent incompetently filed a notice of appeal of a purely ministerial act (the dismissal of the case pursuant to the per curiam order) and caused the opposing party time and expense in responding to the notice of appeal. Further, the fact that Respondent withdrew the appeal after being advised of his incompetence and the fortuitous fact that opposing counsel did not pursue sanctions against Respondent is not relevant to Respondent's guilt.

Supreme Court Case No. 87.667 - TFR No. 95-11,780(6E)
(Keene v. Nudera)

Respondent represented Keene as the plaintiff in a personal injury lawsuit. By order dated November 21, 1994, the trial judge granted defendant's motion to compel deposition, to compel better answers to interrogatories, and to compel production of documents. On or about December 21, 1994, Respondent filed a document with the Second District Court of Appeal (2DCA) titled "PETITION FOR WRIT OF CERTIORARI AND REQUEST TO REVIEW THE 11/21/94 ORDER OF HILLSBOROUGH COUNTY CIRCUIT JUDGE EDWARD H.

WARD, COMPELLING PRODUCTION OF PSYCHOTHERAPIST RECORDS DETAILING ABUSE AS A CHILD, FOR PRESENT CLAIM FOR LAW BACK AND RELATED INJURIES" (TFBI Exh.3).

Second District Court of Appeal Judge Chris Altenbernd testified at the final hearing that the petition improperly included Judge Ward as a party and that the title included argument that he would not expect to be in the caption (TRI at 306 lines 18-25, TRI at 307 lines 1-2).

Respondent again failed to remit the filing fee or proof of insolvency with the petition for writ of certiorari. By order dated December 21, 1994, the Court ordered Respondent to forward the filing fee or proof of insolvency within twenty (20) days or the petition would be subject to dismissal without further notice (TFBI Exh.# 5). Respondent filed the petition without a filing fee or proof of insolvency after receiving numerous previous orders from the Court informing him of the filing fee or proof of insolvency requirement (see, TRI at 269 lines 17-22).

On or about January 6, 1995, Respondent filed a document with the Court titled 'MOTION FOR EXTENSION OF TIME IN WHICH TO **COMPLY WITH THIS COURTS** 12/21/94 **ORDER, OF APPROXIMATELY 30 DAYS,** UNTIL TUESDAY, 2/14/95" (TFBI Exh. G).

By order dated January **11,** 1995, the Court required

Respondent to appear before them on January 31, 1995 to show cause as to why sanctions should not be imposed for his failure to comply with the December 21, 1994 order to forward filing fees or proof of insolvency within twenty (20) days. The order noted that Respondent had "repeatedly filed appeals without the filing fee or order of insolvency" (TFBI Exh. #7). Respondent then filed a document titled "AFFIDAVIT OF THE PETITIONER IN SUPPORT OF HER MOTION FOR INSOLVENCY, FOR PURPOSES OF THE WRIT OF CERTIORARI" (TFBI Exh. #8).

In an opinion dated May 19, 1995 and authored by Judge Chris Altenbernd, the Court dismissed the petition for writ of certiorari as facially insufficient (TFBI Exh. #11). The opinion noted that, even if properly filed, the petition for writ of certiorari would have been summarily dismissed due to Respondent's failure to comply with Rule 9.100(e) of the Florida Rules of Appellate Procedure (see, TFBI Exh. #11 op. at 42). The opinion further noted that the disposition of the matter had been delayed due to Respondent's failure or refusal to file the appropriate fee, obtain an order of indigency or inform the Court that an order of indigency would be forthcoming (Id.). The opinion noted that "on at least ten prior occasions in the last twenty-five months, David Solomon, the attorney who represents

Ms. Keene, has filed appellate proceedings in this court without a fee or an order of indigency" (Id.). The opinion then specifically listed the cases to which it was referring. (Id. at 42 n.2).

The opinion addressed the purported "affidavit" filed by Respondent (see, TFBI Exh. #8) stating that it "contained no formal oath and does not employ standard language of an affidavit". (see, §92.525, Fla. Stat. (1993)). The format of the affidavit would not be acceptable, even if it had been prepared and submitted by a prisoner untrained in the law. State v. Shearer, 629 So. 2d 1102 (Fla. 1993); Fla. R. Crim. P. 3.987." (see, TFBI Exh. #11 op. at 43.)

After,dismissing the petition, the Court ordered Respondent to obtain a minimum of ten continuing legal education hours in appellate practice or procedure, in addition to the mandatory requirements, within twelve months for his "repeated failure to comply with Rule 9.040(h) (Id.).

Respondent then filed a document with the Court titled "APPELLANT'S MOTION FOR REHEARING OF OPINION FILED 5/19/95, THE GROUNDS FOR SUCH REHEARING BEING F.S. 890.5035, "SEXUAL ASSAULT COUNSELOR - VICTIM PRIVILEGE" AND FRAP RULE 9.100(B), "ORIGINAL PROCEEDINGS, SUBSECTION (B) ADDRESSING FILING FEES" (TFBI Exh.

#12). The motion was denied by order dated June 12, 1995 (TFBI Exh. #13).

Judge Altenbernd testified that 'his (Respondent's) motions, to be candid about it, they looked like they might have been filed by a prisoner. They were in capital letters. And just the style of the motions looked very, very unusual. They were more difficult to read as a result of that."

He further testified that 'The titles and the things that they were requesting frequently were not things that lawyers would normally ask for. He'd be asking for an extension of time, which isn't necessarily a rare thing for a lawyer to ask for at all, but he'd be asking for ninety days rather than fifteen or thirty days". (TRI at 267 lines 5-15). The judge was made aware of the fact that "the clerk's office thought there **was** essentially a chronic problem with the filing of these appeals that were being gummed up because there was not filing fees and there was no affidavit" (TRI at 269 lines 17-22). Further, the judge was "not aware of any other lawyer that had this kind of repetitive problem over and over **again"** (TRI at 271 lines 13-14).

Judge Altenbernd testified as to the reasons why the Court reinstated cases of Respondent that were dismissed for lack of filing fee or proof of insolvency after **a** rehearing was filed by

Respondent. "Well, generally you like to have any case resolved on its merits, if you can. And you don't want to have parties prejudiced by whatever the lawyers are doing. So yes, you'll reinstate it just to keep it going." Q (by Bar Counsel) 'To keep the clients from being prejudiced?" A. "Yes." The judge further testified regarding the numerous improper documents filed by Respondent in the record where Respondent requested extensions of time, filed deficient documents and failed to forward filing fees or proof of insolvency in the other disciplinary matters which were pending before the referee and that, based on his review of the documents, Respondent was not competent in appellate practice and procedure (TRI at 334 lines 8-25, through TRI at 336 lines 1-4).

The referee recommended that Respondent be found to have acted incompetently specifically in that he included explicit references to the sexual assault and child abuse allegations in his motions and this resulted in prejudice to the client (RR p. 10). However, during the final hearing, the referee granted Respondent's objection and motion to strike testimony related to this issue.

The record clearly and convincingly establishes that Respondent acted incompetently in the Keene matter, by filing an

incompetent affidavit and other incompetent court documents as reflected in the record. Further, Respondent repeatedly failed to tender filing fees or proof of insolvency with his notices of appeal and repeatedly asked for extensions of time which shows a lack of competence or diligence, or both.

Case No. 88,762- TFB No. 96-10,630(6E)
(Fernandes v. Boisvert)

Respondent filed a Complaint on behalf of Elisa Fernandes in Hillsborough County, Florida on January 25, 1993 alleging that Ms. Fernandes suffered personal injuries on January 25, 1989 and listed six (6) individuals and an estate as defendants (TFBII Exh. #1). The Complaint did not provide the location of the alleged incident although it was established at the final hearing that it occurred in Pinellas County, Florida. The attorney for defendant, Donna Boisvert n/k/a Donna Loving, filed an answer and asserted, as an affirmative defense, that venue was improper (TFBII Exh.# 2). The defendant's counsel also filed a Motion to Transfer Improper Venue stating that venue was properly in Pinellas County (TFBII Exh. #3). A Motion for Summary Judgment was filed on behalf of defendant Donna Loving by her counsel on or about May 4, 1993 along with a supporting affidavit (TFBII Exh. ##5 and 6).

On or about May 28, 1993, Respondent filed a purported "affidavit" in opposition to the summary judgment motion.

The document was titled 'AFFIDAVIT OF ELISA FERNANDES THAT SHE NEVER RESIDED AT DEFENDANT'S HOME, AND IN PARTICULAR, ON THE DATE OF THE ACCIDENT, RESIDED AT HER MOTHER'S HOME" (TFBII Exh. #10). The "affidavit" gave no indication that Ms. Fernandes was attesting to the truth of the contents of the affidavit, that the notary required her to take an oath, or that the person signing the "affidavit" was in fact Ms. Fernandes.

After the summary judgment motion was heard and granted, Respondent filed various documents with the trial court, including: a "NOTICE OF FILING AFFIDAVIT OF PLAINTIFF ELISA FERNANDES AND COPY OF CASE LAW STATING IT IS WITHIN COURT'S DISCRETION TO ACCEPT AFFIDAVITS AFTER SUMMARY JUDGMENT HEARING" (TFBII Exh. #11) with attached affidavit (TFBII Exh. #12); 'REQUEST FOR RECONSIDERATION OF ORDER DATED 6/24/93" (TFBII Exh. #13); "10/21/93 PLAINTIFF'S RENEWED REQUEST FOR CONTINUANCE TO BRING CURED PROOF BEFORE THIS COURT" (TFBII Exh. #14); 'NOTICE OF FILING TO REFLECT THAT THE PLAINTIFF, ELISA FERNANDES, WAS PHYSICALLY PRESENT AT THE 6/2/93 SUMMARY JUDGMENT HEARING, AVAILABLE TO BE SWORN BY THE COURT FOR ANY ADDITIONAL TESTIMONY NEEDED" (TFBII Exh. #15).

Respondent then appealed the dismissal of the lawsuit based on the granting of the summary judgment motion. Respondent's notice of appeal was again filed without the filing fee or proof of insolvency. By order dated December 2, 1993, the Second District Court of Appeal (2DCA) required Respondent to forward the filing fee or proof of insolvency within twenty (20) days or the appeal would be subject to dismissal (TFBII Exh. #16).

The 2DCA rendered an opinion on the matter on August 4, 1995 (659 So. 2d Fla. 2DCA 1995) (TFBII Exh. #20). The opinion, authored by Judge David Patterson, stated, inter alia, that Respondent's Complaint marginally stated a cause of action and failed to include special damages (Id. op. at 412 n.1). The opinion noted that the lawsuit was filed in an improper venue (Id. n.2). The opinion stated as follows regarding the initial purported "affidavit" (see, TFBII Exh. #10) filed by Respondent:

> The statement related to Fernandes' residence on the date of the incident. Although bearing the seal and signature of a notary public, the writing bears no resemblance to an affidavit. Fernandes' attorney did not file or serve an affidavit pursuant to Florida Rule of Civil Procedure 1.510 seeking additional time to obtain an affidavit from Fernandes or move for a continuance of the hearing on the motion. Confronted with the disarray of Fernandes' "pleadings," the trial court understandably granted summary judgment in Boisvert's favor.

Id. at 413.

The opinion concluded as follows:

> We are thus confronted with the question of whether the trial court abused its discretion in refusing to rescue Fernandes from the apparent incompetence of her lawyer. We recognize the broad discretion of the trial court in matters of this kind. While we do not know the underlying reasons which compelled the attorney to pursue this matter in the way he did, it is apparent to us that something has gone awry. Therefore, in light of the unique circumstances presented here, we determine that the trial court abused its discretion in refusing to consider Fernandes' affidavit on rehearing. According, we vacate the final judgement and remand this case for disposition on the merits. Reversed and remanded.

Id.

The referee specifically noted that Respondent filed suit in Hillsborough County, which venue was improper, and this, coupled with the fact that the case was filed on the last day of the statute of limitations, caused the lawsuit to be subject to an effective dismissal with prejudice to refile due to the running of the statute of limitations.- This jeopardized the interests of Respondent's client (RR at 12) . The referee's report further found as follows: "(g)iven the totality of the circumstances, the referee finds that Mr. Solomon's actions contributed

substantially to the delay and consequent harm in timely litigating his client's case and finds that such action fails to meet the standards for competency under Rule 4-1.1" (RR at 14).

Finally, the referee found that Respondent's failure to move to amend the Complaint to include special damages pursuant to the suggestion in footnote 1, p. 412 of the 2DCA opinion was incompetent (RR at 14).

Circuit Judge Robert Bonnano, the trial judge in the Fernandes matter, testified that Respondent does not possess the minimum thoroughness, preparation, knowledge and skill required of Florida lawyers (TRII at 20 lines 7-25).

Judge Patterson discussed the various documents and actions by Respondent and rendered his opinion that Respondent did not act competently in the Fernandes case (TRII at 76 lines 21-25, TRII at 77 lines 1-20).

The record in this matter shows clearly and convincingly that Respondent's actions show a lack of competence and diligence.

D. THE REFEREE ERRONEOUSLY REQUIRED THAT EITHER ACTUAL OR POTENTIAL HARM BE SHOWN AS A SUBSTANTIVE ELEMENT OF INCOMPETENCE AND/OR LACK OF DILIGENCE.

The referee erroneously required actual or potential harm

and prejudice to be shown as an element of incompetence and/or lack of diligence. The referee explained his position at the motion hearing held on January 6, 1997:

> Since this case was indeed a novel one and there appeared to be no case law that was presented to the Court dealing with the standards to be applied and since the testimony of the witnesses were to some extent different, even though there was overwhelming testimony supporting the Bar's position of Mr. Solomon's incompetency and lack of diligence over the years in many, many cases, to give Mr. Solomon the fullest benefit of the doubt the Court found that is was not inappropriate to adopt a higher standard and undertook to find Mr. Solomon guilty in only three cases where there was evidence that there was harm or potential harm to the client.

(TRIV at 597 lines 16-25, TRIV at 598 lines 1-3).

Rules 4-1.1 and 4-1.3 clearly do not require a showing of harm or potential harm to be shown as an element of proof and this Court has not required that harm be shown in proving violations of the referenced rules.

In The Florida Rar v. Littman, 612 So. 2d 582 (Fla. 1993), the attorney was disciplined for failing to advise his client that the client would be required to pay child support even though the child was residing with him and also for failing to include an affidavit required by the Uniform Child Custody

Jurisdiction Act with his motion to change residential custody. In imposing discipline for the attorney's violation of Rule 4-1.1 by providing incompetent representation, the opinion noted "(t)he worst that resulted in the present case is that Littman embarrassed himself and his client by his negligent failure to appreciate applicable law. We do not perceive any real damages the client suffered other than the embarrassment Littman caused." (Littman, at 583). Further, the Florida Standards for Imposing Lawyer Sanctions Stds. 4.4 (lack of diligence) and 4.5 (lack of competence) refer to the appropriate discipline to be imposed if the incompetent or negligent action causes no actual or potential injury.

Based on the foregoing, this Court should not adopt the standard of the referee requiring actual or potential injury to be shown as an element of Rule 4-1.1 and 4-1.3.

The Bar's position, however, is that the record fully supports the finding, in aggravation, that Respondent's actions caused potential and actual harm to clients, the public, and the legal system and that this aggravating factor should enhance the discipline to be imposed upon Respondent.

II. The Referee's Finding That the Costs of The Florida Bar are Reasonable and Taxable to Respondent is Not an Abuse of Discretion and Should be Upheld.

The referee found that all costs of The Florida Bar are reasonable and should be taxed to Respondent (RR at 17-23). After executing the Report of Referee on January 2, 1997, the referee held a hearing at the request of Respondent's counsel on January 6,1997. At the hearing, Respondent's counsel argued for a continuance and/or a reconsideration of the referee's recommendation in the report that the Bar's costs be taxed to Respondent.

The mere fact that the referee found Respondent guilty in certain of the matters and not guilty in others should not be a factor in assessing costs. Where a Respondent in a Bar disciplinary proceeding has been found guilty in any respect, it has been the position of this Court that all reasonable costs should be taxed against such Respondent, rather than imposing that financial burden on the Bar members who did not violate the rules.

In The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1991), the attorney had been found partially not guilty and the referee recommended that he pay the total costs. On review, Miele argued that, because he was found partially not guilty, that he should be responsible only for pro rata costs. Responding to Miele's

argument, this Court stated:

> "This argument ignores the fact that, but for Miele's misconduct, there would have been no complaint and, thus, no costs. We find nothing in the record suggesting that costs were unnecessary, excessive, or improperly authenticated. Therefore, Miele has shown no abuse of discretion. Where the choice is between imposing costs on a Bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member."

(Miele, at 867(citing The Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988); see also, The Florida Bar v. Wilson, 616 So. 2d 953 (Fla. 1993)).

In this brief, The Florida Bar has argued that Respondent should be found guilty of all of the charged rule violations in each disciplinary matter. Should this Court adopt the Bar's arguments, there would be no need to pro rate the costs and the issue would become moot. However, should Respondent be found not guilty of **some** allegations, this Court should adopt the findings of the referee and tax all costs upon Respondent, which findings were as follows:

> THE REFEREE: Well, this case of The Florida Bar versus Joseph R. Miele -- that's M-i-e-l-e -- Respondent, is a 1992 case, a Supreme Court case obviously, and we show seven Supreme Court Justices concurring.
>
> And we note here, the assessment of

> costs of attorney disciplinary proceedings against the attorney was not an abuse of discretion even though the Bar did not prove all of its allegations against the attorney. But for the attorney's misconduct, there would have been no complaint and thus not costs.
>
> Now, I have given substantial consideration to the matter of costs. And, given the unusual nature of this case, the fact that there were in the beginning six counts and then there was another **case** that was consolidated with the first six counts and then subsequently there **was** another case that **was** heard separately, but for the purposes of the Referee's Report was consolidated, given the totality of the testimony and the circumstances, rather than it being simple to prorate the costs it's this Court's view it would be almost impossible to fairly and properly prorate the costs .

(TRIV at 560 lines 21-25, TRIV at 561 lines 1-18).

For the foregoing reasons, the referee's recommendation that all costs be taxed upon Respondent is not an abuse of discretion and should be upheld.

III. The Referee's Recommendation of a Rehabilitative Suspension is Fully Supported by the Facts, Case Law, and Florida Standards for Imposing Lawyer Discipline, the Record of the Disciplinary Hearing and Should be Upheld.

This Court has stated, on numerous occasions, that a sanction must serve three purposes: the judgment must be fair to

society, fair to the attorney and sufficient to deter others from similar misconduct (See, The Florida Bar v. Clement, 662 So. 2d 690, 699 (Fla. 1995)).

The facts as presented in the record and in this brief show a pattern of misconduct in which only a rehabilitative suspension will serve to protect the public, be fair to society and the attorney, and sufficiently deter others from similar misconduct. The Bar's position was, and is, that Respondent is not capable of practicing at a minimum level of competence and diligence and should be required to show his fitness to practice prior to reinstatement to the practice of law in this state.

The record shows the cumulative nature of Respondent's misconduct. In The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983), the Court overturned a referee's recommendation of a public reprimand and imposed a ninety-one (91) day suspension stating: "(i)n rendering discipline, this Court considers the Respondent's previous disciplinary history and increases the discipline where appropriate (citations omitted). The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct" (Fern at 528). The misconduct in the

instant disciplinary matters involves multiple instances of incompetence and lack of diligence which are similar in nature. For example, Respondent's repeated failures to forward filing fees or proof of insolvency with notices of appeal, even after being advised informally and formally (in a court order) of the problem, repeated requests for long extensions of time to file briefs and repeated filing of incompetently drafted court documents.

This Court should consider this cumulative, similar misconduct in determining the appropriate discipline to be imposed. In The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991), the referee recommended a public reprimand based upon the attorney's acceptance of employment despite a possible conflict, entering a business transaction with clients who had differing interests, failing to furnish an accounting and failing to disclose a conflict of interest. That attorney had no prior disciplinary record. The opinion rejected the referee's recommendation of a public reprimand and imposed a sixty (60) day suspension stating that "Roger's misconduct was not an isolated lapse of judgment, but instead, involved misconduct occurring from 1983 to 1986." Rogers, at 1382. The opinion further stated that a "public reprimand should be reversed for isolated

instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent. The Florida Bar v. Welty, 382 So. 2d 1220, 1223 (Fla. 1980); The Florida Bar v. Dougherty, 541 So. 2d 610 (Fla. 1989)" (Id.).

Respondent's incompetence and lack of diligence involved numerous clients, some of whom clearly were harmed or potentially harmed by his conduct. Respondent's actions additionally involved harm or potential harm to the legal system and the public. Further, Respondent's neglect and incompetence encompassed pre-trial, trial and appellate practice over a number of years, which should be considered by the Court in determining the ultimate discipline to be imposed (see, The Florida Bar v. Adler, 589 So. 2d 899(Fla. 1991)).

In The Florida Bar v. Flinn, 575 So. 2d 634 (Fla. 1991), the attorney was disbarred for, among other more serious violations, his failure to understand basic legal principles and failure to properly prepare cases, failure to ask proper questions and address proper issues and causing inordinate delay in the proceedings by rambling and making little sense. Further, four (4) worker's compensation judges testified as to the attorney's incompetence.

The Florida Standards for Imposing Lawyer Sanctions

(Standards] act as a model or guide in determining the appropriate discipline in Bar disciplinary matters. Under Standard 1.1, the purpose of lawyer discipline proceedings is "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly".

The Standards state that the following should be considered in determining the ultimate discipline to be imposed: (1) duty or duties violated, (2) the lawyer's mental state, (3) the potential or actual injury caused by the lawyer's misconduct and; (4) the existence of aggravating or mitigating factors or circumstances (See, Fla. Standard Preamble and Standard 3.0) .

The duties violated by Respondent have been previously discussed in this brief. There is no evidence in the record that Respondent's mental state prevented him from acting competently and diligently as a lawyer.

Standard 4.4 addresses the appropriate discipline for an attorney who fails to act with reasonable diligence or promptness in representing a client. Absent aggravating or mitigating circumstances and applying Standard 3.0, Standard 4.42 states that a suspension is appropriate when a lawyer engages in a

pattern of neglect and causes injury or potential injury to a client. The record clearly establishes, and the referee found, injury and potential injury to clients of Respondent. The record additionally establishes injury and potential injury to the public and the legal system. Judge Altenbernd testified regarding the harm that Respondent caused to Ms. Reene, to other clients, and to the judicial system (TRI @ 336, 11. 5-25, 337 @ 11. 1). Judge Ficcarrotta further testified that Respondent's actions caused actual or potential harm to his clients and to the judicial system (TRI at 156 lines 22-25 through TRI at 159 lines 1-12).

Standard 4.5 addresses the appropriate discipline in cases including, failure to provide competent representation to a client absent aggravating and mitigating factors, and applying Standard 3.0. Standard 4.52 states that a suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence and causes injury or potential injury to a client. At the disciplinary hearing held on December 13, 1996, the referee made explicit findings that "the record is fairly replete with Mr. Solomon undertaking to represent numerous clients in complex litigation where he, I think, knowingly understood that he lacked competence and did

indeed cause injury or potential injury to his client" (TRIII at 524 lines 5-9). The referee heard the evidence and the testimony of Respondent and was in the best position to make this finding, which is amply supported in the record. The record further shows that Respondent demonstrated a failure to understand relevant legal doctrines and procedures and was negligent in determining whether he was competent to handle the various matters which caused injury and potential injury to clients.

Standard 9.22 lists aggravating factors to be considered in determining the appropriate discipline to be imposed.

The referee found the following aggravating factors: 9.22(d) multiple offenses; 9.22(e) pattern of misconduct; and 9.22 (g) refusal to acknowledge the wrongful nature of the misconduct. In finding the three aggravating circumstances, the referee stated,

> "I think perhaps one of the most egregious aggravating factors is (g), refusal to acknowledge wrongful nature of conduct. I recall at the first hearing when Mr. Solomon testified, after we had heard testimony from several Circuit Judges and Judge Altenbernd. And Mr. Solomon acknowledged that maybe there were one or two occasions where he made some mistakes, but other than that he didn't feel that there had been anything that he had done that was especially remarkable".

(TRIII 11. 13-22).

The record clearly supports these findings in aggravation

which "justify an increase in the degree of discipline to be imposed" (see, Standard 9.1).

The Bar called two (2) witnesses at the disciplinary hearing held on these matters to testify regarding Respondent's lack of rehabilitation. Clifford Somers, an attorney practicing in Tampa, Florida, testified regarding Respondent's actions in a medical malpractice matter that began in 1992 and was ongoing as of December 13, 1996, the date of the disciplinary hearing. Mr. Somers was recognized by the referee as an expert in civil trial practice and advocacy. Mr. Somers testified that, among other things, Respondent failed to file a substitution of party within 90 days of the suggestion of death of Respondent's client, thereby resulting in the dismissal of the lawsuit pursuant to Rule 1.260, Florida Rules of Civil Procedure (TRIII at 323 lines 9-25 through TRIII at 337 lines 1-23). Mr. Somers was asked at the disciplinary hearing whether Respondent possesses the requisite knowledge and skill, thoroughness and preparation in order to properly represent his clients. In response, Mr. Somers stated "(h)e does not, did not and continues not to" (TRIII at 338 lines 23-25, TRIII at 339 lines 1-4).

Circuit Judge James D. Whittemore testified that he had an opportunity to observe Respondent at hearings and to review court

documents filed by Respondent subsequent to the dates of the misconduct in the instant disciplinary matters. Respondent appeared at a hearing on September 5, 1996 subsequent to Judge Whittemore's initial testimony in August 1996 and, without filing a written motion to disqualify or notifying the opposing counsel who drove to Tampa from Orlando, Respondent stated that he was concerned about the judge's impartiality and fairness (TRIII at 354 lines 13-25 through TRIII at 357 lines 1-19) Judge Whittemore stated that:

> It was my opinion that was another example of Mr. Solomon failing to exercise appropriate judgment, not just occupying the Court docket on a matter where it was obvious to anyone that the Court should have recused itself and would recuse itself having opined as to his negligence in that very file.
>
> As far as dealing with the opposing counsel, not having the courtesy of notifying counsel of the potential for recusal. In my opinion, there was just simply no excuse for that.
>
> He should have filed a motion to recuse or at least corresponded with the Court and put the Court on notice that there was something pending in the file. I would never preside over a file, having testified to an attorney's incompetence.

(TRIII at 358 lines 2-16).

Based on his recent contact with Respondent, Judge Whittemore testified that Respondent is not now "operating at the

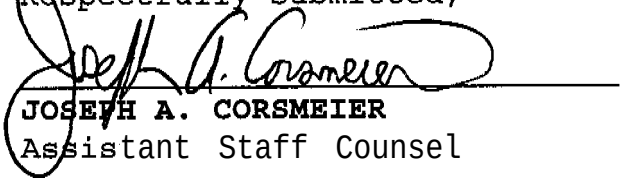
level of competence that he should be for the protection of his clients, the minimum level of competence." (TRIII at 367 lines 7-16). Judge Whittemore further testified that Respondent's actions caused a danger not only to clients but to the legal system and the profession (TRIII at 367 lines 19-25, TRIII at 368 lines 1-16).

Conclusion

The record clearly and overwhelmingly supports a finding that Respondent acted incompetently and negligently in these disciplinary matters and shows a pattern of misconduct and multiple offenses which caused actual or potential injury to Respondent's clients, the public and the legal system. The record also shows that Respondent has not been rehabilitated. Further, the referee's recommendation that costs be taxed upon Respondent is not an abuse of discretion and should be upheld.

Based on the foregoing, the referee's recommendation that Respondent receive a rehabilitative suspension followed by probation should be upheld.

Respectfully Submitted,



JOSEPH A. CORSMEIER
Assistant Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief and Initial Brief on Cross Petition for Review of The Florida Bar has been mailed to SID J. WHITE, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399; a copy by certified mail #P240711161 return receipt requested, to DAVID LAWRENCE SOLOMON, Respondent: at 880 Mandalay Avenue, Suite #N-911, Clearwater, Florida, 33767-1229; a copy to DONALD A. SMITH, Esquire, at 109 N. Brush Street, Suite 150, Tampa, Florida, 33602; and a copy to JOHN T. BERRY, Staff Counsel, 650 Apalachee Parkway, Tallahassee, Florida, 32399, this 11th day of August, 1997.

JOSEPH A. CORSMEIER
Assistant Staff Counsel