097

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

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SID J. WHITE
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Chief Deputy Clerk

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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.

AMENDED INITIAL BRIEF OF APPELLANT

Respectfully submitted by: David Solomon

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STATEMENT OF THE CASE AND FACTS

Respondent has represented clients pro bono who have been declared indigent by the courts and could not find any other lawyer to represent them. (T-627:4;494:2-495:6). Indeed, of the three (3) clients' cases for review by this Court, two of them were declared indigent, Fernandes, Keene, and Keene was pro bono. Many indigent clients are difficult to locate in time to file necessary documents without motioning for extensions of time. (T-629). Indeed, the Second District Court of Appeal issued an Order to Show Cause in the Keene case due to Respondent's inability to locate Ms. Keene in time to execute and file an affidavit. Likewise, the Second District Court of Appeal attributed the trial court's dismissal of the Fernandes case via summary judgment to the Respondent's inability to locate Ms. Fernandes in time to execute and file a cured affidavit before the original summary judgment hearing.

The Clerk of the Second District Court of Appeal informally requested that the Respondent file affidavits of indigency with the notice of appeal or shortly thereafter so the Second DCA would not have to send out their form order requesting the affidavit of indigency or filing fee. (T-593). Respondent immediately and willingly complied with this informal request to the best of his ability.(T-592:24-593:9). In the three following appeals filed by the Respondent, Mottne, Breen, and Anthony, the affidavit was filed before the notice of appeal (Mottne), eight (8) days after the notice of appeal (Anthony), and the Second District's form notice was mailed only six (6) days after the filing of the notice of appeal in Breen.(4/29/96 Bar Motion, also Tab #11).

The inability of the Respondent to locate Ms. Keene in time to execute and file her affidavit of indigency resulted in a show cause order, and also

resulted in the Second DCA going back and pulling all of the Respondent's files for the previous two and one half years, (T-317:23-25). This resulted in the opinion of Keene v. Nudera, 661 So.2d 40 (Fla.App. 2 DCA 1995). This opinion was mailed to the Florida Bar with no request for action, and no statement one way or the other.(T-346:4-14). Following the mailing of the opinion to the Florida Bar, a man by the name of Joseph McFadden of the Florida Bar came and wanted to look at some of the files.(T-347:24). The Florida Bar thereafter looked at closed and pending files.(T-348:2).

The resulting two hundred seventeen (217) paragraphs in fifty-five (55) pages of complaints, contained four categories of alleged violations of the competence rule and of the diligence rule, to wit: (1) Respondent did not file an affidavit of indigency or filing fee with notice of appeals in eight (8) appeals, (2) Respondent timely filed motions for extension of time which were granted, (3) Respondent's pleadings contained all capital letters, and (4) Respondent's pleadings contained an abbreviated certificate of service.

On 6/25/93 the Florida Bar filed an earlier complaint containing twenty-eight (28) paragraphs in five pages, also alleging a violation of the competence rule. One of the cases in the earlier complaint was re-litigated in the later complaint. All of these four categories of alleged violations of the competence rule and diligence rule had also been present in the earlier disciplinary proceeding. The Referee in the earlier disciplinary proceeding found,

> . ..Respondent's carelessness and errors, do not establish clear and convincing evidence of incompetence...

This previous Report of Referee was filed with the Respondent's motion to dismiss and strike various paragraphs on the grounds of res judicata and collateral estoppel. The motion was denied as to all matters except the capital letters. (Please see Tab #1).

After hearing testimony in the eight (8) cases, the Referee found the Respondent to be not guily of any violations whatsoever of the competence rule nor the diligence rule for fully five (5) of the total of the eight (8) cases. In the Fernandes case the Referee found that the Respondent was guilty of three (3) separate and distinct violations of the competence rule. In the Keene case, the Referee found the Respondent to be guilty of only one (I) violation of the competence rule. In the Breen case the Referee found the Respondent to be guilty of only one (1) distinct violation that encompassed both the competence rule and the diligence rule. For the convenience of this Honorable Court, excerpts from the Referee's Report containing the Referee's findings of the five (5) distinct violations, hereinafter designated and referred to as violations one (1) through five (5), are found at Tab #2 of this brief. The specifics of the five (5) violations found by the Referee are as follows.

Violation #1 in the Breen case was the harm ("protracted litigation"/delay) the Respondent allegedly caused by staying the proceedings by the untimely filing of a Rule 9.130(f) interlocutory venue appeal. Please see Tabs #12-#13.

Violation #2 in the Keene case was the harm ("such practice was prejudicial to his client") the Respondent allegedly caused by the "unnecessarily explicit language" he used in the Petition for Writ of Certiorari and in the Motion for Rehearing, to describe the client's 'sexual assault as a child. These two (2) motions were filed at the direction of the client (T-594:13-14, T-595:24-T-596:2) to protect the client from being compelled to comply with the trial court's discovery order to disclose in camera via her medical records, the "full extent" (T-594:13) of that sexual assault. The client contended that medical records from her sexualassault medical providers were privileged by statute from disclosure, and additionally were irrelevant to her claim for neck and back injuries where she had not alleged emotional distress in her complaint. (Please see Petition for Writ of Certiorari and Motion for Rehearing, also found at Tab #11 of this brief). Please see Tabs #10-#11.

Violation #3 in the Fernandes case was the potential harm in a potential dismissal, effectively with prejudice, of the client's complaint for being filed in a venue that was not one of the three (3) statutory alternatives of F.S.§47.011 on the final day of the statute of limitations -- the day the client first contacted the Respondent. Please see relevant documents at Tab #8.

. Violation #4 in the Fernandes case was the harm ("delay and...harm in timely litigating") that the Respondent allegedly caused to the client's case by the passage of time/delay necessary to reverse an error of the trial court by successfully prevailing on appeal. The Referee found that the Respondent had "clearly contributed to the confusion surrounding the [trial court's] entry of the summary judgment", by the Respondent's inability to locate his indigent client before the original summary judgment hearing for her to timely execute and file her cured affidavit to oppose the summary judgment motion. The Referee's finding concurred with Judge Patterson's finding in the appellate opinion of Fernandes v. Boisvert, 659 So.2d 412 (Fla.App. 2 DCA 1995) that the original defective affidavit was in "disarray" which "clearly contributed to the confusion surrounding the entry of the summary judgment..." Please see Tab #3 of this brief containing (1) the cured affidavit, (2) the defective affidavit, (3) the original complaint. Please also see Tab #6 of this brief containing (1) the transcript of the summary judgment rehearing, (2) the Order Granting Summary Judgment, (3) the Order Denying Plaintiff's Motion for Reconsideration. Please also see Tab#7 of this brief containing the Index to the Record on Appea 1. Please see relevant documents at Tabs #3-#7, and #14.

Violation #5 in the Fernandes case was the potential harm if the client was precluded from the recovery of any special damages in her action allegedly because the Respondent (1) faiied to plead any special damages in the complaint, and (2) failing to immediately seek an amendment after Judge Patterson suggested the need for an amended complaint in his opinion in Ferandes v. Boisvert. Please see relevant documents at Tab #9.

Former Supreme Court of Florida Justice Frederick B. Karl testified that is was his opinion that the Respondent did not violate any ethical rules concerning competence nor diligence. Former Justice Karl also noted that while he was serving as a Justice on the Supreme Court of Florida, he was the Chairman of the Disciplinary Rules Committee, better known as the Karl Commission, which in effect rewrote the Rules Regulating the Florida Bar. (T-679:6-11).

The present Chair of the Florida Bar Appellate Practice and Advocacy Section Raymond T. Elligett, Jr., Esq., testified that it was his opinion that the Respondent did not violate any ethical rules concerning competence nor diligence. (T-450:15-18).

Seven (7) clients, including Ms. Fernandes, testified to their satisfaction with the legal services and compassion provided by the Respondent. Six (6) of the seven (7) clients, including Ms. Fernandes, testified that they had searched but were unable to locate any other attorney willing to undertake representation of their causes. The seventh (7th) of the seven clients testifying was a pro bono matter, Ms. Diamond. Three (3) of the seven (7) were clients involved in the eight (8) cases before the Referee. All three (3) testified that they searched but were unable to locate any other attorney willing to undertake representation of their causes, to wit: Ms. Fernandes, Mrs. Flynn, Mr. Poole. Please see the relatively brief transcriptions of the testimony of six (6) of the (7) clients on Friday, December 13, 1996, at T-404-445. Ms. Fernandes' testimony was nine (9) days earlier on 12/4/96.

After all questions were concluded by all of the three (3) attorneys questioning Judge Altenbernd, Judge Altenbernd felt compelled to add the following opinion he had formed of the Respondent, (T-354:7-21),

MR. CORSMEIER: No further questions, Your Honor.
THE REFEREE: Anything else, Mr. Smith?
MR. SMITH: No, sir.
THE REFEREE: Mr. Greenberg?
MR. GREENBERG: No.
THE REFEREE: Thank you very much.
THE WITNESS: I'd like to be very clear and for you to know that I don't think he's done anything malicious. And I don't think there's any ill-will on his part to the Court.

And he's represented some people who needed a lawyer. I don't think that should be overlooked.

THE REFEREE: Thank you very much.
MR. SMITH: Thank you, Judge.
(The witness was excused.)

Respondent's Exhibit #8 is a 3/17/correspondence from the Lawyers Cooperative Publishing company requesting the Respondent to mail to them his pleadings from the case of Breen v. Huntley Jiffy Stores, Inc., 610 So.2d 29 (Fla.App. 2 DCA 1992) for possible publishing as forms sold to Florida lawyers for their use with regard to venue issues. For the convenience of this Honorable Court, this correspondence is also to be found at Tab #12 of this brief.

Hillsborough County Circuit Court Judge James D. Whittemore testified that he was the Judge presiding over the Breen case. Judge Whittemore testified that he had formed an opinion as a result of his presiding over the Breen case that the Respondent simply did not have a grasp of the legal issues concerning venue, which were the issues for his consideration in the Breen case. (T-187:20-21). Please note that Judge Gonzalez presided in Breen v. Huntley Jiffy Stores, Inc., and upon his retirement, Judge Whittemore then presided. Judge Whittemore was aware the the Respondent reversed an error of Judge Gonzalez concerning venue issues by successfully prevailing on appeal. This fact was considered by Judge Whittemore before rendering the above opinion.

Second District Court of Appeal Judge Chris W. Altenbernd's testimony concerning any sexual abuse matters in violation #2 in the Keene case was

striken as irrelevant, however, Judge Altenbernd did testify that it was his opinion that if there was evidence that Ms. Keene was agreeable to or knowledgeable of the limited disclosure of her personal matters versus total disclosure of her records, that might influence any potential harm that may have resulted to her. (T-324-332, T-340:4-11). For the convenience of this Honorable Court, this transcript excerpt is also to be found at Tab #10 of this brief.

Second District Court of Appeal Judge David F. Patterson testified as to violation #5 in the Fernandes case that: (1) the Respondent did not allege any special damages in the original complaint (T-9:20; T-9:24- T-10:3); (2) that the Respondent did allege special damages in the original complaint (T-28:2-5); (3) the Respondent 'did not allege any special damages in the original complaint (T-28:9-16); and concluded that (4) maybe the Respondent did allege special damages in the original complaint. (T-28:23-T-29:4). For the convenience of this Honorable Court please find at Tab #9 of this brief, (1) Judge Patterson's above referenced testimony on Rule 1.120(g) special damages, (2) Defendant Boisvert's Motion to Amend Affirmative Defenses, (3) Order on Defendant's Motion for Leave to Amend,*(4) Plaintiff's Amended Complaint and Request for Jury Trial* (subject to contemporaneously filed motion to file).

Hillsborough County Circuit Judge Robert H. Bonanno and Judge Patterson testified as to violation #4 in the Fernandes case concerning the Respondent reversing Judge Bonanno on an appeal in which Judge Patterson authored the DCA Opinion. For the convenience of this Honorable Court, the trial transcripts and documents that are relevant to this violation #4 are found at Tab#3 through Tab#7 of this brief, and Tab #14 of this brief. Fernandes v.

Boisvert remains a pending case in the Circuit Court for Pinellas County. The entire court file was admitted into evidence for consideration by the Referee at the Final Hearing of this matter for purposes of violations #3-#5 in the Fernandes case. Fernandes v. Boisvert is an active case, therefore, although the Referee had the benefit of the entire court file at the Final Hearing of this matter, the entire court file remains in the custody of the Clerk of the Circuit Court for Pinellas County, and is therefore not included in the Supreme Court of Florida file in Tallahassee concerning this disciplinary matter.

Judge Bonanno testified as to violation #4 in the Fernandes case concerning the original defective affidavit described by Referee and Judge Patterson as being in "disarray", and as to the amended cured affidavit upon which Judge Patterson reversed Judge Bonanno. Judge Bonanno testified no fewer than twenty-two (22) times that he had no independent recollection and could not remember whether he considered the cured affidavit or whether he did not consider the cured affidavit. Again, for the convenience of this Honorable Court, the testimony of Judge Bonanno referenced in the preceding sentence is found at T-17-19 of his testimony on 12/4/96, and is also to be found at Tab #4 of this brief.

Judge Bonanno throughout the course of his testimony on violation #4 in the Fernandes case repeatedly acknowledged that his Order granting summary judgment was reversed. Even while repeatedly acknowledging on the witness stand that his Order granting summary judgment was reversed by Judge Patterson, Judge Bonanno testified that he cannot recall whether at the time of the original summary judgment hearing that he granted the Defendant3 motion for summary judgment-because: (1) the Plaintiff's original

admittedly defective affidavit was not competent proof to be considered to rebut the Defendant's affidavit, or alternatively, that (2) even with a cured affidavit that the summary judgment was still appropriate because the Plaintiff's complaint would be unable to state a cause of action sufficient to withstand a motion to dismiss; (T-17:25-18:3, T-24:7-T-27:6). For the convenience of this Honorable Court, this transcript excerpt is also found at Tab #4 of this brief.

Judge Patterson's written opinion in Fernandes v. Boisvert at page 413 that, "Upon rehearing, the trial court declined to consider this [cured] affidavit and denied the motion." could only have been based upon the following three (3) documents in the record on appeal: (1) the transcript of the rehearing, (2) the Order Granting Summary Judgment, and (3) the Order Denying Plaintiff's Request for Reconsideration. For the convenience of this Honorable Court, these three documents are found at Tab #6 of this brief. Judge Patterson testified consistently with his written opinion that the reason Judge Bonanno erroneously granted the summary judgment was that Judge Bonanno erroneously declined to consider the cured affidavit on rehearing.

Judge Patterson also testified as to violation #3 in the Fernandes case concerning venue issues raised by F.S.§47.011, F.R.C.P Rule 1.140(b)(3), and F.R.C.P. Rule 1.060(b). Judge Patterson testified that because the Fernandes complaint was not filed in one (1) of the three (3) venue alternatives of F.S.§47.011 on the final day of the statute of limitations that it would not have been reversible error for the trial court to dismiss the complaint with prejudice, although the better practice is for the trial court to treat a Rule 1.140(b)(3) improper venue defense as a motion to transfer rather than a

motion to dismiss. (T-35:18-22). Judge Patterson testified that the caselaw would support a dismissal with prejudice but did not cite any such case. (T-35:18-22). The date of Judge Patterson's oral testimony was 12/4/96.

On 12/13/96 , the Referee was advised of the fact that (1) Judge Patterson had authored the recent opinion of King v. Pearlstein, 592 So.2d 1176 (Fla.App. 2 DCA 1992) expressing in footnote 2 on page 1177 of that opinion in writing, the exact opposite opinion he expressed in his oral testimony, (2) Judge Patterson nor the Bar cited any such caselaw supporting a dismissal with prejudice, and (3) there exists no such case in Florida and if that were the result had this case not already been transferred, it would have been the first time such a dismissal would have been upheld on appeal. (T-375:8-11; T-379-380). For the convenience of this Honorable Court, at Tab #8 please find (1) the transcript (T-35-36) of Judge Patterson testifying that dismissal with prejudice to refile because of the statute of limitations may not be reversible error under the caselaw, (2) page 1177 of Judge Patterson's, King v. Pearlstein containing footnote #2 which expressing in writing an opinion contrary to the oral opinion expressed at trial, (3) 3/12/96 Notice of Hearing to Transfer Venue on complaint filed three (3) years and three (3) months earlier on 1/25/93, (4) 3/15/96 Order Transferring Venue.

To oppose the Respondent's arguments, the Bar cited to the Referee Gross v. Franklin, 387 So.2d 1046 (Fla.App. 3 DCA 1980). (T-378:7). The Bar did not read the case into the record, however, in concluding on the interrelationship of Rule 1.140(b)(3) and Rule 1.060(b)(2), starting at the very bottom of page 1048, Gross v. Franklin holds,

> Thus, Rule 1.060(b) merely vests authority in the court to transfer when a timely Rule 1.140 motion challenging venue [emphasis added] is made. Since transter, not dismissal is the favored remedy for improper venue, James A. Knowles, Inc. v. Imperial Lumber Company, 238 So.2d 487 (Fla.2d DCA 1970); [the other case cited by the Bar in opposition to the Respondent. Other citations omitted]...a Rule 1.140 motion to dismiss Csicl is, in effect, a motion to transfer.

The Referee's Report was executed on Thursday, January 2, 1997, including the assessment of costs against the Respondent without a hearing, in the amount of $10,173.33 as incurred by the Bar for the prosecution of the Respondent in all eight (8) cases.

On Monday, January 6, 1997, the final day of the Referee's lengthy career on the bench, at the rehearing, the Respondent objected that (1) violations #1-#4 were not charged in the two hundred seventeen (217) paragraphs contained in the fifty-five (55) pages of complaints, (2) costs properly should not be assessed without a hearing, and (3) as Respondent was found not guilty by the Referee of two hundred sixteen (216) of the two hundred seventeen (217) paragraphs contained in the fifty-five (55) pages of complaints, the the apportionment of costs was the fairer and more just remedy, if indeed, any guilt was to be assessed against the Respondent.

On 12/13/96 in the "guilt phase" of the proceedings, Judge Whittemore testified that the Respondent is very polite, never indignant, almost polite to a fault, because he does respect the Judge and the system and he tries to be very professional and polite with the Judge and staff.(T-371:9-12).

On 12/4/96 Judge Bonanno testified that he doesn't feel comfortable testifying against the competence of the Respondent because it is Judge

Bonanno's opinion that the Respondent is a very fine person who has always been very courteous and very cooperative with the Court in all of Judge Bonanno's dealings with the Respondent.(T-55:21-24).

Judge Altenbernd's unsolicited opinion of the Respondent which he felt compelled to add after all questioning was absolutely concluded, that' it should not be overlooked that the Respondent has represented some people who needed a lawyer (T-354:7-21) is also found at page six (6) of this brief.

Ms. Fernandes testified that she graduated from Bible seminary school, (T-5:15-16), attended seminary school for two and a half years, (T-5:19), and has significant religious backround and training. (T-5:20-22). She testified that when she dated Mr. Loving, she was not aware that he was a convicted felon who had spent four years in jail and had six or seven misdemeanors.(T-9:2-4). Ms. Fernandes testified that she had a backround in claims as she had been employed by Allstate Claims for four and one half (4%) years. (T-7: 16-17). She also testified that she had contacted at least a half a dozen attorneys who had declined to undertake representation of her cause.(T-7:4). Ms. Fernandes then expressed the following opinion concerning the' Respondent, (T-7:20-25),

> In talking to the other attorneys, which I had talked to several of them, they weren't looking for a difficult case. They were looking for, basically, in my opinion, cases that were easy. They didn't want to help the underdog out where -- you know, really have cases that they really had to work hard at.

Ms. Fernandes first contacted the Respondent with only several hours remaining until the statute of limitations was to expire on her cause. (T-7:7-8).

The Respondent caused Ms. Fernandes' complaint to be filed and date stamped six (6) minutes before the courts would close for the day, to wit: Ms. Fernandes' complaint was date stamped 4:54 P.M. Seven (7) more minutes could have placed Ms. Fernandes' claim beyond the statute of limitation.

The Respondent timely filed his Petition for Review of the Report of Referee and the Bar timely cross petitioned.

The Referee recommended that the Respondent be suspended from the practice of law indefinitely, subject to further proceedings no sooner than ninety-one (91) days from the effective date of the suspension, which proceedings will then d&ermine whether the Respondent was able to sufficiently rehabilitate himself to be permitted to return to the practice of law.

SUMMARY OF ARGUMENT

A constitutional issue is presented in the violations #1-#4 were uncharged in the complaint. The U.S. Supreme Court's Roth requires allegations bearing on one's ability to earn a living be charged in a complaint.

Procedurally, all evidence as to violations #2 and #4 were striken, therefore there is no competent proof in the record to support these violations, regardless of whether they appear in the complaint.

Violations #1, #3, and #5 have stipulated facts and are questions of law which the Referee misapprehended, to wit: Rule 9.130(f) provides an interlocutory appeal does not stay a proceeding as does a final appeal (Referee held 9.130(f) stays proceedings); Rule 1.140(b)(3) and 1.060(b) as'applied by caselaw always has resulted in transfer and never dismissal with prejudice (Referee held there is potential for dismissal with prejudice); Rule 1.945, 1.946, 1.949, 1.951 list medical care and permanent injuries as special damages. The Referee found Respondent alleged medical expenses and permanent injuries, but found these not to allege special damages.

ARGUMENT WITH REGARD TO EACH ISSUE

I. Constitutional Issue: Whether the Referee deprived-the Respondent of his Fifth and Fourteenth Amendment liberty interests that are guaranteed by 92 S.Ct. 2701(1972) by finding the Respondent guilty of violations #1-#4 that were not charged in any of the paragraphs of the complaints?

The Florida Bar, by repeatedly citing the Florida Supreme Court case of Florida Bar v. Stillman, 401 So.2d 1306(Fla.1981) appears to concede that violations #1-#4 were not charged against the Kespondent in any of the paragraphs of the complaints. Stillman held that uncharged information that appears nowhere in the complaint is competent proof to support a Referee's findings as to discipline, but not as to guilt. In Stillman, the Referee did,

> ...include information not charged in the Florida Bar's complaint. Evidence of unethical conduct, not squarely within the scope of the Bar's accusations, is admissible...because it is relevant to...the respondent's fitness to practice law and thus relevant to the discipline to be imposed. [emphasis added].

An analysis of the above cited U.S. Supreme Court case of Roth, which conflicts with the holding in the Florida Supreme Court case of Stillman, and seven (7) subsequent cases citing and expanding on Stillman will follow. Three (3) of the seven (7) cases citing Stillman have expanded the above rule of law first stated in Stillman to allow uncharged information appearing nowhere in the complaint to be upheld as competent proof to support a Referee's findings as to guilt, in addition to discipline.

In Roth, the U.S. Supreme Court held that an untenured university instructor's Fifth and Fourteenth Amendment liberty interests were not deprived by the non-

renewal of his employment contract without stating the reasons for the non-renewal, and holding a hearing on the sufficiency of the reasons for non-renewal of an untenured university instructor's employment contract. In reaching this decision, Roth did hold that if state action results in charges that damage one's ability to earn a living, that all of the procedural protections of the U.S. Constitution's Fifth and Fourteenth Amendmenkrequired in criminal proceedings are under those circumstances required in such civil proceedings, to wit: notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge. Please see Cole v. State of Arkansas, 68 S.Ct. 499(1948).

In Cole labor protesters were charged with $2 of a state statute which prohibited unlawful assembly, but convicted of §1 of the same statute which prohibited unlawful use of force and violence. The U.S. Supreme Court reversed the conviction because the accused were not convicted of the offense charged in the complaint.

Roth extends the procedural Fifth and Fourteenth Amendment protections for criminally accused to those civilly accused if and only if the conviction of such civil charges will damage one's ability to earn a living. Roth reached this conclusion by defining the Fifth and Fourteenth Amendment liberty interest of impairing one's ability to earn a living as the equivalent of being imprisoned. Roth at page 2707 states, that the Fifth and Fourteenth Amendment's liberty interest is,

> ...not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life...

Stillman's seven (7) progeny listed chronologically are Florida Bar v. Lancaster, 448 So.2d 1019(Fla.1984)(nolo contendre plea only evidence of guilt), Florida Bar v. Kent, 484 So.2d 1230(Fla.1986)(Respondent pled guilty, uncharged commingling to determine discipline), Florida Bar v. Lipman, 497 So.2d 1165(Fla.1986)(charged and found guilty of counterfeiting and trust violations, uncharged trust violations to determine discipline), The Florida Bar v. Setien, 530 So.2d 298(Fla.1988)(specifics of uncharged information not contained in the opinion, but held uncharged information only to determine discipline), Florida Bar v. Deserio, 529 So.2d 1117(Fla.1988)(uncharged information competent to support guilt, uncharged information consisted of an additional $20,000 trust violation of the same client of a charged $23,500 trust violation), Florida Bar v. Flinn, 575 So.2d 634 (Fla.1991)(uncharged information of false billings to chiropractor as dishonest conduct only to determine discipline), Florida Bar v. Vaughn 608 So.2d 18(Fla.1992)(Respondent found not guilty of three charges, but found guilty of an uncharged violation of not replying nor appearing to the charges of which he was ultimately found not guilty)..

Of the seven (7) current Florida Supreme Court Justices, only Justice Overton was on the Court for Stillman and Lancaster. Justice Shaw was on the Court for Kent (dissent without opinion) and Lipman. Justice Grimes and Justice Kogan were on the Court for Setien, Deserio, and Flinn (Justice Shaw recused). Justice Harding joined the Court in Vaughn.

Stillman involved the Referee considering an existing uncharged felony conviction, and evidence of forgery, for purposes of discipline only.

Of course, Vaughn is the best case for the Bar and the worst case for

the Respondent.

Taking Vaughn to its logical extension, it is no longer necessary to even provide the Respondent with a complaint. Taking Vaughn to its logical extension, all the Bar needs to do is to summon a Respondent to appear for no stated reason. Taking Vaughn to its logical extension, if the Respondent appears, he will then be apprised of the charges and have an opportunity at that time to respond to the charges of which he was first advised when he appeared. Vaughn at page 19 and footnote #1 holds that Vaughn was sufficiently put on notice he was to be tried for not replying nor appearing to the charges of which he was ultimately found not guilty. Vaughn was held to be sufficiently put on notice he was to be tried for uncharged rule violations of not replying nor appearing by paragraph 6 of the complaint which stated he did not reply nor appear, attaching a copy of the return receipt evidencing Vaughn's knowledge of the inquiry.

Vaughn was not fairly noticed he was to be tried for the uncharged rule violation of not replying nor appearing. Paragraph #6 of the complaint appears to be included in the complaint not to apprise Vaughn that he was to be tried for not replying nor appearing, but to establish jurisdiction over his person by proof he had notice of the charges.

There is no reason why a separate complaint was not drafted and served on Vaughn charging him with the rule violation of not replying not appearing.

Due process translated into common language is fairness. In theory and ideally, our laws aim to be drafted with a preference that the guilty go free rather than the innocent are convicted. With no opportunity to prepare an adequate defense, there cannot be any fairness, or "due process".

If this Respondent is found guilty of violations #2 or #4, it is

respectfully submitted to this Honorable Court, that a further extension of Stillman and Vaughn will be necessary as a new principle to establish uncharged evidence striken from the record may establish guilt.

If somehow, this Honorable Court overcomes the procedural barrier of the fact that all evidence of violations #2 and #4 have now been striken from the record, an additional new legal principle will be necessary to establish guilt based upon pure speculation for #2. 'The Ear did not present necessary evidence from Ms. Keene as to hninstructions to her attorney, the Respondent. A creative use of the present rule allowing hearsay in Bar proceedings may accomplish this purpose.

If somehow, this Honorable Court overcomes the procedural barrier of all evidence of violations #2 and #4 having been striken from the record, an additional new legal principle will be necessary to establish guilt, based upon an attorney performing the task for which he was retained, to wit: successfully prevailing on an appeal. This will be an especially difficult task for this Court, as the appellate court had the same record as the trial court. This will be an especially difficult task for this Court because the appellate court reverses the trial court if, and only if, the error of the trial court is preserved in accord with the the applicable statutes, rules, and caselaw.

If this Respondent is found guilty by this Honorable Court of violations #1, #3, or #5, We will'be only one step away from the ultimate breach of fairness or "due process". In violations #1, #3, and #5 the Referee found guilt based upon his erroneous understanding of the law. If this Respondent is found guilty by this Honorable Court of violations #1, #3, or #5, it is the equivalent of being found guilty and punished for following existing law.

Rule 9.130(f) clearly states that an interlocutory appeal does not stay a pending proceeding. To delay or cause protracted litigation by an untimely Rule 9.130(f) interlocutory venue appeal, the Referee necessarily found as a matter of law, that a Rule 9.130(f) interlocutory venue appeal stays a pending proceeding. This addresses violation #1. The Referee misapprehends the law.

Every case in which wrong venue resulted in a dismissal with a bar to refiling due to the statute of limitations, or any other reason, that result was reversed on appeal. That is the law. The Referee in violation #3, as a matter of law, found wrong venue resulting in a dismissal effectively with prejudice will not be reversed on appeal. The Referee misapprehends the law.

The Referee finds in the first sentence of the third paragraph on page eleven (11) of his report, that the property owners in Fernandes v. Boisvert were alleged to be responsible for medical bills at Tampa General Hospital and permanent injuries. Rule 1.945, 1.946, 1.949, and 1.951 are Florida Supreme Court authorized forms alleging medical care and permanent injuries as items of special damages. The Referee in violation #5, as a matter of law, has found alleging medical care and permanent injuries is not a sufficient allegation of special damages. The Referee misapprehends the law.

The last paragraph of the previous page stated that if this Respondent is found guilty and punished for following existing law, we will be only one step away from the ultimate breach of fairness or "due process". The ultimate breach of fairness or "due process" will be where the government will impose a punishment or penalty for following existing law without even the pretext of notice and hearing.

The erosions of our freedoms may be necessary in our increasingly violent world. Hopefully, they will not be eroded to the extent of depriving one of

notice with a fair opportunity to prepare a defense, and an opportunity to be heard, --not by "summary procedure" more correctly referred to as no procedure, before impairing an honest citizens pursuit of an honest method of financially surviving, in that citizen's efforts to earn an honest living.

It is therefore respectfully submitted to this Honorable Court that the principle stated in Roth of fair notice and hearing before impairing one's ability to earn a living, supercede the principles stated in Stillman and extended in Vaughn that favor expedient administration of "justice" over fairer justice, read as (1)written charges and (2) a fair opportunity to heard in a trial of the issues raised by the written charges.

Conclusion as to Constitutional Issue

For the foregoing reasons, the Referee deprived the Respondent of his Fifth and Fourteenth Amendment liberty interests that are protected by Roth, by the Referee finding the Respondent guilty of violations #1-#4 that were not charged, in any paragraphs of the complaints.

II. Procedural Issue: Whether the Referee erred, as a matter of law, in finding the Respondent guilty of violation #2 and violation #4 after the Referee sustained objections and had striken from the record all testimony referring to sexual assault (T-324-332)(Tab #10)(violation #2), and all testimony referring to the Respondent's opposing the motion for summary judgment, (T-11-22)(Tab #5)(violation #4)?

The Referee sustained the Respondent's objections and motions to strike any reference to sexual assault allegations (T-324-332)(Tab #10)(violation #2). The Bar unsuccessfully opposed these objections by arguing that paragraph-#23 clearly placed the document at issue, that document being the motion for

rehearing. The Referee on the record, examined paragraph #23 in response to the Bar's argument, and found that paragraph #23 addressed the Respondent referring to himself as a pipsqueak compared to the power of the DCA. The Referee further found that paragraph #23 contained no references to sexual assault allegations. The Referee found that the Respondent's motion to strike had merit given the limited allegations in paragraphs twenty-three (23) and twenty-four (24), that the Referee found to contain no references to sexual assault allegations. The Bar then stipulated that it is within the Referee's discretion to strike any references to sexual assault from the record. The Referee ruled that any sexual assault allegations appeared to be outside the allegations of the complaint, and therefore sustained the Respondent's motion to strike in its entirety. (T-324-332) (Tab #10).

All references to sexual assault were striken from the record by the Referee. Even allowing the application of Stillman, since the Referee had striken the uncharged matters from the record concerning sexual assault allegations, ipso facto, there exists no evidence in this record charged or uncharged, as competent proof to support an ultimate finding of guilt on matters concerning sexual assault allegations that were striken from the record.

Furthermore, the Bar stipulated that it was within the discretion of the Referee to strike uncharged matters concerning sexual assault allegations from the record in their entirety.

The Referee sustained the Respondent's objections and motions to strike all references to sexual assault allegations from the record. Therefore, any findings and conclusions of the Referee addressing sexual assault allegations have no competent and substantial support in this record.

An application of Florida Bar v. MacMillan, 600 So.2d 457(Fla.1992)

("If findings of the referee are supported by competent, substantial evidence, this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee.") appears to lead to the conclusion, as a matter of law, that the Referee erred by making findings and conclusions addressing sexual assault allegations that were striken from the record in their entirety.

Similarly, the Referee also sustained the Respondent's objections and motions to strike any and all possible competent proof as to the Respondent's opposition to the summary judgment motion.(T-11-22)(Tab #5)(violation #4). Immediately after the Bar inquired of Judge Patterson requesting Judge Patterson's conclusions as to the Respondent's opposition to the summary judgment motion, the Respondent stated on the record his objection that because the Bar had failed to plead and include in their complaint any allegations addressing the Respondent's opposition to the summary judgment motion, (T-12:6), that any attempt, to introduce into evidence any competent proof on that issue was irrelevant.(T-12:11-12). As state earlier, the Bar has stipulated that they agree that the Referee is vested with the discretion to strike from the record in its entirety any allegations that were not charged in writing in specific paragraphs in the complaint. A colloquy then ensues over the following four pages in the transcript resulting in the Referee conditionally overruling the objection subject to renewal of the objection when the Bar's line of questioning becomes more defined, thus allowing the Bar leeway to develop an admissible line of questioning, (T-16:18-19), subject to the Respondent having preserved the opportunity to renew his motion to strike the testimony as irrelevant, as that testimony becomes more defined.(T-16:16-17; T-16:22-24). On the following line in the transcript, the Bar thanks the Referee for such

leeway to develop admissible and competent proof for the record and the Referee's consideration in this matter. On the very next line of the transcript, the Bar again asks the same objectionable question upon which the Referee had just expressed serious relevancy concerns.(T-17:2-5). Again the Respondent vehemently objected. This time the Referee rules and decides to sustain the Respondent's objection to this attempted line of questioning concerning the Respondent's opposition to the summary judgment motion.(T-17:6-11).

The application of Florida Bar v. MacMillan on the previous page to the striking of all uncharged allegations relevant to violation #2 in Keene, is equally applicable and analogous to the argument to be made as to Florida Bar v. MacMillan's application to stiking all uncharged allegations relevant to violation #4. As the repetition of that analysis unnecessarily will burden this Honorable Court, the Respondent with this Honorable Court's indulgence incorporates that analysis by reference, and will move on the the substantive issues.

III. Substantive Issues:

Introductory note: To a large extent an analysis of the substantive issues has already been done in some detail in discussion of the Constitutional Issue , and in the discussion of the Procedural Issue-. Again, as the repetition of those analyses will unnecessarily burden this Honorable Court, the Respondent with this Honorable Court's indulgence incorporates by reference herein the analyses of violations #1-#5 as discussed in the Constitutional Issue , and Procedural Issue sections of this brief. There are several remaining points the Respondent will now discuss with regard to the substantive issues as they apply to violations #I-#5. With this

Honorable Court's indulgence, the Respondent will now discuss the remaining substantive issues as they apply to violations #1-#5 in reverse chronological order, to wit: discussion of violation #5 will be followed by discussion of violation #4, etc.

Violation #5 in the Fernandes case: This is the alleged special damages violation. There is not much remaining to be discussed with regard to violation #5. The Respondent only wishes to emphasize that this was the only violation of the five (5) violations charged in the two-hundred seventeen (217) paragraphs contained in fifty-five (55) of complaints. This rule violation is specifically charged in paragraph number three (3) of the Fernandes amended complaint.

The Respondent also wished to emphasize that in the Referee's findings in the first full sentence of the third paragraph on page eleven (11), that the complaint filed in the Fernandes case charged the Defendants with liability and resulting responsibility for medical bills at Tampa General and permanent injuries. Aside for considerations of Rule 1.945, Rule 1.946, Rule 1.949, and Rule 1.951, the Report of Referee found the Fernandes complaint as a matter of law charged the Defendants with liability for medical expenses and permanent injuries.

To conclude as to violation #5, the Respondent respectfully requests that this Honorable Court note that even within the four (4) suggested Florida Supreme Court forms listed above, there is variation in the wording that lists the items of special damages. Therefore it is a reasonable conclusion that there does exist more than one acceptable way to plead special damages.

To summarize, the Referee misapprehended the law on pleading special damages. As a matter of law, the Respondent has pled special damages. The record evidence on violation #5 is therefore irrelevant to this

Honorable Court's determination of the Respondent's guilt with regard to violation #5. To avoid unnecessary repetition, this argument is equally application to violation #3, and violation #1. In violations #1, #3, and #5 there were no disputed facts. The questions were purely questions of law.

If this Honorable Court upholds the Referee's striking of all references to sexual assault allegations (violation #2) and the Respondent's opposition to the summary judgment motion (violation #4), then this Honorable Court review of the guilt of the Respondent on violations #2 and #4 likewise becomes a question of law. If this Honorable Court upholds the Referee's striking of the evidence as to violation #2 and violation #4, it also becomes irrelevant whether or not any charges were pled in the complaint.

If this Honorable Court upholds the Referee's striking of the evidence application to sexual assault allegations (violation #2) and the Respondent's opposition to the summary judgment motion (violation #4) then there is no evidence in the record to support any such findings by the Referee. This is true whether the violations #2 and #4 are charged in the complaint or if they are unctiarged in the complaint.

Violation #4: The real problem in both violation #4 and violation #2 was the clients were declared indigent by the court and were difficult to contact. Particularly for violation #4, the Respondent agreed to the wishes of the client as to the method of communication. The client reasonably feared for her life, and was apparently correctly concerned that there may be circumstances in which her attorney may be compelled to disclose her address. (T-111).

Constitutional and procedural barriers aside, the Referee decided two (2) question of fact to reach his finding of harm to the client. These two (2)

questions of facts were (1) Did Judge Bonanno grant the summary judgment motion because he believed that the Plaintiff's complaint would be unable to state a cause of action sufficient to withstand a motion to dismiss, or did Judge Bonanno grant the summary judgment motion because he failed to consider the cured affidavit on rehearing? and (2) Was the Respondent able to contact his client to have her timely execute and file a cured affidavit before the original summary judgment hearing?

As to the first question, Judge Bonanno testified at least twenty-two (22) times he did not recall which of the two reason caused him to grant summary judgment. However, Judge Bonanno, today, is of the opinion that the complaint cannot state a cause of action. This is really the only competent evidence that exists on this point. As a factual matter, Judge Patterson's invention that Judge Bonanno did not consider the cured affidavit is without competent proof in the record to support such an assertion.

The only documents Judge Patterson reviewed in his appellate capacity to reach such a conclusion were the transcript of the rehearing in which Judge Bonanno expresses no reasons why he granted the summary judgment and denied the motion for reconsideration. The original order and order on rehearing likewise state no reasons for the orders. Judge Patterson's conclusion is without any competent or even incompetent record support. It is nothing more than Judge Patterson's independent invention unsupported by the record. To base an indefinite suspension of an attorney on such an unsupported invention is contrary to the earlier principles cited in Florida Bar v. MacMillan.

The second question of fact implicitly decided by the Referee has to do with Rule 1.510(f) on continuances for summary judgments when affidavits are unavailable. Subject to admission by this Court are Rule 1.510(f)

"affidavits" of the reported cases on Rule 1.510(f). The only one that is sworn is for a case in which the continuance was denied. The prevailing practice in the State of Florida, and accepted by the DCA's is to grant a continuance if the party has demonstrated-reasonable diligence in obtaining the affidavits, and denying a continuance if the party has not demonstrated reasonable diligence, regardless of whether the motion is sworn. Furthermore, Rule 1.510(e) allows further affidavits in the discretion of the trial court. This is the same standard as Rule 1.510(f) except (f) appears to require an affidavit.

Notwithstanding the above analysis, it appears the Referee implicitly found that the Respondent should have been able to file the cured affidavit before the original summary judgment hearing as evidenced by his finding that the Respondent apparently had a reasonably quick method to contact the client. If a trial court and/or an appellate court were of the same sentiments, a properly sworn Rule 1.510(f) motion would have been denied anyway.

Notwithstanding the above, it is irrelevant how the Referee decided these questions of fact. The trial court was reversed on appeal on a competently preserved record of the trial court's error. To find the Respondent guilty of violation #4, this Honorable Court must thereby hold every attorney who has ever prevailed on appeal as incompetent.

Moreover, it was the mistake of the client that caused the difficulties. The Respondent was careful to have the cured affidavit verbatim of the defective affidavit to the extent of the allegation of the defective affidavit. To the extent of the first two (2) paragraphs of the defective and cured affidavit differ, is only that the defective affidavit does not have the words "sworn and subscibed before me" and the "Deposes and says" at the beginning.

What the Referee refers to as "delay" in violation #4 does not necessarily mean that the client sustained legal harm. In litigation what the Referee refers to as "delay" occurs frequently for many valid and legally necessary reasons.

Perhaps the very most legally necessary reason for "delay" in litigation, is to engage the appellate process. When a litigant's cause is erroneously dismissed that litigant then properly has a legal right to an appeal, or to engage the appellate process of review. The "delay" necessarily entailed in engaging the appellate process of review is an essential "delay" necessary to preserve the legal rights of the litigant whose cause was erroneously terminated and dismissed by the trial court.

The Referee's finding that Mrs. Fernandes was "harmed" by the "delay" legally necessary to engage the appellate process of review, which in turn reversed the trial court's error, is a clearly erroneous finding by the Referee, as a matter of law.

To uphold this clearly erroneous finding of the Referee is to strip every litigant of their legal right to engage the appellate process of review of an erroneous ruling of the trial court.

The Referee in violation #4 attributed the trial court's erroneous ruling, not upon the trial court itself, but upon the attorney whose legal arguments the trial court erroneously rejected.

The Referee in violation #4 attributed the trial court's erroneous ruling, not upon the trial court itself, but upon the attorney who prevailed at the appellate level by causing the reversal of the trial court's erroneous ruling.

Appellate rules require that the appellate court must review the trial court's allegedly erroneous orders with only record evidence that was, (1) properly before the trial court according to rules of civil procedure, and (2) properly preserved in the record according to rules of appellate procedure.

The appellate court's decision as to whether the trial court committed

reversible error is based only upon the same evidence, or even less evidence, than the trial court should have considered in reaching its decision.

The appellate court in reviewing the trial court's allegedly erroneous ruling in Fernandes v. Boisvert held, based upon the same evidence that was before the trial court, that the trial court had committed reversible error in granting the summary judgment.

The appellate court's stated legal basis upon which the appellate court in Fernandes v. Boisvert reversed the trial court is that the appellate court found that the trial court had failed to consider the timely filed, cured, affidavit on rehearing. Legally, according to Holl v. Talcott, 191 So.2d 40 (Fla. 1966) and Charlonne v. Rosenthal, 642 So.2d 632 (Fla.App. 3 DCA 1994), a trial court legally must consider a timely filed affidavit on rehearing which cures the technical deficiencies of an original technically defective affidavit. The technical deficiencies in the Fernandes affidavit were the inadvertent omission of the technical "sworn and subscribed" language necessary for factual statements to be considered by the trial court as competent record proof.

There is no competent record proof in our record that the Fernandes trial court's failure to consider the cured affidavit on rehearing was the real reason why the trial court granted the summary judgment. If the trial court's failure to consider the cured affidavit on rehearing was the real reason why the trial court granted the summary judgment, this error is properly attributable to the trial court. If the trial court's failure to consider the cured affidavit on rehearing was the real reason why the trial court granted the summary judgment, this error is not fairly attributable to the attorney who properly followed the rules of civil and appellate procedure in preserving the trial court's error for appellate review. If the trial court's failure to consider the cured affidavit on rehearing was the real reason why the trial court granted the summary judgment, this error is not fairly attributable to the attorney who failed to convince the trial court of

the merits of his cause of action.

Fernandes correctly states the applicable law with regard to cured affidavits on rehearing as established in Holl and Charlonne. However, Fernandes finds, without support in the appellate record, that the reason that the trial court granted the summary judgment was because the trial court erroneously did not consider the cured affidavit on rehearing, as the trial court should have done under the law as established in Holl and Charlonne.

In our instant disciplinary proceeding we have additional evidence as to the real reason the trial court in Fernandes granted the summary judgment. This additional evidence is the direct testimony of the trial court explaining to its best recollection its reason for granting the summary judgment in Fernandes. This trial court testimony is evidence that was unavailable to the appellate court in Fernandes.

The Fernandes trial court testified in this disciplinary proceeding that the real reason that the trial court granted the summary judgment in Fernandes was because the trial court found that the Plaintiff in Fernandes would be unable to state a cause of action, even with a cured affidavit. The Fernandes trial court did not agree that the Plaintiff stated a premises liability cause of action by alleging that a property owner has a legal duty to mitigate the dangerous condition of an extended physical assault occurring on its property by calling 911.

The only legally proper conclusion based upon the testimony of the Fernandes trial court in this disciplinary proceeding, explaining its decision to grant the summary judgment, is that the defective and cured affidavits had nothing to do with the trial court's decision to grant the summary judgment.

This is the only legally proper conclusion because in the Fernandes trial court's testimony, the trial court stated that even now knowing that it was reversed by the appellate court, that the trial court still does not agree

with the appellate court that the Plaintiff stated a cause of action. (T-24:15-16; T-25:11-12)(Tab #4).

Either way, neither (1) the failure of the trial court to consider the cured affidavit on rehearing, nor (2) the failure of the trial court to find a cause of action, are errors fairly attributable to the attorney who, (1) properly stated a cause of action, and (2) properly procedurally cured the technical deficiencies of an affidavit on rehearing in conformity with F.R.C.P. and applicable caselaw concerning curing an affidavit's technical deficiencies on rehearing.

The Respondent prevailed on appeal. All of the legal rights of the client that were erroneously terminated by the trial court were restored. If the client in the future ultimately prevails in her pending litigation and is awarded significant compensatory damages, one cannot reasonably argue that the client was "harmed" by the necessary "delay" in restoring her legal rights by exercising her legal right to appellate review. The client exercised her legal right to appellate review to correct an error of the trial court. An attorney's successful exercise of his client's legal right to appellate review cannot support this Referee's finding of incompetence against that attorney for the "delay" in restoring the client's legal rights by exercising her legal right to appellate review.

Assuming arguendo that the trial court granted summary judgment due to the defective affidavit, the defective affidavit was filed because of the client's own error in inadvertently omitting the "sworn and subscribed" language from her affidavit by inadvertently not following her attorney's directions. Furthermore, the reason that the client rather than the attorney drafted the affidavit in the first place, was due to circumstances imposed upon the litigation by the indigent client's unavailability. The indigent client's unavailability was caused by her

indigency coupled with her justified fear of retaliation if she were to reveal her address in the course of the litigation. If Mrs. Fernandes was a wealthy client and not an indigent client, she could afford modern means of communication. If the client was wealth enough to afford modern means of communication, she never would have been unavailable to execute her cured affidavit before the original summary judgment hearing. Holl and Charlonne do.- not require her to file a technically sufficient affidavit before the original summary judgment hearing, as long as she cures any techical deficiencies in her affidavit before rehearing.

The Referee's finding of guilt in violation #4 is founded upon the diff iculty in locating an indigent client to execute an affidavit. The obvious future precaution to avoid any such findings of guilt is for the Respondent to only represent wealthy clients, or certainly to not represent indigent clients.

Unfortunately, the Respondent has been forced as a result of these disciplinary proceedings to accept this distasteful precautionary measure.

Even assuming, arguendo, it was an error of the attorney that caused the trial court to commit reversible error, this is harmless error under Florida Statutes. F.S.§59.041, the harmless error statute, overlooks all errors in litigation unless there is a miscarriage of justice caused by such errors. Errors that do not effect the ultimate outcome of the litigation are held to be harmless errors. In our case, a11 of the client's legal rights were restored because the appellate court reversed the trial court's erroneous order granting summary judgment.

The Referee's finding of actual harm is clearly erroneous. There is no actual harm if all of the client's right were restored because the appellate court reversed the trial court's erroneous order granting summary judgment.

Violation #3: The Referee's finding that because of the filing of the Fernandes case in other than the statutory venue alternatives that the case "might well be subject to dismissal with prejudice" is clearly erroreous as a matter of law. Every written opinion on this subject, without exception, holds that any such dismissal with prejudice is a reversible error that has always been reversed on appeal. Judge Patterson, the only witness supporting the erroneous finding of the Referee, is candid with the Referee in testifying that the caselaw does not support this conclusion. (T-35:18-22)(Tab #8). What Judge Patterson does not tell us is upon what legal basis he reached his conclusion-of a possible dismissal with prejudice.

Furthermore, it is a common misperception that all Rule 1.140(b) "defenses" result in dismissal. Rule 1.140(b) lists seven (7) "defenses". Of these seven (7) listed defenses, arguably only one (I), lack of subject matter jurisdiction, must result in dismissal with prejudice without an opportunity to amend.

Nowhere in Rule 1.140(b) is it stated that these defenses are to be asserted as "Motions to Dismiss". All of these defenses are waivable if not affirmatively asserted.

Gross v. Franklin cited on page 11 of this brief and by the Bar is opposition to the Respondent, is perhaps the best case against the Bar's position and in support of the Respondent's position.

Gross analyzes the interrelationship of Rule 1.140(b)(3) and Rule 1.060. Gross carefully describes the Rule 1.140(b)(3) "defense" as a "motion to challenge venue". Gross carefully designates the Rule 1.140(b)(3) defense as a "motion to challenge venue", and not as it is commonly and erroneously designated as being a "motion to dismiss".

Gross concludes its detailed analysis of this point by holding that the commonly file "Motion to Dismiss" for improper venue, is in effect, "a motion to transfer".

In practice attorneys often file and litigate to conclusion cases in the "improper" venue for the same reasons of practicality and convenience that Fernandes was filed in Hillsborough County, the location of key witnesses.

It is true that the assault in Fernandes occurred in Pinellas County, and that the Defendant in Fernandes resides in Pinellas County. However, extensive and significant medical care occurred in Hillsborough County. The venue rules do not provide for such a practical result absent stipulation of the parties. Another common example of attorneys intentionally filing cases in improper venues frequently occurs when accidents occur in Key West in Monroe County and are routinely filed in Dade County for obvious reasons. Sometimes Defendants assert their venue defense, and sometimes they do not. It is reasonable to conclude that if not for the pointed footnote of Judge Patterson, Fernandes would have been litigated to conclusion in Hillsborough County, where key medical witnesses are located.

Judge Patterson testified (T-36:3-4)(Tab #8) that the potential problem of dismissal with prejudice for improper venue would not have existed if this case were filed in the first year of a four year statute of limitations. This is an incorrect statement on our record. On our record it was three years and three months from the filing of the lawsuit until the order of transfer.

Violation #2: The Referee found that disclosing that the client was abused as a child was "prejudicial to the interest of his client", and that stating the official title to a Florida Statute when arguing that Florida Statute was "prejudicial to the interest of his client". These findings are clearly erroneous as a matter of law.

The reason that the client sought relief from the appellate court with a Petition for Writ of Certiorari was because of her abuse as a child, The

appellate court had to somehow be apprised of this fact. The client could not be expected to go before the appellate court and not disclose to the appellate court the nature of the relief she seeks from the appellate court.

The Bar's criticism of the Respondent in violation #2 is caused because the Respondent made every effort to protect the privacy of the client at both the trial and appellate level.

The difficulty presented in Keene v. Nudera is that in the trial court there is the opportunity to easily communicate information to the trial court orally and off of the record that is not available in the appellate process with the filing of a Petition for Writ of Certiorari. Normally there is no oral communication to the appellate court before pleadings are filed.

Furthermore, a Petition for Writ of Certiorari is a Rule 9.100 original proceeding in which the Petitioner is free to make a new record for the appellate court. If the opposing party ever objected, (which he did not) to the Petitioner disclosing in writing for the first time in her Petition for Writ of Certiorari that she was abused as a child, either, (1) the client could have executed an affidavit stating she was abused as a child, which properly could have been filed with the appellate court, or (2) the Rule 9.200(b)(4) motion that was filed should have been granted to attempt to reconstruct what orally transpired in the trial court. The Respondent did file a motion for a Rule 9.200(b)(4) reconstruction of the record. The trial court's own additional handwritten admonishments to counsel can fairly be read as a red flag to an appellate court of some concern of the trial court that one cannot fully know from a reading of the trial court's order alone.

As to the "explicit language", the only explicit language is the words, "sexual assault" contained in the official title to F.S.§90.5035. The official title to this Florida Statute was stated in the title to the Motion for Rehearing.

For goodness sake, this is the official title to a Florida Statute. The Referee has held that it is incompetent to state the official title to a Florida Statute when arguing that Florida Statute when the official title addresses a distasteful subject such as sexual assault. If this is the standard for defining incompetence then many other Florida attorneys also may be found incompetent under this standard. Prohibiting an attorney from stating the official title to a Florida Statute on a distasteful subject only forces the reviewing court to look up the official titles to Florida Statutes on distasteful subjects.

Furthermore, the approval by the Florida Legislature of the "explicit language" of "Sexual Assault Counselor Victim Privilege" as the official title to a Florida Statute renders the Referee's finding clearly erroneous in holding an attorney incompetent for stating the official title to this Florida Statute when arguing this Florida Statute to an appellate court. There are very strict legal requirements as to what "explicit" language is legally required in official titles to Florida Statutes.

Furthermore, the Referee has based his finding of guilt in violation #2 upon facts not contained in the record. A necessary logical step in finding that disclosure of the client's abuse as a child was "prejudicial to the interests of the client" is that the client objected to the disclosure of her abuse as a child.

There is no record support for this finding. The person best able to testify to this fact is the client. The client did not'testify.

The only competent proof in this record on the client's wishes is the Respondent's testimony that the client authorized a Writ of Certiorari to protect disclosure of her child abuse records in an effort to protect the "full extent" of that abuse that was detailed in those records from being disclosed, even in camera. (T-594:13-14). The client was aware she was being compelled to produce records concerning her child abuse. The client was aware of the Petition for

Writ of Certiorari because she did execute an affidavit for that proceeding.

The client was not called to testify on this subject.

The client's attorney stated under oath that it was his understanding that the client directed him to protect her from being compelled to produce her child abuse records detailing the full extent of that abuse.

The Bar has not met its burden of introducing competent evidence into this record to support a finding by this Referee that the client prohibited disclosure of the fact of her abuse as a child, Disclosure of the fact of her abuse as a child is significantly different than production of the records detailing the "full extent" of that abuse as a child.

The Referees finding is supported by the (striken) testimony of Judge Altenbernd on this subject (T-325:1-6)(Tab #IO). It was Judge Altenbernd's opinion that the Respondent "felt" disclosure of the fact of the abuse was harmful to the client.

Even as to this (stiken) "evidence", it is improper for Judge Altenbernd to testify as to what Judge Altenbernd subjectively believes the Respondent "felt was harmful to his client". The only person properly to testify as to what the Respondent "felt was harmful to his client" would be the Respondent himself.

The Respondent did testify that he was following the directions of his client. This is the only competent evidence on this subject.

Even Judge Altenbernd agrees that if the client agreed to limited disclosure of her personal matters versus total disclosure of her records, that this fact might influence any finding of any potential harm to the client.

In conclusion, the only two people competent to testify concerning the client's wishes are the client and her attorney.

The Bar did not call the client to testify.

The Respondent also did not call the client to testify because the

Respondent had no notice that this was to be an issue in this trial.

The Bar has not met its burden. The Bar did not call the client to testify. Had the Bar given proper notice of this issue in the complaint, the Respondent would have called the client to testify. Had the Bar given proper notice of this issue in the complaint, the Referee would not have striken Judge Altenbernd's testimony on this subject from the record.

Violation #1: The Referee found that the 'second notice of appeal delayed the timely completion of the litigation'. The Referee found "that the interest of the Respondent's client was clearly damaged by the protracted litigation" due to the "delay" caused by the second notice of appeal.

First of all, the total amount of time that the second appeal was pending was only thirty nine (39) days. It was only thirty nine (39) days from the date on which the untimely interlocutory appeal was filed (7/7/94) until it was dismissed sua sponte (8/16/94).

More importantly, the filing of an interlocutory venue appeal does not stay the underlying case. The filing of an interlocutory venue appeal does not stop the underlying case from continuing. The filing of an interlocutory venue appeal does not stop the underlying proceeding from continuing.

Rule 9.130(f) specifically states that during proceedings to review non-final orders the lower tribunal may proceed with all matters, including a trial or final hearing; provided that the lower tribunal may not render a final order disposing of the cause pending such review.

The filing of an interlocutory venue appeal does not stay a proceeding. Discovery may continue. Even a final hearing may be held.

Aside from the "damage" that the Referee found to the client by the thirty nine (39) day pendency of this untimely interlocutory venue appeal, which the Referee described as "protracted litigation", many lawyers have mistakenly

believed that a motion for rehearing will toll the time for an interlocutory appeal, and many lawyers will continue to make this very common mistake. This rule needs to be revised. Please see Wagner v. Bieley, Wagner & Associates, Inc., 263 So.2d 1 (Fla.1972), Blattman v. Williams Island Associates, 592 So.2d 269 (Fla.App. 3 DCA 1991), Richardson v. Watson, 611 So.2d 1254 (Fla.App. 2 DCA 1992), Ramos v. State, 456 So.2d 1297 (Fla.App. 2 DCA 1984); Potucek v. Smeja, 419 So.2d 1192 (Fla.App.2 DCA 1982), Bennett v. Bennett, 645 So.2d 32 (Fla.App. 5 DCA 1994), Adlow, Inc. v. Mauda, Inc., 632 So.2d 714 (Fla.App. 5 DCA 1994), Freeman v. Perdue, 588 So.2d 671 (Fla.App. 5 DCA 1991), Bell v. Geist, 531 So.2d 406 (Fla.App. 5 DCA 1988), Longo v. Longo, 515 So.2d 1013 (Fla.App. 1 DCA 1987), Williams v. Dept. of H.R.S., 468 So.2d 504 (Fla.App. 5 DCA 1985). There are numerous other cases in accord attesting that many attorneys have made this mistake, and will continue to make this mistake until this rule is revised.

As in violation #2, the reason that the Referee was not advised during the trial that, (1) an interlocutory venue appeal does not cause "delay" nor stay the underlying case, and (2) the "delay"/pendency of the interlocutory venue appeal was only thirty nine (39) days, was that the Respondent was not given notice of this issue in the complaint, nor even during the course of the trial.

IV. Discipline to be Imposed:

It is respectfully submitted to this Honorable Supreme Court of Florida that as this Honorable Court found in 1994 in Florida Bar v. Solomon (Tab #1), that this Honorable Court now likewise find that the Respondent be found not guilty of any misconduct and that this case be dismissed.

From 1989-1996 the Florida Supreme Court has published two hundred forty five (245) disciplinary opinions. Of these two hundred forty five (245) opinions, one hundred fifty one (151)(62%) were suspensions/disbarments beyond ninety one (91) days, fourteen (14)(6%) were of ninety one (91) days, forty five (45)(18%)

were suspensions of one (1) to ninety one (91) days, twenty eight (28)(11%) were public reprimands, and seven (7)(3%) were dismissed.

In this seven (7) year period, seven (7) cases were dismissed. That averages out to one (1) dismissal each year. It is respectfully submitted that for 1997 this is the case that should be dismissed.

After compilation and analysis of these two hundred forty five (245) published disciplinary opinions, these opinions overwhelmingly involve attorneys stealing money from their clients and being disbarred. There are four (4) of these two hundred forty five (245) cases relevant to our instant case, to wit: Florida Bar v. Kinney, 606 So.2d 367 (Fla.1992)(attorney missed multiple statutes of limitations resulting in final dismissals of clients' cases, public reprimand found to be appropriate discipline), Florida Bar v. Whitaker, 596 So.2d 672 (Fla. 1992)(attorney missed statute of limitations resulting in final dismissal of client's case and other professional misconduct, public reprimand found to be appropriate discipline), Florida Bar v. Burke, 578 So.2d 1099 (Fla.1991)(substantial trust account irregularities, ninety one (91) day suspension found to be appropriate discipline), Florida Bar v. Littman, 612 So.2d 582 (Fla.1993) (previous discipline involving lack of diligence coupled with present case of failing to advise client of law that client obligated to follow anyway--client embarrassed by being advised of law by court rather than by attorney, private reprimand aggravated to a public reprimand by previous similar disciplinary record).

In Kinney and Whitaker the attorneys' professional misconduct caused the clients' cases to be dismissed with prejudice. In both cases a public reprimand was held to be appropriate discipline, None of the three (3) underlying cases for review in our instant proceeding has been dismissed--the ultimate harm to be suffered by a client. However, the Referee in our case recommended

discipline far more serious than a public reprimand. Our Referee recommended a ninety one (91) day suspension. This is the same discipline that Burke held appropriate for substantial trust account violations. Furthermore, with the advent of the new Bar Policy #15.70, (Tab #15) it is even questionable whether Kinney and Whitaker would even be prosecuted today.

The only case the Bar has cited as authority to justify discipline in our case is Littman. Attorney Littman, as Attorneys Kinney and Whitaker, received a public reprimand. In Littman, there was no actual harm to the client, only what this Honorable Court describes as embarrassment. Attorney Littman failed to advise his client to pay child support even though this was the applicable law. The trial court advised the client to pay this child support and presumably embarrassed Littman's client. This Honorable Court also noted that attorney Littman's client thereafter terminated his services. Not only did Respondent's clients not terminate his services in any of the underlying eight (8) cases, none of these clients even testified against the Respondent, and many of the clients in these underlying cases strongly testified praising the Respondent for his compassion and good work, especially client Fernandes. It is client Fernandes' cases that is the main subject of our instant case.

The only case the Bar cited was the Littman case where attorney Littman received a public reprimand. How did the Referee ever come to recommend a ninety one (91) day suspension based upon Littman?

It is respectfully submitted to this Honorable Court that in our case, (1) the clients were in no way harmed and effusively praised the Respondent, (2) the Referee incorrectly applied the law in finding that the clients were harmed, and therefore his findings are clearly erroneous as a matter of law, and (3) any remotely arguable harm to the Respondent's clients cannot fairly be

compared to the ultimate harm of final dismissal suffered by the clients in Kinney and Whitaker. A public reprimand in our case therefore is not consistent with law.

Florida Standards for Imposing Lawyer Sanctions §4.5, Lack of Competence, and §4.4, Lack of Diligence, recommend an admonishment for little or no injury to a client when a lawyer is negligent in an isolated instance. This appears to be the standard alluded to in Littman.

Even in Littman, if it were not for attorney Littman's similar prior disciplinary record, this Honorable Court stated that an admonishment would have been appropriate discipline. This Honorable Court in Littman found that there must be a similar prior disciplinary record to aggravate a private reprimand for little or no harm to a client, into a public reprimand.

In our case, there is no such similar prior disciplinary record. Therefore, even if this Honorable Court finds there was little or no harm to the Respondent's clients, there is no justification in the rules nor the caselaw (Littman) to aggravate a private reprimand into a public reprimand, as was done in Littman because of his similar prior disciplinary record.

The Florida Standards for Imposing Lawyer Sanctions state a public reprimand is warranted by the rules if there is attorney negligence causing more than "little or no" injury. The caselaw (Kinney, Whitaker) has defined the ultimate harm of a final dismissal as being more than "little or no" injury sufficient to warrant a public reprimand.

In none of our underlying cases were the clients' cases subject to the ultimate harm of a final dismissal. Where a final dismissal of the clients' case does not occur, as in our instant case, a public reprimand is not warranted under the caselaw nor under the rules.

Even if it is argued that Fernandes potentially could have been dismissed for improper venue, the fact remains that Fernandes was not dismissed and is very

much an active and pending case. Kinney involved multiple dismissals, and Whitaker involved additional vio lations besides a dismissal. No matter how one views the caselaw, discipline of a public reprimand in our case is not consistent with the results in Kinney, Whitaker, nor Littman.

Needless to say, discipline of a ninety one (91) day suspension in our case is not consistent with the type of extreme professsional misconduct found in Burke.

Furthermore, the Referee failed to find any of the eight (8) mitigating factors listed in §9.32 of, (1) Respondent's timely good faith effort to rectify the consequences of his acts, (2) Respondent's cooperative attitude toward the proceedings, (3) Respondent's full and free disclosure, (4) Respondent's inexperience in the practice of law at the time of the violations, (5) Respondent's character or reputation, (6) Respondent's interim rehabilitation (well in excess of seventy two (72) hours of CLE in less than one year--over six (6) years of required CLE), (7) the other sanctions imposed upon Respondent (appellate court sanction of published unfavorable opinions and required CLE), (8) Respondent's remorse. The Respondent proved all of the above.

In addition, the fact that the Repondent's clients were declared indigent by the court, and some were undertaken on a pro bono basis, and after diligent search the clients could find no other lawyer to represent them before finding Respondent, is further evidence of mitigation of discipline to be imposed.

In addition, the unanimous testimony that the Respondent is always courteous, acts with professionalism to the court and court staff, and is "polite to a fault" with the Court, is respectfully submitted to be additional factors to be considered in mitigation of any considered discipline, to warrant no more than an admonishment or private reprimand, if any guilt or discipline is to be found.

Costs:

It is respectfully submitted that this case be remanded for a full evidentiary hearing on costs. If this is done, it is respectfully submitted that the likely result is that even if the Respondent is found guilty of all five (5) violations in the three (3) cases, that a reasonable accounting of the costs fairly attributable to each of the eight (8) underlying cases involving both findings of guilt and findings of innocence, will result in the Bar being assessed costs.

Conclusion

Judge Altenbernd's opinion in Keene v. Nudera sparked the Bar's interest in the Respondent. Ms. Keene was declared indigent and her case was furthermore undertaken on a pro bono basis. As a result of Keene, Judge Altenbernd and the Florida Bar undertook perhaps the most extensive investigation of any attorney in this entire country. As a result of this extensive investigation by both the appellate court and the Florida Bar we have (1) these five (5) questionable violations, and (2) Judge Altenbernd's plea to the Referee, and by logical extension to this Honorable Florida Supreme Court, concerning the Respondent.

Judge Altenbernd as a witness adverse to the Respondent emotionally pleaded with the Referee not to overlook that the Respondent has represented people who needed a lawyer.

Judge Altenbernd testified that the Respondent does things differently, but that differently is not necessarily wrong. It is respectfully submitted that Judge Altenbernd is attempting to convey to the Referee and to this Honorable Supreme Court of Florida that in this disciplinary proceeding's hypertechnical procedural arguments concerning finepoints of procedural rules on indigency, affidavits, and other rules, it has been overlooked that the cases that have brought this Respondent before this Honorable Court, were difficult cases,

that no other lawyer would undertake, for indigents, often on a pro bono basis.

It is respectfully submitted to this Honorable Supreme Court of Florida that Judge Altenbernd is attempting to communicate to the Referee and to this Honorable Supreme Court of Florida that a lawyer such as this Respondent, (1) willing to undertake difficult cases, (2) that no other lawyer is willing to undertake, (3) on behalf of indigents, (4) often on a pro bono basis, is a rare lawyer indeed, and is the kind of lawyer the public and the Bar needs, even though he does things differently, and in many respects is imperfect.

For the foregoing reasons it is respectfully submitted that this Honorable Supreme Court of Florida find that the Referee's findings are clearly erroneous as a matter of law, and that the Referee's findings are not supported by competent nor substantial evidence, and therefore find that the Respondent is not to be found guilty of any professional misconduct, or alternatively only of professional misconduct warranting an admonishment.

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 6th day of August, 1997.

Respectfully submitted by:

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Violation#:

INDEX TO TABS

1. 3/10/94 Order Approving Referee's 12/9/93 Report.
   12/9/93 Referee's Report, page 3.

2. Violations #1-#5 excerpted from 1/2/97 Referee's Report.

#4 3. 6/2/93 Cured Affidavit
   5/28/93 Defective Affidavit
   1/25/93 Original Complaint

#4 4. Judge Bonanno's Trial Testimony relevant to him being unable to find a cause of action in the complaint.

#4 5. Judge Patterson's Trial Testimony during which the Referee sustained the Respondent's irrelevancy objection and motion to strike all references to the Respondent's opposition to the summary judgment motion, as being irrelevant evidence because it was uncharged in the Bar's complaint.

#4 6. 10/21/93 Rehearing Transcript.
   10/21/93 Order Denying Plaintiff's Request for Reconsideration.
   6/24/93 Order Granting Summary Judgment.

#4 7. Fernandes v. Boisvert Index to Record on Appeal.

#3 8. 12/4/96 Judge Patterson Trial Testimony that it may not be reversible error to dismiss with prejudice a complaint because of venue in other than the three statutory alternatives.

   King v. Pearlstein, authored by Judge Patterson, where in footnote #2 he expresses the opposite opinion in writing in the Southern Reporter than he did when orally testify against the Respondent.

   2/27/96 Notice of Hearing to Transfer Venue of complaint filed 1/25/93, over three (3) years and three (3) months earlier.

   3/15/96 Order transferring venue.

#5 9. Judge Patterson's conflicting testimony on special damages.
   Defendant's Motion to Amend Affirmative Defenses.
   Order granting leave to amend.
   Amended complaint*

#2 10. Judge Altenbernd's Trial Testimony during which the Referee sustained the Respondent's irrelevancy objection and motion to strike all references to sexual assault allegations, as being irrelevant evidence because it was uncharged in the Bar's complaint.

#2 11. Keene Petition for Writ of Certiorari.
   Keene Motion for Rehearing.
   Appeal Chart.

#1 12. 3/17/92 Lawyers Cooperative Publishing Correspondence.
   Rule 1.060.

Violation#:

#1 13. Rule 9.130(f) and Committee Notes.

#4 14. Rule 1.510
Respondent's Motion for Continuance to Bring Cured Proof before the Court.
"Rule 1.510(f)" motions for continuance of cases in the Southern Reporter in which Rule 1.510(f) was the issue. The only swarn motion was denied and upheld on appeal. The unsworn motion which the trial court denied was reversed on appeal because the movant demonstrated diligence and good cause in his unsworn motion.*

15. Unsolicited correspondence from Elisa Fernandes on 12/21/96.
Unsolicited correspondence from Christine on 12/23/96.
1/10/97, four (4) days after 1/6/96 Rehearing, Board of Governors passage of new Bar policy with regard to prosecuting competence rule violations.*

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*Subject to being admitted on Respondent's contemporaneous motion.