IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

vs.

DAVID LAWRENCE SOLOMON
Respondent.
_____/

CONSOLIDATED CASE NUMBERS:
86,914
87,667
88,762

097

FILED
SID J. WHITE
OCT 8 1997
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

10/15

On a Petition for Review of Referee Donald F. Castor, from the County Court of the 13th Judicial Circuit in and for Hillsborough County, Florida,

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RESPONDENT'S CROSS-ANSWER/REPLY BRIEF

Respectfully submitted by: _____

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STATEMENT OF THE CASE AND OF THE FACTS

There are a number of problems with the Florida Bar's statement of the case and facts. Most significantly, F.R.A.P 9.210(3) requires that record and transcript cites shall be included in the statement of the case and of the facts. The Bar's Answer Brief contains a statement of the case and of the facts of five (5) pages without even one single record or transcript citation. Furthermore, the commentary to this rule encourages the parties "to place every fact utilized in the argument section of the brief in the statement of the facts." The Bar's statement of the facts contains no factual statements used in the argument section. The Bar's statement of the facts contains three (3) erroneous objections to Attorney Solomon's Initial Brief, and a procedural history that has no relevance to the issues on appeal. It also completely ignores all of the issues raised in the initial brief except for admitting that the record contains no support for violation #2, the "sexual assault" language violation in the Keene v. Nudera complaint. The Bar agrees that the Referee has striken all record support from the record for violation #2. More unsettling, is that even though the Bar has conceded all such record support for violation #2 has been striken from the record, the Bar continues to argue the viability of the striken evidence in their "Upholding the Suspension' section commencing on page 40 of their Answer Brief. And notwithstanding that the Referee found Attorney Solomon not guilty in five (5) of the eight (8) counts/cases where there were disputed issues of material fact, it states the facts argumentatively, in a light most favorable to the Bar. This was entirely inappropriate, of course. See, e.g. Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991)(where sufficiency of evidence to support a verdict is being challenged on appeal, appellant's counsel has an obligation

to provide the court with a fair summary of the evidence stated in a light most favorable to the prevailing party below). Additionally, the cases were not listed alphabetically as required by F.R.A.P.

The purpose of these tactics, we think, was to complicate and obfuscate what is, in actuality, the Referee's allegedly erroneous finding of guilt in two (2) of eight (8) cases with the forced review of all of the eight (8) cases. In the five (5) cases in which Attorney Solomon was found not guilty by the Referee, the Referee's findings of not guilty are both fully supported by abundant competent evidence and legally permissible in every respect -- a point which a fair statement,' of the case and facts would have made clear at the outset. We must therefore restate the case and factswith an emphasis on the facts, which we will state in the proper light. See Kolosky v. Winn-Dixie.Stores, Inc., 472 So.2d 891 (Fla. 4th DCA 1985), rev. den., 482 So.2d 350 (Fla.1986)(on appeal, evidence must be viewed in a light most favorable to the verdict, with all conflicts resolved and all reasonable inferences drawn in favor of the party who prevailed below).

Only Attorney Solomon tendered to the Referee an expert in areas of legal competence and the principles of professional discipline, Justice Frederick B. Karl. (T-675:15- T-684:ll). The Bar tendered to the Referee experts in trial practice and procedure and appellate practice and procedure (Judge Patterson at 12/4/96 T-61:5-6), and Judge Altenbernd as an expert in appellate practice and procedures. (T-265:6-7). Attorney Solomon also tendered to the Referee an expert in appellate practice and procedure, Raymond T. Elligett, Jr., Esq.(T-419:8-9). At the time of his testimony, Mr. Elligett was the presiding Chairman of the Florida Bar Appellate Practice and Advocacy Section. (T-419:17-18).

Attorney Solomon will incorporate here by reference verbatim his statement of the case and facts as found in his initial brief to the extent of the three (3) of the eight (8) cases discussed in the initial brief, to wit: Fernandes, Rreen, Keene.

Poole v. C.F. Industries, Inc. (Count 1):

Poole v. C.F. Industries, Inc., hereinafter referred to as Poole, involved an action for personal injuries and consortium damages by Mr. and Mrs. Poole against the landowner defendant, C.F. Industries, Inc. (Bar exhibit I-A). This case was a premises liability cause of action that arose on 7/27/85 filed on 7/24/89, (Id). The Referee found that Attorney Solomon did not violate the competence rule 4-1.1, nor the diligence rule 4-1.3, by undertaking this premises liability cause of action filed on 7/24/89 by Attorney Solomon. RR 13:25. The Poole case was Attorney Solomon's first litigation case. (T-495:11-14). In preparation for this trial Attorney Solomon sat through many trials of the most prominent lawyers in New York, and Florida, including Bill Wagner and Steve Yerrid, (T-498:9-11), often obtained complete transcripts of these trials which he read and studied (T-498:21), attended courses given to practicing attorneys about trial practice (T-498:23), read transcriptions of famous summations (T-499:2), recorded and re-recorded these summations into a tape recorder to improve his speaking befpne he would address a jury (T-499:16), notably attended a Florida Civil Procedure course in 1989 which did not discuss Rule 1.530 (T-499:20), compiled recent premises liability decisions from Florida Digest and Florida Jar. into a black binder (T-500:3), compiled general negligence cases applicable to Poole from Florida Digest and Florida Jur. into a binder (T_500:7), compiled a binder of relevant cases from the Evidence Code Annotated into a binder 1% inches thick (T-500:10), studied the seminal Fundamentals of Trial Technique (T-500:19), and at least an additional banker's box full of relevant educational materials (T-500:22), brought in a box containing the most recent pocketparts to F.S.A. and Florida Jur. into the courtroom for reference during the Poole trials (T-501:15), and attempted to associate Bill Wagner's office, Jim Clark% office, and Florida

Trial Lawyers President and Florida Bar President Ed Rood's office (T-502:1, T-502:13, 503:8). Mr. Rood did not disclose his disciplinary problems until a few days before Mr. Poole's third trial. (T-503:14). At that point Attorney Solomon had no alternative but to go in by himself or dismiss the case. (T-503:17). As it would turn out in many of Attorney Solomon's cases, no other attorney was willing to undertake the case. The first Poole trial went smoothly before Judge Padgett, but resulted in a hung jury (T-504:18, T-506:1). Subsequently in this premises liability case Attorney Solomon successfully opposed the Defendant's summary judgment motion (T-507:9) and motion for directed verdict in the first trial (T-507:10). Having obtained a hung jury in one trial, successfully opposed a summary judgment and directed verdict, Attorney Solomon was confronted with many objections in the second Poole trial before Judgs Padgett in 1990. (T-506:18).

Defendant's Counsel Mr. Jenkins, objected to Plaintiff's safety expert Kalin's testimony on the grounds that Mr. Kalin's testimony was based upon a conclusion arrived at upon a misrepresentation by Attorney Solomon. Attorney Jenkins at a bench conference represented Attorney Solomon never asked Attorney Jenkins to produce the defendant's safety manual (Bar Exhibit I-F, Tab #4: page 12:1-13). Attorney Solomon responded that interrogatories 12 and 41 specifically requested this information. (Id). After this bench conference Attorney Solomon was "on a roll" while cross-examining the defendant's corporate representative. (T-509:21, Tab #3, page 3:21). Judge Padgett personally believed the plaintiffs' case was "an attempted grand theft" (T-130:4, also Tab #3, page 1:4). Both Judge Padgett and Attorney Solomon admitted at that moment to be caught in the "heat" of the moment (T-137:11, T-511:6, also Tab #3 page 2:11, and page 5:6). In that heated moment, Attorney Solomon's inquiry concerning a striken juror caused a mistrial. Six unheated years later Judge Padgett testified during this hearing that Attorney Solomon's representation of the Poole's improved the Plaintiffs' case into a "substantially better case" (T-130:18, also Tab #3, page 1:18) and wondered if he had not been caught in the "heat" of the moment, if he would have granted the mistrial (T-137:6, also

Tab #3, page 2:6). Attorney Jenkins made other objections such as referring to a previous trial transcript (Bar Trial Exhibit I-B, and I-D, also Tab #4, page 1-4), violating the sequestration rule (Bar Trial Exhibit I-E, also Tab #4, pages 5-6) that were either overruled, or upon which our record appears silent. Judge Padgett granted a mistrial over the striken juror inquiry and thereafter granted a renewed motion for directed verdict (T-511:19, also Tab #3, page 5: 19). Attorney Solomon objected to hearsay, articulating an incorrect basis (T-602:23).

During the appeal of the directed verdict Attorney Jenkins untimely requested an additional record. This caused the record on appeal not to be timely prepared because of the actions of Attorney Jenkins. At first, the DCA was unaware that Attorney Jenkins delayed the record by his untimely request for an additional record. Initially the DCA dismissed the appeal because Attorney Solomon's brief was not timely filed. When the DCA learned via Attorney Solomon's motion for reconsideration, that Attorney Solomon's initial brief was delayed because the record was unavailable due to Attorney Jenkins' untimely request for an additional record, the DCA re-instated the appeal. (Bar Trial Exhibits I-Q, and I-R, also Tab #4, page 18).

In this premises liability appeal of a directed verdict, Atttorney Solomon prevailed. (T-511:25, also Tab #3, page 5:25). In Attorney Solomon's initial brief, Attorney Solomon made insensitive remarks concerning Attorney Jenkins surname. (RR page 3:37). Upon remand Judge Padgett recused himself and Judge Ficarrotta presided over the case (T-513:23).

The record reflects Attorney Solomon and Attorney Jenkins could not agree on a trial date and Attorney Solomon set the matter for hearing (T-65:23, also Tab #5, page 18:23). Judge Ficarrotta set the hearing for less than 30 days from the Order setting the trial date,which Attorney Solomon believed violated Rule 1.440. Attorney Solomon timely filed a Petition for Writ of Certiorari directed to this issue. During the pendency of the Petition, Judge Ficarrotta

rescheduled the trial date by Order dated more than 30 days from the trial date. Since the Petition had become moot, Attorney Solomon abandoned the Petition. Attorney Solomon had not yet had an opportunity to obtain an affidavit of indigency or filing fee applicable to the Petition. Since the issue was moot, Attorney Solomon did not pursue an affidavit of indigency nor the filing fee and the Petition was dismissed on that basis. (T-86:18-22, T-76:24, also Tab #5:24). Attorney Solomon took steps to recuse Judge Ficarrotta, but also abandoned those efforts by never setting the matter for hearing. (T-81:10, also Tab #5:28:10).

A Rule 1.820 non-binding arbitration was held. Attorney Solomon improperly revealed to Judge Ficarrotta that the arbitrators recommended $50,000. Attorney Jenkins objected to this matter being revealed to Judge Ficarrotta. The record in this disciplinary proceeding reflects Judge Ficarrotta ruled that there was no harm because he was not going to be the trier of fact, and he wasn't going to decide liability nor damages. (T-520:1-3).

Poole's first trial went smoothly before Judge Padgett. (T-504:18). The second Poole trial before Judge Padgett obviously did not. (T-506:18). For the third Poole trial Attorney Solomon was led to believe that Attorney Rood would appear in the courtroom to assist if necessary. (T-503:14). Rood was suspended days before trial.

After the third Poole trial Attorney Solomon successfully completed an intensive 12 day trial advocacy program sponsored by Notre Dame Law School under the auspices of the National Institute for Trial Advocacy, otherwise known as NITA, and other of their courses including an evidence course. (12/13/96 T-465: 7-16). Attorney Solomon then tried the case of Lewis v. Franz before Brevard Circuit Judge Edward Jackson, who testified that based upon Attorney Solomon's performance in trying this difficult case, that Attorney Solomon was always welcome in his courtroom. Please see Respondent's Videotape Trial Exhibit. Both Mr. Poole and Mrs. Lewis also had nothing but effusive praise and appreciation for Attorney Solomon. (12/13/96 T-404:10-19, T-422:1-25).

Polk v. F.D.O.T. (Count 2):

Polk v. F.D.O.T. hereinafter referred to as Polk, involved an action for wrongful death by the mothers of three minors against the landowner defendant, F.D.O.T. (T-537:20-22). This case was a premises liability cause of action that was filed in the Circuit Court in 1988 by Attorney Salzman. Attorney Salzman lost a summary judgment motion filed by F.D.O.T. that was finalized by an Order in February of 1993. The three mothers were unable to find an attorney besides Attorney Solomon to undertake the appeal. (T-538:5, 12/13/96 T-460:2-4). Polk was a difficult premises liability case. (Id.)

During proceedings in the Circuit Court, Attorney Salzman also lost summary judgments against other landowner defendants in 1991. (T-229:24, also Tab 5, page 42:24). Due to the efforts of Attorney Solomon, the DCA waived the appellate filing fees due to the indigency status of the Plaintiff/Appellants established by Attorney Solomon. (Please see Tab #11 of Initial Brief).

In 1993 Attorney Solomon received an Answer Brief from F.D.O.T., but not the other landowner defendants who prevailed on summary judgment in 1991. Attorney Solomon erroneously believed the other landowner defendants who prevailed on summary judgment in 1991, also were to file Answer Briefs. Attorney Solomon filed a pleading entitled, "Motion for Judgment on the Pleadings". The body of this pleading was intended to give notice to the other landowner defendants to file Answer briefs. This pleading effectively did give such notice which prompted a telephone call from one of the defendants. The defendant advised the summary judgment rule in state court did not require those defendants to file Answer Briefs if no appeal was taken within 30 days of their summary judgments in 1991. Based upon this telephone call, the pleading was voluntarily withdrawn without further pleadings by any party, nor any involvement from the DCA. (T-551-553, also Tab #3:8-10).

The three dots preceding brackets ...[xxxxx]... and following brackets are properly referred to as "ellipses". The 1993 summary judgment order was paraphrased by Attorney Solomon using ellipses and brackets to delete the portions of the order not relevant to the issue on appeal, which was the Circuit Court's precluding F.D.O.T. liability based on their transportation mission. Where the actual Order stated,

> ...Even assuming that there existed a parking area and picnic tables,,, such facilities are owned and maintained by DOT...

Attorney Solomon paraphrased the above excerpt in his initial brief as follows,

> ...[The Court discusses the facilities of the parking area and picnic tables serving the beach at which these three young boys drowned, and then concludes]...

The included punctuation properly indicated that those words were paraphrasings of the actual Order.(T-547:3-11). Attorney Solomon testified he believed substituting the word "discusses" for the words "even assuming" was a fair paraphrasing of the Order.(T-548:4-6). The opposing counsel objected to this paraphrasing in his Answer Brief but the DCA did not strike it,reject it, nor impose any sanctions.(T-547:14-17). Attorney Solomon testified that if the Court in its final order was saying, "Even assuming there were picnic tables and a parking area," he believed it was permissible argument in opposing a summary judgment on appeal to indulge every reasonable inference in the losing party's favor.(T-549:21-23). Attorney Solomon was not involved at the trial court level, There was not much in the record below, and Attorney Solomon did not know all matters leading to the 9 or 11 page final summary judgment order.(T-549:11). Attorney Solomon testified that he cannot imagine that the trial judge would include language of picnic tables and a parking area in the final summary judgment order for no reason.(T-525:6). Attorney Solomon testified that he believed he could indulge every reasonable inference in his favor to

oppose a summary judgment. Attorney Solomon testified he believed such a paraphrasing to be a fair paraphrasing.(T-548:4-6).of the trial court's final summmary judgment order in this premises liability cause of action.

Breen v. Huntley Jiffy Stores, Inc. (Count 3)

Breen v. Huntley Jiffy Stores, Inc., hereinafter referred to as Breen, involves a presently pending action for personal injuries by Mr. and Mrs. Breen against the landowner defendant, Huntley Jiffy Stores, Inc., and the commercial user of the abovereferenced premises, Southern Bell Telephone and Telegraph Company. This case is a premises liability cause of action that was filed in the Circuit Court in Hillsborough County, Florida on in 1991. (Bar Trial Exhibit III-E). The defendants successfully moved to transfer venue in the trial court from Hillsborough County to Duval County, memorialized by trial court order rendered November 27, 1991.(Bar Trial Exhibit III-H). Attorney Solomon filed a timely and sufficient notice of appeal filed December 26, 1991. (Bar Trial Exhibit III-I). By DCA Order filed November 25, 1992, the DCA reversed the trial court based upon the law as presented to them by Attorney Solomon.(Bar Trial Exhibit III-S). The opinion notes that venue is proper in Hillsborough County since both appellees have agents in Hillsborough County. The DCA reverses the trial court because the defendants produced no affidavits to overcome the plaintiffs' venue selection under the venue statute. The cause was remanded to Hillsborough County pursuant to the DCA opinion of 11/25/92.

Defendants for-the second time successfully moved to transfer venue in the trial court in Hillsborough County to Duval County. Attorney Solomon filed a motion for rehearing of this second interlocutory order transferring venue. Attorney Solomon's motion for rehearing of this second interlocutory order transferring venue was denied by trial court order rendered June 7, 1994. (Bar Trial Exhibit III-T). On July 7, 1994, within thirty (30) days of the trial

Court's denial of Attorney Solomon's second interlocutory order transferring venue, Attorney Solomon filed a notice of appeal of the second interlocutory venue order of the trial court that transferred venue from Hillsborough County to Duval County. DCA Opinion dated August 16, 1994, sua sponte, dismissed the second interlocutory venue appeal as untimely per Rule 9.130(b). Although a 1.530 motion for rehearing tolls the time in which to appeal a final order as per Rule 9.020(g), it is Rule 9.130 that applies to proceedings to review-non-final orders. (Bar Trial Exhibit III-Z), Trial court proceedings were in no way stayed by this appeal.

This is the first of the three cases in which the Referee found Attorney Solomon guilty of any professional rule violation. The Referee specifically found that there was insufficient evidence of a violation of the competence rule or diligence rule as to the first interlocutory venue appeal filed in 1991. (RR page 5:35-40, also Referee's Report is found in its entirety in Tab #2).

Notwithstanding that the trial court proceedings were in no way stayed by the untimely second interlocutory venue appeal, the Referee found that Attorney Solomon was guilty of violation of the competence rule and diligence rule with regard to the second interlocutory venue appeal because the dismissal of the second interlocutory venue appeal by the DCA sua sponte, thirty nine (39) days after the second interlocutory venue appeal was filed, "clearly damaged" "the interest of Respondent's client" by this untimely second interlocutory appeal having caused, "protracted litigation". (RR-6:11-15).

Keene v. Burdines (Count 4)

Keene v. Burdines, hereinafter referred to as Keene/Burdines (as opposed to an additional Count Keene v. Nudera hereinafter referred to as Keene) was a pro bono matter (T-627:4, T-628:23) involving her efforts to obtain unemployment compensation after being discharged for alleged lateness. (T-562:4). Attorney

Solomon in his appellate brief asserted that Keene/Burdines was a case of first impression in the State of Florida on this issue of discharge for lateness, as opposed to discharge for absence.(T-563:16). The Bar charged Attorney Solomon with violation of the competence rule and diligence rule for stating that Keene/Burdines was a case of first impression in the State of Florida on the issue of discharge from employment for latenesses, as opposed to discharge from employment for absences. Please see Count IV of Bar's Complaint in this disciplinary proceeding. At trial, Attorney Solomon maintained Keene/Burdines was a case of first impression in Florida on the issue of discharge for lateness, as opposed to discharge for absence.(T-563:20, .T-272:19). The Bar charged Attorney Solomon with a violation of the competence rule and the diligence rule for failing to find any Florida cases on the issue of discharge for lateness, as opposed to discharge for absence. Attorney Moore testified on behalf of the Bar. Attorney Moore, who has been an attorney for thirteen years with the Florida Unemployment Appeals Commission in Tallahassee, Florida, testified that Sanchez v. Dept. of Labor 411 So.2d 313 (Fla. 3rd DCA 1982)decided the issue of lateness as opposed to absenteeism. (T-253:10). For the convenience of this Honorable Court, the Sanchez case may be found at Tab #3: page 14. After reading the Sanchez case, the Referee found Attorney Solomon not guilty of violating the competence nor diligence rules.

Hurst v. Yamaha (Count 5)

Hurst v. Yamaha, hereinafter referred to as Hurst was a products liability cause of action (T-567:16) in which the Plaintiffs could find no other counsel (T-567:18) in which Attorney Solomon assisted the Plaintiffs in recovering $150,000. (T-568:5, also at Tab #3 page 16:5). Attorney Solomon filed the case in state court and successfully opposed the defendant's first motion for removal to federal court.(T-578:5-6, also Tab #3 page 26:5-6). If one does not file a

motion for removal within one year, the motion is thereafter time barred. Defendants realized that year was to expire in less than one week and they had not scheduled a hearing on their petition for removal. (T-568:25, also Tab #3 page 16:25). The defendants telephoned the state court Judge's Judicial Assistant and unilaterally scheduled a hearing within the following three business days. Attorney Solomon objected to short notice and unilaterally scheduling hearings, as the Judge does not approve of not clearing hearing dates with opposing counsel if possible. There were a series of telephone calls between defense counsel and the J.A., and plaintiffs' counsel and the J.A. concerning the scheduling of the hearing. The hearing was scheduled and cancelled and the rescheduled with less than sufficient notice. Attorney Solomon appealed the Order resulting from the hearing based upon failure of sufficient reasonable notice. However, since the entire record in such an appeal would be of the telephone calls between the counsel and the J.A., some kind of reconstruction of a record was needed. The J.A. nor the Judge had any recollection of these series of telephone calls between counsel and the J.A., therefore a record could not be reconstructed. While following the procedures to reconstruct such a record, Attorney Solomon motioned the DCA for an extension of time in which to file their initial brief until 30 days after the record on appeal is prepared. (Bar Trial Exhibit V-E, T-568478, also Tab #3 pages 16 to 26). The DCA denied the motion for extension of time because there was no showing of the record being requested. (Bar Trial Exhibit V-F). Before any further action was required by the DCA, the case was settled for $150,000, and both parties filed a motion for dismissal of the appeal, which was granted.(The Bar charged Attorney Solomon with violations of the competence rule and the diligence rule. Paragraph 151 of the First Amended Six Count Complaint, page 35 of that First Amended Complaint. The Referee found Attorney Solomon not guilty of such charges.

Finley v. Villanti (Count 6)

Finley v. Villanti, hereinafter referred to as Finley was an automobile negligence cause of action(Bar Trial Exhibit VI-B) against a motor vehicle operator who had died and whose estate had been closed.(Id). Attorney Solomon motioned to reopen the estate for purposes of this automobile negligence action. (Id). The motion was denied by the Circuit Court, and affirmed by the DCA. (Id). Attorney Solomon appealed the Circuit Court's Order enforcing the DCA mandate. (Bar Trial Exhibit VI-D). After Attorney Solomon had filed his appeal, the Circuit Court was divested of jurisdiction. Nonetheless, Defendant's Counsel filed a motion to dismiss the appeal in the Circuit Court.(Bar Trial Exhibit VI-E). Although the Defendant's Counsel apparently filed his motion to dismiss in the wrong court which was without jurisdiction to grant relief, Attorney Solomon was persuaded by the merits of the motion and caused to be filed within fifteen (15) days, in the DCA, a voluntary dismissal. The Bar charged Attorney Solomon with a violation of the competence rule and of the diligence rule based upon the above facts. The Referee found Attorney Solomon not guilty of such charges.

Notably, the Bar on Page 2, lines 5-22 (from the fifth line to the bottom of page 2) statesthat Attorney Solomon improperly refers to a previous "unrelated" complaint, claiming it was relitigated in the instant proceedings. The case to which Attorney Solomon refers is this Finley case. The Bar claims Attorney Solomon's "purported "summary"" is inaccurate and inappropriate opinion and should be striken. The "purported "summary"" is objective quantifiable fact, as follows. Tab #1 of the Initial Brief contains a 3/10/94 Order: of The Supreme Court of Florida approving the Referee's finding of not guilty and imposing no discipline, dated 12/9/93. That portion of the Referee's 12/9/93 Report was concerning a previous complaint filed by the Bar against Attorney Solomon concerning the Finley case. In the procedural history in Attorney Solomon's

Initial Brief; Attorney Solomon stated that his motion to dismiss based upon the principles of res judicata and collateral estoppel was erroneously denied by the Referee below. As that Order was interlocutory in nature, it is properly reviewable here in our final appeal.

On 6/25/93 the Bar filed a disciplinary complaint concerning the Finley case. Principles of res judicata and collateral estoppel strictly prohibit any issues that were litigated, or could have been litigated in the 1993 Finley case, from being raised again in future litigation. In our instant litigation, the Bar has impermissibly raised issues that could have been litigated in the 1993 Finley case, but which were not litigated by the Bar in the 1993 Finley case. The following two (2) issues which the Bar had the opportunity to litigate in the 1993 Finley case, but did not litigate in the 1993 Finley case are the issues concerning (1) timely motions for extensions of time which are granted by the DCA, and (2) pleadings containing all capital letters and abbreviated certificates of service, which the Bar refers to as "irregularly styled". Under principles of res judicata and collateral estoppel, the Bar should be strictly prohibited from raising the issues concerning (1) timely motions for extensions of time which are granted by the DCA, and (2) pleadings containing all capital letters and abbreviated certificates of service, which the Bar refers to as "irregularly styled". Evidence that these matters were present in the 1993 Finley case are the Bar's Trial Exhibits in Finley in our instant case of Attorney Solomon's pleadings which contain all capital letters and abbreviated certificates of service. The Bar's assertion on page 2 of their Answer Brief in their Statement of the Facts section, that Attorney Solomon's "purported "summary"" is inaccurate and inappropriate opinion, is not a well founded assertion by the Bar. Fully 36% of the total paragraphs, or 80 of 224 paragraphs of the complaints in our case charge Attorney Solomon with incompetence for pleadings containing all capital letters and abbreviated certificates of service. The number of 80 paragraphs is even greater if paragraphs addressing timely motions for extensions which were granted by the DCA would have been included in that compilation of 80 paragraphs.

Keene v. Nudera (Separate Complaint)

Keene was an automobile negligence case in which a Petition for Writ of Certiorari was filed. (Bar Trial Exhibit #11 in Keene). As the Bar has agreed that all record evidence with regard to "sexual assault" was striken by the Referee, Attorney Solomon will rely upon this stipulation, and address the limited facts aside from "sexual assault" matters, to wit: timely motions for extension of time which were granted, "other incompetent court documents" unspecified by the Bar, but presumably involving pleadings containing all capital letters and an abbreviated certificate of service, and the "incompetent [insolvency] affidavit" rejected as insufficient by DCA, but accepted by The Florida Supreme Court on appeal/petition for review. (T-580:24).

Judge Altenbernd testified that the DCA clerk's office has a standard form order that is mailed if a notice of appeal is filed without an indigency affidavit or filing fee. (T-269:25- T-270:2, also at Tab #3 page 34:25 - page 35:2). Judge Altenbernd further testified that until Keene the DCA had never addressed the issues related to insolvency affidavits versus filing fees. (T-314: 11-21, also at Tab #3 page 36:11-21). Judge Altenbernd noted that the Fourth DCA addressed the issue coincidentally at the same time the Second DCA addressed the issue in Keene. [Fourth DCA opinion resulted in Florida Supreme Court's emergency rule on 9.43011

Attorney Solomon testified that since all DCA's have these form orders, the mailing of the form orders appeared as a procedure and not a sanction. (T-592:4-11). Attorney Solomon also testified that after the DCA clerk informally requested him to file indigency affidavits with the notice of appeal to save him the effort of mailing a form order, Attorney Solomon immediately complied, even though not required by any rule. (T-592:21 - T-593:9, also at Tab #3 page 41:21 - page 42:9).

As far as Judge Altenbernd not accepting the indigency affidavit even

though The Florida Supreme Court accepted the indigency affidavit (T:352:25, also at Tab #3 page 37:25), Judge Altenbernd testified that,(T-320;18-25, Tab #3:18-25

> ...infairness to Mr. Solomon, the practice of law in Florida would be a lot simpler if we had a particular rule of procedure or a statute that just clearly and unambiguously stated what needed to be in an affidavit to make it an affidavit.
>
> We have a statute that gives you precise language for a verified complaint but not for an affidavit.

The Bar did not allege in their complaint anything about Judge Ward being in the Petition for Writ of Certiorari's caption, nor inquired of Attorney Solomon at trial. Judge Altenbernd did comment on it,(T-306:21-24), but this is the first notice this was an issue. Any such new matters on appeal are prohibited.

The Referee found Attorney Solomon guilty of incompetence as to the "sexual assault" matters, and not guilty as to all other allegations concerning Keene. As the Bar has agreed that all record evidence concerning the "sexual assault" matters have been striken, the result is that Attorney Solomon is effectively found guilty of violating the rule on competence on only two (2) cases, Breen, and Fernandes.

Fernandes v. Boisvert (Separate Complaint)

Fernandes v. Boisvert, hereinafter referred to as Fernandes, is a pending premises liability cause of action-filed on 1/25/93 (Bar Trial Exhibit #1), in Hillsborough County, Florida, alleging Elisa Fernandes; [illegible]

> ...suffered permanent injuries, for which she received extensive medical care at Tampa General Hospital.

The Referee's Report on page 10, line 13 (second line of the second paragraph), finds that the Fernandes complaint filed by Attorney Solomon put the Defendants on notice that they were alleged to be responsible for medical bills of Mrs.Fernandes,

> . ..the property owners were charged with negli ence and alleged to be responsible for medical bills [emphasis added. at Tampa General and permanent injuries...

Notwithstanding the above finding of the Referee, the Referee then goes on to find Attorney Solomon guilty of violating the competence rule for failing to allege any special damages in the Fernandes complaint.

The Referee also found Attorney Solomon guilty of violating the competence rule for filing the complaint in Hillsborough County. The alleged premises liability negligence occurred in neighboring Pinellas County. The Referee found that filing the Fernandes complaint in a county other than where the negligence occurred subject the Fernandes complaint to potential dismissal with prejudice. The Referee found that if the underlying four (4) year statute of limitations for premises liability negligence were to expire before Defendant's Motion to Transfer was decided, that a potential dismissal on the Defendant's Motion to Transfer, (for improper venue) may have potentially barred the refiling of the Fernandes complaint, due to the statute of limitations defense. Defendants in Fernandes filed a Motion to Transfer. Defendants in Fernandes did not file a Motion to Dismiss. (Bar Trial Exhibit #3).

The premises liability cause of action alleged that Mrs. Fernandes was brutally beaten on the property. Both Attorney Solomon and Client Fernandes testified that due to Client Fernandes' fear of retaliation from her assailant, coupled with the possibility that Attorney Solomon may be compelled to disclose Client Fernandes' whereabouts, that Attorney Solomon would not be advised of Client Fernandes' whereabouts, and therefore would be unable to contact her directly. (12/4/96 T-1 11:1 - T- 112:25). She would periodically contact him. Her mother and sister's telephone were provided, but often they were unable to contact her promptly.(T-161:21). Therefore, when

Defendant filed a summary judgment motion, Mrs. Fernandes prepared the affidavit and mailed it to Attorney Solomon. (12/4/96 T-113:1-25). The original affidavit had technical deficiencies.(Bar Trial Exhibit 10, also Initial Brief Tab #3). Defendant prevailed at the original summary judgment hearing, although the reasons Defendant prevailed were not stated in the Order granting summary judgment. (Initial Brief Tab #6, Fernandes file in evidence during trial but since it is a pending case was returned to the Circuit Court). A cured affidavit was timely filed before rehearing. (Initial Brief Tabs #6, #7, #3). Attorney Solomon believed the defective affidavit was the reason the original summary judgment was granted.(Initial Brief Tab #6-Rehearing Transcript).

Judge Bonanno testified at least 22 times that although he has no independent recollection of why he granted the summary judgment at the original hearing and denied Attorney Solomon's motion for rehearing,(Initial Brief Tab #4) that even today he does not agree with the DCA that the complaint states a cause of action for premises liability. (Id). Judge Bonanno was reversed on appeal because,

> ...Upon rehearing, the trial court declined to consider this affidavit and denied the motion...

(Bar Trial Exhibit #20, top of second column on page 413). The Referee attributed Judge Bonanno's erroneous granting of the summary judgment to Attorney Solomon for permitting the defective affidavit to be filed. (RR page 12, line 29-31),

> ...the plaintiff's pleadings were in disarray and clearly contributed to the confusion surrounding the entry of the summary judgment at the outset...

The Referee on page 12, lines 36-40 finds Attorney Solomon guilty of violating the competence rule by the "delay and consequent harm in timely litigating his client's case", presumably the delay caused by the successful appeal.

The Initial Brief in Issue #2 argued that the Referee had striken from the record all testimony concerning violation #2 (Keene "sexual assault", please see transcript of Referee striking this testimony at Tab #10 of Initial Brief), and violation #4 (Fernandes "Attorney Solomon's opposition to the summary judgment", please see transcript of Referee striking this testimony at Tab #5 of Initial Brief).

The Bar's Answer Brief has agreed that violation #2 testimony was striken, but was silent on whether they agree that violation #4 testimony was striken.[1]

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The Friday December 13, 1996 Disciplinary Hearing (Tracked in the 'Suspension Upheld' section of the Bar's Answer Brief beginning on Page 40)

The Bar called two (2) witnesses in the disciplinary hearing to discuss three (3) additional cases of Attorney Solomon, These two witnesses were Attorney Somers discussing his firm's errors (12/13/96 T-333:4, T-350:3, also see Attorney Solomon testimony T-451:18) in Kolata v. H.C.A., and Judge Whittemore discussing Attorney Solomon's ore tenus motion in Breen, (12/13/96 T-355:8), dismissal in Hall v. Allstate (12/13/96 T-360:5-10; also Tab #5 page 78 upper right page line 4), and motion to present expert physician testimony by deposition rather than live at trial in Lustan v. Henefin. (12/13/96 T-364:9, T-365:3-4). For the above reasons both Attorney Somers and Judge Whittemore opined that Attorney Solomon was incompetent. Kolata v. HCA. (Kolata)(Attorney Somers' testimony)

Attorney John Feegel, who is also an M.D. was associated with Attorney Solomon when the case was filed, (12/13/96 T-342:7, also Tab #5, page 75a), withdrew (Id), and Attorney Elligett appeared and is currently litigating Kolata as co-counsel with Attorney Solomon. (12/13/96 T-343:6, also Tab #5 page 75a).

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1 With the hope of shortening this lengthy Reply Brief necessited by the Bar's violation of Rule 9.210(3), Attorney Solomon requested a written stipulation that the Bar agreed violation #4 testimony was striken, as the Bar's Answer Brief was silent on this matter. The Bar explained there were matters they did not address and refused to commit one way or another on violation #4 testimony, promising if this exchange was disclosed in the Reply Brief, the Bar would file a motion to strike. If such a motion is filed, it is requested the Bar state whether they agree that violation #4 testimony was striken, as the Bar has agreed that violation #2 testimony was striken.

Although Attorney Solomon did not file a substitution of parties upon the death of one of the litigants, the caselaw permits the case to continue if certain other procedural conditions are met. Attorney Somers testified that because Attorney Solomon did not file a substitution of parties as per Rule 1.260, the case was dismissed. However, Attorney Somers conceded that under the procedural steps taken by Attorney Solomon, the dismissal was erroneous. Attorney Somers admitted that the consortium claim was incorrectly dismissed (12/13/96 T-333:4, also Tab #5 page 73), upon his firm's motion to dismiss. Attorney Somers further testified that the consortium claim continues to be a viable claim.(12/13/96 T-350:3). Attorney Solomon elaborated in his testimony that Attorney Somer's firm stipulated to their error in filing the motion to dismiss the consortium claim, and stipulated to re-instating the consortium claim.(12/13/96 T-451:4).[2] Based upon these facts, Attorney Somers testified that Attorney Solomon does not possess the requisite knowledge and skill, thoroughness and preparation to properly represent his client in this matter.

Breen September 5, 1996 Hearing. (Judge Whittemore testimony).

Judge Whittemore testified that Attorney Solomon does not possess the requisite knowledge and skill, thoroughness and preparation that is required of a competent practicioner based upon the following actions of Attorney Solomon. On 8/21/96 Judge Whittemore testified in the Bar's case in chief that it was his opinion that Attorney Solomon was not a competent practicioner based upon Judge Whittemore's belief that Attorney Solomon does not have a "grasp" of venue principles.(T-187:21),

2. The remainder of the claim, for funeral expenses, was re-instated by Order dated September 26, 1997.

based upon Attorney Solomon's advocacy of his motion opposing venue transfer at a hearing held March 12, 1993.(T-182). At the commencement of a 9/5/96 hearing in the Breen case held before Judge Whittemore, Attorney Solomon made an ore tenue motion to leave it to Judge Whittemore's discretion if he felt he could be impartial or fair in light of his testimony in this cause less than two weeks before that 9/5/96 hearing. Judge Whittemore recused himself.

Hall v. Allstate (Hall)(Judge Whittemore testimony)

Judge Whittemore required the Plaintiffs to post $12,000 in bond to go forward, which sum they did not possess. Therefore Judge Whittemore was correct that the Plaintiffs intended to enter a dismissal.(12/13/96 T-449:19-23). At the 11/15/96 hearing, Judge Whittemore advised he would allow about 30 days for the Plaintiff to take some action.(12/13/96 T-450:13). These disciplinary proceedings have occupied Attorney Solomon, and Judge Whittemore entered a dismissal nearly 30 days after the 11/15/96 hearing,(12/13/96 T-360:5-10) before Attorney Solomon had the opportunity to do so.(12/13/96 T-449:22). Judge Whittemore expressed no opinion concerning Attorney Solomon's competence in Hall.

Lustan v. Henifin (Lustan)(Judge Whittemore testimony)

Judge Whittemore testified that F.R.C.P. states that medical testimony at trial is allowed by deposition as opposed to live testimony. However, because depositions of the Plaintiff's physician and Defendant's physician were lengthy, he required their testimony live.(12/13/96 T-363:6, T-363:11, T-365:3). Attorney Solomon filed a motion for Judge Whittemore to reconsider this ruling.(12/13/96 T-364:9, also Tab 5:79).Judge Whittemore concluded that it was his opinion that at times Attorney Solomon's conduct appeared to him to be competent at times, and not competent at other times.(12/13/96 T-370:22-24, also Tab #5 page 81).

ISSUES ON APPEAL

The Bar has stated three (3) purported issues on appeal. By our count, the Bar has argued at least 28 separate and distinct issues under three general headings. To restate the issues actually presented would therefore be a laborious task which we should not have to undertake for the Bar's benefit. Instead, we will follow the Bar's general format for the convenience of this Honorable Court, and we will identify each of the 28 separate issues in an appropriate manner as we proceed.

SUMMARY OF THE ARGUMENT

In our judgment, the circumstances do not lend themselves to prepartion of the type of summary of the argument which would ordinarily belong here. We reach that conclusion because the Bar's inability to separate the wheat from chaff and their "everything but the kitchen sink" approach to appellate advocacy--coupled with the page limitation imposed upon us, and the need to use many of those pages to supplement the Bar's inadequate statement of the facts and to discuss the manner in which a number of issues were not preserved for review (particularly violation #4 striken testimony)--necessari ly means that our arguments will be little more than summaries themselves, and to summarize those summaries were would amount to mere repetition of an already unfortunately lengthy brief. We also seriously doubt that this Honorable Court will want to read each of our 28 responsive arguments twice--so, requesting the Court's indulgence, we will turn directly to the merits of the 28 issues on appeal after a short summary of the reason that no discipline should be imposed.

No discipline should be imposed because four (4) of the eight @-underlying client cases were premises liability causes of action, to wit: Poole (1985), Polk (1993), Breen (1991), Fernandes (1993). Why is this fact the determining

factor in concluding no discipline should be imposed?

The answer to this paramount question begins with the requirement that any discipline to be imposed for a violation of the competence rule must conform to the standards set forth in Florida Standards for Imposing Lawyer Sanctions, Rule 4.5 Lack of Competence, sections 4.52 (suspension), 4.53 (public reprimand) and 4.54 (admonishment).

The Referee has found no competence violations for Poole, a premises liability cause of action, and for Polk, also a premises liability cause of action. In addition, the Referee specifically found Attorney Solomon was competent in the first Breen interlocutory venue appeal. Breen is also a premises liability cause of action. Therefore, the Referee has specifically found, in three (3) separate and unrelated counts and underlying premises liability cases (Poole, Polk and Breen) that Attorney Solomon was competent to "engage in an area of practice" (please see suspension Rule 4.52) referred to as premises liability causes of action, The Referee has also specifically therefore found, that Attorney Solomon was not "negligent in determing whether the lawyer is competent to handle a legal matter" where the legal matter involved what are referred to as premises liability causes of action. (Please see admonishment Rule 4.54). Even more specifically, the Referee pointedly and specifically found that Attorney Solomon in the first Breen interlocutory venue appeal to be (1) competent to "engage in an [that] area of practice" (please see suspension Rule 4.52) and (2) not "negligent in determining whether the lawyer is competent to handle a [interlocutory venue appeals] legal matter" (please see admonishment Rule 4.54).

It is therefore inconsistent for the Referee to find Attorney Solomon competent to "engage in an area of practice" of premises liability in Poole in 1985, Polk in 1993, Breen (up to 1991, but not after 1994), and subsequently become incompetent to "engage in an area of practice [premises liability causes of action]"

for the second Breen interlocutory venue appeal in 1994, and the Fernandes case in 1993. Specifically as to Polk and Fernandes, technically Attorney Solomon became involved in Fernandes on 1/25/93 and Polk approximately five (5) to ten (10) days later. Technically it can be argued that Attorney Solomon was not "competent" to engage in premises liability cases on 1/25/93 for Fernandes, but miraculously became competent to engage in premises liability cases five (5) to ten (10) days later for Polk. Even if one would engage in this distinction of five (5) to ten (10) days of Fernandes preceding Polk, such logic hits a brick wall when faced with the fact that the Referee has found Attorney Solomon competent to "engage in an area of practice" and "in determining whether the lawyer is competent to handle a legal matter" with regard to premises liability causes of action for the two earlier cases of Poole (1985), and the first Breen interlocutory venue appeal (1991). Of course these conclusions are based upon determining that "premises liability causes of action" and "interlocutory venue appeals" may be defined as "areas of practice" for purposes of suspension Rule 4.52, and "legal matters" for purposes of admonishment Rule 4.54. If the reader agrees with the foregoing analysis of the facts as applied to suspension Rule 4.52 and admonishment Rule 4.54, the reader should be questioning where the public reprimand Rule 4.53 fits within this analysis.

Unlike the suspension Rule 4.52 and admonishment Rule 4.54 which each have only one threshhold factor, the public reprimand Rule 4.53 is bifurcated. Therefore, although there is only one way an attorney can be found guilty of a suspension (threshhold issue is "engaging in an area of practice in which the lawyer knowingly lacks competence"), or an admonishment (threshhold issue is "an isolated instance of negligence in determining whether the lawyer is competent to handle a legal matter", there are two (2) ways in which a lawyer can be found guilty of a public reprimand. The two bifurcated threshhold issues to be found

guilty of a public reprimand are when a lawyer either, "(a) demonstrates failure to understand relevant legal doctrines or procedures..." OR "(b) is negligent in determining whether the lawyer is competent to handle a legal matter..." As the reader may have observed, the second ("b") threshhold issue in the bifurcated public reprimand Rule 4.53 is verbatim with part of the admonishment Rule 4.54 threshhold issue. The distinction between the threshhold issue in admonishment Rule 4.54, and public reprimand Rule 4.53(b) is that admonishment Rule 4.54 restricts its threshhold issue to "isolated instances". Nonetheless, if a lawyer cannot be found guilty of an admonishment, it is inconsistent to find the lawyer guilty of a public reprimand under the Rule 4.53(b) section of the public reprimand Rule 4.53.

Therefore, having determined earlier that Attorney Solomon was found by the Referee to be competent "in determining whether the lawyer is competent to handle a [premises liability] legal matter" in Poole in 1985, Breen in 1991, and Polk in 1993, we have therefore likewise determined that Attorney Solomon cannot be found guilty of public reprimand Rule 4.53(b).

Public reprimand Rule 4.53(a) would require this Honorable Court to reverse the Referee's findings in order to find Attorney Solomon not guilty of public reprimand Rule 4.53(a). Public reprimand Rule 4.53(a)'s threshhold issue is when a lawyer, "(a) demonstrates failure to understand relevant legal doctrines or procedures... ". In Fernandes the Referee found Attorney Solomon did not understand the legal doctrines of (1) special damages ("medical expenses") and (2) venue (potential dismissal with prejudice as a result of Defendant's Motion to Transfer). It is respectfully submitted that the Referee erred AS A MATTER OF LAW in finding the Fernandes complaint did not allege any special damages where, (1) the Referee himself found the Fernandes complaint put the Defendants on notice that they were alleged to be responsible for medical bills

of Mrs. Fernandes, and (2) the Fernandes complaint alleged "extensive medical care at Tampa General Hospital" and "permanent injuries". It is also respectfully submitted that the Referee erred AS A MATTER OF LAW in finding the Fernandes complaint potentially was subject to dismissal with prejudice as a result of the Defendant's Motion to Transfer, First of all, every case in Florida where a case was dismissed with prejudice for improper venue, was reversed on appeal. Secondly, the Defendant motioned for a transfer, not a dismissal. It-is respectfully submitted that the record reflects that all record evidence applicable to violation #4 (Fernandes Summary Judgment Hearing) was striken, (please see Referee's sustaining Attorney Solomon's objection at (12/4/96 T-22:3-8, also Tab #5 of Initial Brief). Alternatively, it is argued that Attorney Solomon fully understood relevant legal doctrines and procedures with regard to the necessity for the "sworn" language on an affidavit, as demonstrated by the cured affidavit. It is respectfully submitted that the defective affidavit was not the result of Attorney Solomon's failure to understand relevant legal doctrines and procedures. It is respectfully submitted that the defective affidavit in Fernandes was caused by the difficulty incontacting Client Fernandes reasonably required by her due to her fear of retaliation from her assailant.

With regard to Breen it is respectfully submitted that the Referee erred AS A MATTER OF LAW in finding the untimely second interlocutory appeal in any way caused "protracted litigation" for two reasons: (1) Rule 9.130(f) specifically states that, "during the pendency of a review of a non-final order, the lower tribunal may proceed with all matters...", and (2) Even if it is determined the Breen litigation was delayed by the untimely second interlocutory appeal, such a delay would have only been 39 days from its 7/7/94 filing to 8/16/94 dismissal. A further matter is Attorney Solomon's failure to understand that Rule 1.530 does not toll the time in which to appeal non-final orders. Although the

Referee did not specifically find Attorney Solomon's failure to understand this legal procedure in determining guilt, Attorney Solomon forthrightly and candidly admitted his failure to understand this legal procedure (1.530 rehearing) in response to the Bar's initial informal inquiry.(Bar Trial Exhibit III-aa). Unquestionably, Attorney Solomon has crossed the threshhold in public reprimand Rule 4.53(a) of failing to understand relevant legal doctrines or procedures. However, Rule 4.53(a) requires injury or potential injury to a client by such a failure. The Referee found no such harm. Specifically, the Referee's final words concerned his requirement of harm for a finding of guilt.(12/13/96 T-598:1-3, also Tab #5 page 61). Presumably, the Referee found no harm in the Breen case being tried in Duval County rather than Hillsborough County. Additionally, even if there were such harm, since venue is an interlocutory matter, any such harm could be revisited at the conclusion of the case, if for some reason Duval jurors would be unable to give the Breens a fair trial.

In any other matter where Attorney Solomon failed to understand relevant legal doctrines or procedures, the Referee specifically found no harm based upon competent and substantial evidence in the record. Therefore the second prong of public reprimand Rule 4.53(a) cannot be met unless this Honorable Court reverses the factual findings of the Referee of no harm in any other matters. As the Bar has stipulated to the findings of fact of the Referee, such a reversal of any findings that are stipulated is against the principles of stipulations announced by this Florida Supreme Court in Cunningham v. Standard Guaranty Ins. Co. 630 So.2d 179 (Fla. 1994). Please see Naghtin v. Jones By And Through Jones 680 So.2d 573 (Fla. 1 DCA 1996), Johnson v. Johnson 663 So.2d 663 (Fla. 2 DCA 1995), EGYB, Inc. v. First Union Nat. Bank 630 So.2d 1216 (Fla. 5 DCA 1994).Factual finding reversal is additionally prohibited if substantial competent evidence supports those findings. Florida Bar v. MacMillan 600 So.2d 457 (Fla.1992). Therefore, Attorney Solomon should be found no guilty of any misconduct, no discipline imposed, and this case should be dismissed, as this Honorable Court has done in 1993.(Initial Brief Tab #1).

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS CONCERNING GUILT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, EXCEPTIN BREEN FERNAND S, AND KEENE.

A. The Referee's findings of fact and conclusions concerning guilt in Counts I, II, IV-VI of Case No. 86,914 are supported by competent substantial evidence and the Referee's findings that the Respondent was competent and diligent must be upheld as a matter of law. The Referee's findings in Count III are clearly erroneous and without competent substantial support, and are erroneous as a matter of law, regardless of any testimony. Testimony is not relevant to a question of law.

Poole

[ISSUE 1] The Bar first contends Attorney Solomon was incompetent for improperly referring to a previous trial in front of the jury two times. The Bar first introduces #I-B, but for obvious reasons is not candid with this Court as to what is contained in HI-B, and does not cite #I-B in their brief, even though the Bar cites "two" examples. #I-B is also found at Tab 4, page 1. Judge Padgett denied Attorney Jenkins objection holding the mentioning of a previous trial "won't hurt". This evidence supports the Referee's finding of no guilt. Bar also cites T-37, also at Tab #5 page 1, which is useless because the witness has no independent recollection.

[ISSUE 2] Second reference to a previous trial is as a courtesy to opposing counsel Jenkins for him to locate the statement. #I-D, also Tab #4 page 3. Attorney Jenkins objection again overruled. Transcript citation of T-39, also Tab #5 page 2 is useless because the witness has no independent recollection.

[ISSUE 3] The Bar next contends that merely communicating with an expert sequestered, during lunch is incompetent. #I-E, (Tab #4 page 5) confirms Attorney Solomon communicated with the sequestered expert during lunch, and that Attorney Jenkins objected. Communication is permitted -as long as matters concerning the expert's testimony are not discussed. #I-E is transcript of the objection, and the beginning of voir dire to determine whether improper subjects were discussed.

Again, the Bar intentionally omits Judge Padgetts ruling on this issue they have raised. Unless the Bar proves improper matters were discussed, there is nothing improper in communicating with a sequestered expert during lunch. As the previous two issues and transcript excerpts, the omission of the Judge Padgett's rruling on Attorney Jenkins objection arguably raises questions of the candor of the Bar towards this tribunal. Bar cites T-41-42 (Tab #5:5) in which Attorney Jenkins states his feelings that any communication is improper. This is not the law. The Bar has not established the Referee finding of not guilty on this matter was without competent substantial evidence. (No finding on this mat

[ISSUE 41 #I-F (Tab #4:7), T-45-46 (Tab #5:6-7). Bar alleges expertsppinion was based upon incorrect information supplied by Attorney Solomon. Please see #I-F page 111:8-13 of Poole trial transcript. Attorney Jenkins objects that Attorney Solomon's interrogatories never asked for a safety manual. 111:9. Attorney Solomon responds that two (2) interrogatories, #12 and #41 asked for this information. Again, the Bar provides only Attorney Jenkins objection, and not Judge Padgett's ruling on Attorney Jenkins' objection. Again, the candor of the Bar to this tribunal is properly questioned. In light of the interrogatories #12 and #41, and the absence of Judge Padgett's ruling on this objection, the Bar has not established the Referee's findings of fact and conclusions concerning guilt are clearly erroneous and without competent substantial record support. (No finding on this matter-)

[ISSUE 5] #I-G (Tab 4:14-16), T-49-50 (Tab 5:8-9). Bar alleges incompetence because Attorney Solomon requested Judge Padgett instruct him on impeaching a witness. Please see T-188:25. Attorney Solomon properly started to lay a foundation to impeach, by stating, "I can ask you that right now." Poole was Attorney Solomon's first litigation matter, and he was easily rattled in this new territory. The fact remains Attorney Solomon was following F.S.§90.608(1), (Tab 4:17) even though he was uncertain of himself. Furthermore,

the cited Poole trial transcript appears to have nothing to do with impeaching by documentary evidence. It appears to be involving a ruling the previous day concerning 8 year old records. Again, the Bar has not provided all relevant information ta determine what is transpiring concerning these 8 year old records, therefore the Referee's findings of fact (no finding on this matter) must be upheld.

[ISSUE 63 Bar alleges incompetence because Attorney Solomon asked an improper question on the striking of a potential juror. #I-H, T-51-52(Tab 5:10-11). Also see T-130:18, T-137:6, T:137:11,T-509:21, and T-511:6, especially T-514:21. It is true Attorney Solomon asked an improper question. It is true Judge Padgett ruled mistrial based upon this question. However it is also true that both Judge Padgett and Attorney Solomon testified that at this moment they both were in the "heat" of the moment. T-137:11 (Tab 3:2). It is true that Judge Padgett testified that if he was not in the "heat" of the moment, his was unsure if he would have granted the mistrial.(T-137:6)(Tab 3:2). Judge Padgett testified Attorney Solomon substantially improved Mr. Poole's case. (T-130:18)(Tab 3:1). Judge Padgett was also candid enough with the Referee to admit he was biased about this case.(T-130:4)(Tab 3:1 (line 4)). Eventually Judge Padgett voluntarily recused himself. Furthermore, the Bar has stipulated that it is not alleged that Attorney Solomon's actions resulted in the eventual defense verdict. (T-514:21) (Tab 3:6 (line 21)). It appears therefore that the Bar has stipulated;(please see Cunningham et seq. cited on page 27 re: stipulations) no harm to Poole due to Attorney Solomon's actions. This is consistent with the Referee's finding of no harm to Mr. Poole. A mistake does not equal incompetence. Mistakes in the "heat" of trial are made by lawyers and Judges. This is consistent with the testimony of Justice Karl, the only expert tendered in this proceeding on legal competence and the principles of professional discipline. Justice Karl testified making mistakes does not equate to incompetence and even a litany of insignificant

mistakes, no matter how many there are, will become an accumulation that constitutes incompetence. (T-690:9, T-697:21). Justice Karl properly reads competence Rule 4.5 to require potential or actual damage to clients to sustain a finding of incompetence. Although there was no real damage to the client in Florida Bar v. Littman 612 So.2d 582(Fla. 1993), this Honorable Court did find that Attorney Littman caused his client embarrassment. Although embarrassment is not ordinarily considered legal harm, it is not an experience people enjoy and is arguably a form of transitory harm. In light of the Bar's stipulation of no harm to Mr. Poole, Justice Karl's unrebutted testimony as a legal competence and professional discipline expert, and the litany of what Attorney Solomon did in preparation for this trial as found on page 3 of this brief, there is ample record support for the Referee's finding of no violation of competence with regard to this allegation of the Bar.

[ISSUE 7] The Bar alleges Attorney Solomon's off color humor is incompetence. #I-I, T-58 (Tab 5:12). Poor humor has ho bearing on (1) an area of practice (suspension), nor (2)legal doctrines or procedures (pub1 ic reprimand), nor (3) negligence in determining competence to handle a legal matter (admonishment).

[ISSUE 8] The Bar alleges not providing an Order Setting Trial to Judge Ficanrotta is incompetence. (T-63-69) (Tab 5: 16-23). There is testimony that opposing counsel could not agree on a trial date, and Attorney Solomon promptly scheduled a hearing for Judge Ficarrotta to resolve that matter.(T-65:23)(Tab 5:18 line 23). Counsel unable to agree on a hearing date is not incompetence.

[ISSUE 9] The Bar alleges incompetence for not filing a pleading to inform the DCA a Petition for Certiorari is abandoned.(T-76)(Tab 5:23). It is not incompetent to abandon motions without filing a pleading advising the Court the motion is abandoned. It is a good practice, but if counsel is aware the motion will be dismissed if no action is taken, it is not incompetence to withdraw the motion by written pleading before it is otherwise dismissed.

[ISSUE 10] Similar to issue #9. Recusal motion abandoned therefore never perfected. Never scheduled for hearing. If it were scheduled for hearing, the additional requirements for recusal would have been met.(T-77-81)(Tab 5:24-28).

[ISSUE 111 Bar alleges incompetence for disclosing arbitrators award to Court. Court ruled no harm because Court is not trier of fact and will not decide liability nor damages.(T-530:1-3).

[ISSUE 12] Bar alleges incompetence for objecting to hearsay, articulating incorrect basis.(T-602:23). Bar stipulated to no harm in the Poole trial by Attorney Solomon's actions, therefore by stipulation suspension Rule 4.52 and public reprimand Rule 4.53 cannot apply. Failure to articulate the correct basis for a correct objection has no bearing in "determining competence to handle a legal matter [premises liability cause of action]."

[ISSUE 13] Bar alleges dismissal of Poole's second appeal based upon ATTORNEY JENKINS FAILURE TO FOLLOW APPELLATE PROCEDURE BY UNTIMELY REQUESTING AN ADDITIONAL RECORD, is Attorney Solomon's incompetence. #I-R, Tab 4:18. Please see page 5 of this brief. Factual statements sufficiently state argument. Attorney Jenkins caused the record on appeal to be unavailable to Attorney Solomon. Furthermore, in untimely requesting an additional record from the Court Reporter, the Court Reporter is required to motion for an extension of time with the DCA as per Rule 9.900. Such a motion for extension properly tolls the time in which to serve appellate briefs in the DCA under Rule 9.300.

[ISSUE 14] Bar alleges unspecified errors in third Poole trial are incompetence. Unspecified errors cannot serve as a basis for a finding of guilt, nor reversing a Referee's finding of not guilty. Furthermore, in light of the extensive trial transcripts from the second Poole trial, the complete absence of any transcripts from the third Poole trial are conspicuous by their absence from this record.

Polk

[ISSUE 151 Bar alleges incompetence for filing an incorrect pleading and voluntarily withdrawing in response to a telephone call without any opposing pleadings being filed, nor any Court action required. Please see page 7 of this brief. Tab 5:42-44.)

[ISSUE 16] Bar alleges use of ellipses (. ..) and brackets ([Good morning]) in paraphrasing Order is incompetence. Please see page 8 of this brief. Facts can suffice for argument.

Breen

[ISSUE 171 Bar alleges incompetence, and Referee finds incompetence based upon "protracted litigation" caused by the dismissal of the second Breen interlocutory venue appeal, pending for 39 days. Rule 9.130(f) provides interlocutory appeals in no way delay pending litigation. Referee's finding that a Rule 9.130 interlocutory appeal causes pending litigation to become "protracted", is erroneous as a matter of law, and therefore is without competent substantial record support, and therefore should be reversed. Florida Bar v. MacMillan, supra.

[ISSUE 181 Bar alleges failure to provide indigency affidavit or filing fee with notice of appeal is incompetence. Please see factual discussion of pages 15-16 of this brief under Keene. This allegation &repeated several times in all eight cases. This argument in issue 18 is incorporated by reference verbatim to apply to this issue, where ever it may be raised by the Bar.

[ISSUE 19] Baraalleges incompetence for filing timely motions for extensions of time which are granted by DCA. Likewise, this allegation is repeated several times in all eight cases, The following argument in issue 19 is incorporated by reference verbatim to apply to this issue, where ever raised by Bar. 9.300 authorizes filing timely motions for extensions of time.

[ISSUE 20] Bar alleges incompetence for Attorney Solomon's understanding of the legal doctrines and procedures applicable to venue based upon Judge Whittemore's testimony that Attorney Solomon was incompetent in his knowledge of venue principles, and did not have a "grasp" (T-187:21) of venue principles.

The Referee made no such finding and the following record evidence is competent substantial evidence to support the Referee not finding guilt with regard to Attorney Solomon understanding of venue, based upon Judge Whittemore's opinions. The two (3) items of evidence in this regard are (1) In Poole the premises liability negligence occurred in Polk county, yet because the Defendant had offices in Hillsborough County and many physicians worked in Hillsborough County, Judge Padgett denied Attorney Jenkins Motion to Dismiss. (Poole file believed to have been in evidence at trial), (2) In Breen Attorney Solomon again displayed his understanding of the venue concept that even proper statutory venue need not necessarily be in the county in which the negligence occurred if the defendants have agents in other counties. In addition, in Breen Attorney Solomon displayed his understanding of the venue requirement that sufficient affidavits are required to sustain motions to transfer venue. The resulting DCA opinion in the first Breen appeal drew national legal attention from Lawyers Cooperative Publishers. Please see Attorney Solomon's Trial Exhibit #8, the one page letter from Lawyers Cooperative Publishers requesting Attorney Solomon's pleadings in this matter to be published for the benefit of Florida practicioners. (3) Justice Karl opined (12/9/96 T-227:18- T-228:20) the exact opposite opinion of Judge Whittemore. Justice Karl opined that contrary to Judge Whittemore's assessment that Attorney Solomon has no "grasp" of venue principles, and is incompetent for his approach to venue, Justice Karl believes that Attorney Solomon's conduct with regard to venue is proof of a detailed

and sophisticated understanding of venue concepts. Even contrary to the Referee's finding, and Judge Patterson's testimony, Justice Karl testified that Attorney Solomon's understanding that improper venue will at worst result in transfer rather than dismissal, is proof of review of the caselaw, and a thorough and sophisticated understanding of venue. Justice Karl opined that the casual observer to venue might conclude venue must be where the incident occurred, but Attorney Solomon's understanding that venue may be selected elsewhere without risk of dismissal, is proof of an understanding of venue that "inexperienced lawyers don't quite understand of comprehent". No disrespectto Judge Whittemore is intended, but Judge Whittemore may wish to reconsider his opinion, or at least the stridency of it, and consider the merits of Justice Karl's analysis.

Keene/Burdines

[ISSUE 21] Bar alleges incompetence because Attorney Solomon believes the Sanchez case decides the issue of absences, and not latenesses. The Bar contends Sanchez decides the issue of lateness, not the issue of absence. If determination of whether the issue decided in Sanchez determines competence, clearly either the Bar of Attorney Solomon are incompetent. Sanchez is found at Tab 3:14. Sanchez does cite four (8) cases on lateness, but they are Louisiana, New York, and Pennsylvania cases. Bar alleges incompetence because Attorney Solomon claimed his Keene/Burdines case was one of first impression in Florida on lateness. Attorney Solomon asserted at trial that his position was unrebuttedbby the Bar. The Bar offerred Sanchez to rebut Attorney Solomon's assertion.

Hurst

[ISSUE 221 Bar alleges incompetence because motion to dismiss was denied. Factual statement on pages II-12 of this brief are offered as argument for this issue. Please see Tab #3:16-26.

Finley

[ISSUE 23] Similar to issue 15 in Polk, and issue 22 in Hurst. Motions filed are withdrawn/voluntarily dismisses when Attorney Solomon recognizes the merit of opposing counsel's position, or the motion otherwise is determined as one on which Attorney Solomon likely will not prevail. These determinations were made promptly by Attorney Solomon. Although on occasion Attorney Solomon will not have an opportunity to withdraw/dismiss such motions, (please see issue 9 in Poole, issue 10 in Poole, issue in Hall of Disciplinary Hearing) he tries to do so.

Keene

[ISSUE 24 AND 25] Please see issues 18 and 19 in Breen for indigency affidavits not filed at time of appeal, and timely motions for extension of time that are granted by DCA. Factual statements on page 15-16 incorporated here as argument.

X [illegible]

Fernandes

[ISSUE 26] Bar alleges incompetence because of the manner in which Attorney Solomon handled other motions besides the summary judgment motion, before Judge Bonanno.(T2/4/96 T-20:18)(Tab 5:57 line 18). There were no other motions in Fernandes. Please see Index to Record on Appeal in Initial Brief Tab #7 for verification.

[ISSUE 27] Bar alleges incompetence, and Referee concurs for failure to allege any special damages in Fernandes complaint. Factual statement on page 16-17 of this brief are incorporated here as argument.

In addition, Attorney Solomon notes the substantial change in Judge Patterson's opinion on this issue from his direct examination and his cross examination

once he was shown paragraph 8 of the Fernandes complaint which spefically used the words “medical care” and "permanent injuries”. Judge Patterson's testimony on direct examination was at (12/4/96 T-64:9-10).

> . ..the most fundamental omission is the lack of any allegation as to special damages...

Judge Patterson’s testimony on cross examination at (12/4/96 T-83:13-14)

> I think that could be argued either way. All right?

It is respectfully submitted that Judge Patterson had the candor to recede from his erroneous opinion to some extent, but not enough to admit he simply overlooked the applicable language in the Fernandes complaint. No disrespeet is intended to Judge Patterson. To the contrary, it is a mark of his candor that he receded so significantly from his opinion of cross examination. This line of argument must be brought to the attention of this Honorable Court, because Attorney Solomon’s license to practice law is at stake based upon Judge Patterson overlooking the applicable language in the Fernandes complaint. Perhaps Judge Patterson believed the Referee would be dissuaded from imposing discipline by the radical change in his opin’ion from direct to cross, and significantly, as written in his DCA opinion. If this was Judge Patterson’s intent, it did not come to pass at the Referee level. Judge Patterson’s testimony should properly serve as a cautionary tale to the Judiciary as to the power of their testimony to significantly alter the course of a citizen’s life.

[ISSUES 28 AND 29] Bar alleges incompetence, and Referee concurs, for venue selection and defective affidavit causing need for appeal. As the Bar has not raised any argument in there Answer brief besides conclusory statements

supporting the Referee's findings of guilt on these matters, Attorney Solomon will incorporate here arguments on those subject in the factual section of this brief, and

As alluded to in footnote one on page 19, the Bar has not responded to the argument in the Initial Brief that all record testimony relevant to violation #4 was striken. Please see transcript of Referee's ruling in Initial Brief Tab #I. It is Attorney Solomon's position that the record transcript in Tab #5 establishes that such testimony was striken from this record.

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

[ISSUE] 30 Suspension rule 4.52 and public reprimand rule 4.53 explicitly require actual of potential harm be shown. Although admonishment rule 4.54 does not explicitly require harm, the only case on this subject appear to be Littman. Although Littman's client sustained no significant menetary loss other than an unnecessary visit to the Courthouse (his gasoline and possible parking expense, and depreciation on his vehicle, if he drove his own vehicle), it appears this Honorable Court took into consideration there was an irate client who discharged Littman based upon his performance at this hearing, and refused to pay him, Although not legally monetary "potential or actual" harm, such embarrassment and unnecessary stress is a "non" legal harm considered in arriving at a violation of rule 4.54 in the absence of any appreciable potential or actual monetary/legal harm. In our case, all clients who testified could not be happier with Attorney Solomon, and could not be more disappointed with this disciplinary matter that condemns their lawyer who they hold in such high regard. Please see Initial Brief Tab #15 12/21/96 Fernaades correspondence, and client testimony (12/13/96 T-404-447).

II. The Referee's Finding That the Costs of The Florida Bar are Reasonable and Taxable to Respondent is an abuse of discretion requiring reversal.

[ISSUE 311 There was no evidentiary hearing on costs as required. Regardless of the outcome of these proceedings in the Supreme Court, this cause is properly remanded for such a hearing. Even in the absence of such a hearing, a significant portion of the costs are easily apportionable to findings of guilt and not guilty. Such a breakdown is provided as best as possible in Tab #2, following the Referee's Report. "Total" indicates total charges to be assessed against Attorney Solomon for findings of guilt. This, of course, would change, if the Honorable Court found no guilt on either or both of the two remaining cases, or found additional guilt in any of the other six cases in which there is now no finding of guilt (considering Bar agree Keene violation #2 testimony is striken).

III. The Referee's Recommendation of a Rehabilitative Suspension is completely without competent substantial record support and should be reversed.

In support of this section of their brief, the Bar cites the testimony of four (4) witnesses and the Referee, as follows.

Judge Altenbernd alleging that (1) Ms. Keene was harmed by Attorney Solomon. As this testimony was agree as striken, it is troubling the Bar raises it as support for their position. Full preparation and cross examination did not occur on this issue of harm to Ms. Keene. Notwithstanding the foregoing, Attorney Solomon is compelled to respond as a precautionary measure that (1) Ms. Keene clearly did not want her full medical records disclosed even in camera regarding her abuse as a child. Her affidavit of indigency should serve as proof of her desire to challenge Judge Ward's discovery order, in the absence of her direct testimony, which of course, is what is really required to establish the wishes of Ms. Keene. As the Bar failed to call Ms. Keene,

any speculation as to her wishes cannot properly be a basis for disciplinary measures. Had Attorney Solomon had notice this was to be aniissue at trial, he would have called Ms. Keene, and ellicited her testimony about her wishes and opinions concerning Judge Ward's Order. Since the Bar has failed to present competent substantial evidence on this matter, the speculative testimony of Judge Altenbernd that Ms. Keene's wishes were not followed cannot properly be deemed competent substantial evidence on this subject. Even Judge Altenbernd concedes if Ms. Keene advised she was agreeable to limited disclosure of the abuse to prevent total disclosure of the records this might influence his determination of harm to her.(T340:6-11).

Judge Altenbernd also testified there was harm to the judicial system by the DCA having to sent out their form notices in no more than 10 cases. Back in 1993, stamps still cost 29¢, so even if the DCA sent a notice for each case, this damage to the Judicial system still totals $2.90. If you want to figure the time to stuff 10 envelopes, this could be done in well under five minutes. Any further discussion of this argument is respectfully submitted as unnecessary. .

Judge Ficarrotta testified Attorney Solomon harmed Mr. Poole. (Tab 5:66-69) The Referee found Attorney Solomon did not harm Mr. Poole. Furthermore, the Bar stipulated (T-514:21)(Tab 3:6) Cunningham et seq. on page 27 of this brief, no harm to Mr. Poole. The Referee findings and the Bar's stipulation negate this testimony of Judge Ficarrotta offered in support of the suspension

Referee (12/13/96 T-524:5-22)(Tab 5 page 70). This portion of the transcript reflects the Referee finding that Attorney Solomon undertook to represent "numerous clients...where he. ..knowingly understood that he lacked competence and did indeed cause injury or potential injury to his client..."

The Referee does not specify which clients. However, the present posture of this case is two (2) clients found to have sustained harm or potential harm, Breen, and Fernandes. These are both premises liability causes of action. The Referee found Attorney Solomon competent to undertake the premises liability case of Poole as early as 1985, Breen's first venue appeal in 1991, and Polk's 1993 case. Furthermore, the Referee found Attorney Solomon competent to handle the first Breen venue appeal. Therefore Attorney Solomon is necessarily competent to handle the second Breen venue appeal involving identical issues. The difference between the first and second Breen venue appeals did not involve issues of venue, but issues of-l.530 rehearing. Please recall in preparation for undertaking clients, Attorney Solomon completed a Florida Civil Procedure Course, which made no mention of Rule 1.530.(T-499:20). There simply is no competent substantial support for this finding by the Referee.

The Referee testifies a severe aggravating factor is Attorney Solomon's lack of remorse. There is no competent substantial support for this finding either. The substantial CLE (72 hours in one year--6 years of CLE) including a 12 day trial advocacy course, and evidence course sponsored by NITA. The cessation of pleadings containing all capital letters and abbreviated certificates of service is another concrete indication of Attorney Solomon's remorse and a desire to not "rock the boat". No Court ever required Attorney Solomon to conform to more conventional pleading format. Attorney Solomon did these things in an erroneous belief it would assist the Court by making pleadings shorter, and easier to read. As with the withdraw pleadings, once he was advised otherwise, he voluntarily and immediately took action.

Attorney Somers essentially testified his firm erroneous caused the consortium claim to be dismissed, and thereafter agree to its re-instatement. The non-sequitar conclusion is that it is Attorney Solomon that is incompetent.

Attorney Somers testimony is not competent substantial testimony upon which a suspension should be based. Attorney Somers also testified that at the time of filing suit Attorney Feegel was associated with Attorney Solomon. Once Attorney Feegel withdrew, Attorney Solomon then associated Attorney Elligett. The commentary to the competence Rule 4-1.1 states,

> . ..Competent representation can also be provided through association of a lawyer of established competence in the field in question.

Attorney Somers testified that Attorney Feegel, also a pathologist, has proven expertise in that field.(12/13/96 T-342:1-2)(Tab 5, page 75a).

Judge Whittemore testified that Attorney Solomon is incompetent to practice because of the three matters related on pages 20-21. Those factual statements are herein incorporated as argument. In addition as to requesting Judge Whittemore to use his discretion as to whether he should withdraw, please note that even though Judge Whittemore herein testifies he believes Attorney Solomon incompetent in Lustan, Judge Whittemore insisted he would' preside when Attorney Solomon was to try that case.(12/13/96 T-364:23). Contrary to Judge Whittemore's testimony, there is no prohibition on ore tenus motions. Moreover ore tenus motions do not establish incompetence under the competence rule 4.52 addressing suspensions. Additionally, a Judge has an obligation to conform to Rules of Judicial Conduct requiring him to recuse himself if he believes he should. For Attorney Solomon to remind Judge Whittemore of his Judicial obligations cannot be incompetence deserving suspension under Rule 4.52.

As to Judge Whittemore ruling all medical experts were to testify live, such a ruling is most likely reversible error as an abuse of discretion.

F.R.C.P. explicitly provides that deposition testimony of experts shall be allowed in lieu of live testimony at trial. The Court arguably has discretion in limiting the amount of time of the testimony in a reasonable manner, such as requiring editing, but to outright prohibit deposition testimony of medical experts at trial is respectfully submitted to be reversible error on the part of Judge Whittemore, not an indication of incompetence of Attorney Solomon. Furthermore, the depositions were not in evidence in this disciplinary proceeding to evaluate Attorney Solomon's performance. Even if Judge Whittemore has the discretion to completely abrogate F.R.C.P., any discipline as severe as a suspension should not be supported on Judge Whittemore's speculation concerning depositions he has likely never seen. Even the most minimal discipline should not be based upon speculation. If the Bar had a problem with Attorney Solomon's performance in those depositions, it is their burden to submit them into evidence for examination and review. Rank speculation by Judge Whittemore on the contents of those depositions is not competent substantial record evidence supporting a 91 day suspension. The Bar has not met their burden if they fail to introduce competent substantial evidence to support their allegations.

Finally, the real heart of Judge Whittemore's opinion concerning Attorney Solomon is based upon Attorney Solomon's performance at the 3/12/93 venue hearing. In this regard, Justice Karl's opinions set forth on page 34-35 in issue 20 in the Breen case are incorporated herein.

Since the Fernandes case allegations appear to be primary in our case, the sentiments expressed by Client Fernandes in her 12/21/96 correspondence are respectfully requested to be given particularly special consideration.

Conclusion

For the foregoing reasons it is respectfully requested that this Honorable Court reverse the Referee's findings in Fernandes and Breen AS A MATTER OF LAW, and find Attorney Solomon not guilty of any misconduct, and remand this case

for an evidentiary hearing on costs. (If for some reason Keene testimony is deemed not to have been striken, it is respectfully requested this conclusion concerning guilt be found not to be supported by competent substantial evidence in the absence of testimony by Ms. Keene as to her wishes,)

Certificate of Service

I certify a true copy of the foregoing was furnished by U.S. Mail to: JOSEPH A. CORSMEIER, ESQ., Tampa Airport Marriott Hotel # C-49, Tampa, FL 33607; DONALD A. SMITH, JR., ESQ., 109 North Brush Street # 150, Tampa, FL 33602 this 30th day of September, 1997.

Respectfully submitted by:

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