IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL H. WEISSER

Respondent.

_____/

Supreme Court Case
No. 87,035

Michael H. Weisser's Initial Brief

On Petition for Review

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STATEMENT OF THE CASE

The Florida Bar filed its Petition for Order To Show Cause on September 18, 1995, why Respondent should not be held in contempt of court. On December 21, 1995, this Court issued its Order To Show Cause. The basis of the Bar's petition was Respondent's alleged unauthorized practice of law in violation of this Court's Order dated May 9, 1991, Case No. 77,746. On June 9, 1988, this Court had suspended Respondent from the practice of law for six months in Case No. 69,937 for (a) failing to appear at the trial of a case, and (b) after filing an appeal on behalf of a client, refusing to prosecute the appeal because the client refused to pay the demanded fee. On April 15, 1991 Respondent petitioned this Court for leave to resign from

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the Bar. This Court granted Respondent's Petition on May 15, 1991. The resignation was *Nunc Pro Tunc* to June 9, 1988 and was for three and one half years.

The Respondent filed his Response to Petition for Order To Show Cause on January 22, 1996 and his Amended Response on January 26, 1996. The Florida Bar Submitted its Reply to Respondent's Response February 2, 1996.

The Honorable Arthur Taylor was duly appointed Referee in this cause, and a final hearing was conducted on September 17, 1996. On September 25, 1996, prior to the decision of the Referee, Respondent filed an Affidavit and Motion to Recuse Referee. On September 26, 1996, Respondent filed a Renewed motion to Recuse Referee. On September 27, 1996, Respondent filed a Supplement to Renewed Motion to Recuse Referee. The Motion to Recuse was summarily denied by Referee Taylor on September 25, 1996 and on October 9, 1996, he also denied the Renewed motion to Recuse Referee. Respondent then filed a Petition for Writ of Prohibition on October 11, 1996. On January 9, 1997 this Court ordered Referee Taylor to file a Response to said Petition and he did so on January 23, 1997. The Writ of Prohibition was denied by this Court.

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On November 7, 1996, the Referee filed his Report, finding the Respondent guilty of intentionally and contemptuously engaging in the practice of law in representing his son, Jason Weisser, in a matter pending before the County Court in and for Dade County, Florida (Jason Weisser vs. Lumbermans Mutual Casualty Company a/k/a Kemper National Insurance Company, Case No. 92-13093 CC 23) (hereinafter referred to as the "underlying case"), and that he intentionally and contemptuously held himself out as a licensed practicing attorney in that case. The Referee did not hold a hearing to consider the issue of discipline but simply issued his report.

The Referee found that Respondent committed the following acts, in the underlying case, which showed his intent to practice law and hold himself out as an attorney:

(a) Prepared, signed and filed the complaint in a representative capacity for his son,

(b) Prepare, signed and filed numerous motions, notices, discovery request, responses for and on behalf of his son, and

(C) Prepared, signed and filed documents on behalf of his son which indicated that Respondent was an attorney:

i. Notice of Taking Deposition dated March 18, 1993 stating "the undersigned attorneys..." (TFB Exhibit 2a.)

ii. Motion for Sanctions and Attorney's Fees dated June 23, 1993. (TFB Exhibit 2b.)

iii. Notice of Taking Deposition dated May 9, 1994 stating "the undersigned attorneys..." (TFB Exhibit 2c.)

iv. Notice of Hearing setting Respondent's Motion for Sanctions and

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Attorney's Fees. (TFB Exhibit 2d.)

Further, the Referee found that Respondent failed to advise opposing counsel or the judge, in the underlying case, that he was not a licensed Florida Attorney.

The Referee recommended that Respondent be found guilty of practicing law and holding himself out as a licensed, practicing attorney, in violation of the Supreme Court's order dated May 9, 1991 in Case No. 77,746.

It is clear from a casual reading of the trial transcript that the Respondent made a plethora of blunders in representing himself prior to and subsequent to the trial, as well as his filing of voluminous pleadings. It is also clear that the trial turned into a rather shabby example of the proper way parties to litigation should conduct themeselves. This obviously had a negative impact on the Referee, whose patience was tested to the limit and, in part, might help to explain his decision. As a result of all these factors coming into play, the trial, in essence degenerated into a circus environment, fraught with temperamental, impassioned and contentious outbursts. (See Trial Transcript at pages 265-267)

Throughout these proceedings, prior to and subsequent to the September 17, 1997 trial, Respondent was conducting himself emotionally and with a total absence of perspective and objectivity. After the trial and prior to the entry of the Referee's Report, Respondent filed an avalanche of motions and pleadings, which evidenced his loss of perspective and objectivity. These pleadings included, but were not limited to:

-Respondent's Affidavit and Motion to Recuse (9/25/96)

-Notice of Withdrawal of Robert Shupack (9/25/96)

-Respondent's Motion to Stay / Permission to Take Interlocutory Appeal (9/25/96)

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-Respondent's Affidavit in Support of renewed Motion to recuse referee (9/25/96)

-Respondent's renewed Motion to Recuse Referee (9/26/96)

-Respondent's Supplement to Renewed Motion to Recuse Referee (9/27/96)

-Respondent's Motion for Reconsideration (10/7/96)

-Respondent's Proposed Findings of Fact by Referee (10/9/96)

-Respondent's Closing Argument and Memorandum of Law (10/9/96)

-Respondent's Petition for Writ of Prohibition (10/11/96)

The Referee recommended that Respondent be disbarred for a period of ten (10) years. The Respondent takes issue with the recommended discipline and asks this Court not to approve the Referee's recommendation. Respondent filed a timely Petition for Review and this Court has jurisdiction pursuant to Art. V, Section 15, Fla. Const.

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SUMMARY OF ARGUMENTS

The punishment of a ten year disbarment recommended by the Referee is excessive and illogical based on the facts of this case and the case law. This discipline is not just to the public, is not intended to correct or deter similar acts in the future, and is not fair to the Respondent. Disbarment should never be decreed where any punishment less severe, such as reprimand, temporary suspension or fine, would accomplish the end desired.

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ARGUMENT

THE TEN YEAR SUSPENSION RECOMMENDED

IS EXCESSIVE AND ILLOGICAL

The sanction resulting from a Bar disciplinary action must serve three purposes: The sanction must be fair to society; the sanction must be fair to the attorney; and the sanction must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Neu, 597 So.2d 266, 269 (Fla. 1992). This Court's review of a referee's recommendations as to disciplinary measures is broader than that afforded to factual findings because the ultimate responsibility to order an appropriate sanction rests with this Court. The Florida Bar v. Rue, 643 So.2d 1080, 1082 (Fla. 1994).

The gravamen of the case at bar is the unauthorized practice of law by a suspended attorney. This Court has consistently held that the single most important concern in policing the unauthorized practice of law is the protection of the public from unethical, or irresponsible representation. The Florida Bar v. Moses, 380 So.2d 412-417 (Fla. 1980), *citing* The Florida Bar v. Brambaugh, 355 So.2d 1186 (Fla. 1978), and The Florida Bar v. Sperry, 140 So.2d 587 (Fla. 1962).

Respondent's behavior in the underlying case, although borne out of a love for his son and a desire to defend and protect him from an incident which he felt was unjust, was nonetheless a foolish exercise. His behavior in the case at bar was ill advised. It appears that Abraham Lincoln's old adage that *"Any man who represents himself has a fool for a client"*, still holds true today. However, we now need to look at the ultimate punishment of disbarment handed down by the Referee in light of Respondent's behavior and the existing case law. From

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the case law relied upon by the Referee, the conclusion that can be drawn is that although the Referee may have been correct as to the facts, he reached an erroneous decision as to punishment. The Respondent does not deserve the *"Death Penalty"* of disbarment.

The facts of the instant case are analogous, in part, to those of the case of The Florida Bar v. Neckman, 616 So.2d 31 (Fla. 1993). In that case, Neckman was a Florida attorney who previously resigned his license in light of disciplinary allegations involving a ver substantial misappropriation of funds. Neckman had represented himself to be an attorney in connection with a debt-collection matter after the date his resignation became effective. A Petition for Order To Show Cause was filed against him predicated upon the unauthorized practice of law. The Referee, although finding him guilty of one of the two counts against him, determined that there were mitigating circumstances: (1) he did not charge a fee, (2) he was doing this as a favor for friends, (3) he was also in recovery from a substance abuse problem, and the Court established certain criteria, such as: (1) his injury to the public which was absent here, and (2) the Referee determined that there was no injury to the public and recommended a private reprimand of Neckman.

In the Neckman case as in the case *sub judice*, the Bar relied primarily on the case of The Florida Bar v. Winter, 549 So.2d 188 (Fla. 1989) for the proposition that attorneys should be disbarred for long periods or permanently for practicing law after being suspended or resigned. In the Neckman case, this Court distinguished the holding in the Winter case and determined that a public reprimand was more appropriate and set forth the proposition that "we do not believe that the Winter case stands for the proposition that the unauthorized practice of law by such a person (referring to a person who is an attorney) always requires disbarment."

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In the Winter case the Respondent was found guilty of twenty-one separate counts of engaging in the practice of law after resigning from The Florida Bar. In recommending that Winter be disbarred, the referee noted that disbarment was appropriate so that the stigma of disbarment would be attached to Winter's record. Winter's twenty-one (21) counts of practicing law were certainly more egregious that Mr. Weisser's single act of unauthorized practice of law in representing his son. The Winter case bears little resemblance to the case at bar. In Winter, the Respondent had *permanently* resigned from the Bar as a result of past disciplinary judgments. In the instant case, Respondent's resignation was for only three and a half years from June 9, 1988.

Standard 7.1 of the Florida Standards for Imposing Lawyer Sanctions deal with *inter alia*, the unauthorized practice of law, and reads as follows:

> Disbarment is appropriate when a lawyer *intentionally* engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system. [Emphasis added].

Standard 8.1, which deals with conduct in violation of prior discipline orders, reads as follows:

> Disbarment is appropriate when a lawyer: (a) *intentionally* violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession; or (b) has been suspended for the same or similar misconduct, and *intentionally* engages in further similar acts of misconduct. [Emphasis added].

"Intent" is defined in the Florida Standards as "the conscious objective or purpose to accomplish a particular result," which is remarkably similar to the language of the Model Penal Code, from which it was evidently adopted. (See Sections 1.13 and 2.02, Model Penal Code [U.L.A.].)

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Mr. Weisser's conduct, although foolish and ill advised, cannot be characterized as intentional, as you would characterize the culpable state of mind of a criminal defendant.

In The Florida Bar v. Golden, 563 So.2d 81, 82 (Fla. 1990), the Respondent engaged in the unauthorized practice of law by "counseling and attempting to assist his client in requesting two continuances," while he was under a ninety-day suspension from the Bar for a "lengthy history of past disciplinary violations." The Referee recommended a one-year suspension from the Bar, while the Bar, as in the case *sub judice*, recommended disbarment. This Court approved the Referee's recommendations on the grounds that the unauthorized practice of law was "minimal" and not sufficiently "direct" or "substantial" to warrant disbarment. *See also:* The Florida Bar v. Weil, 575 So.2d 202 (Fla. 1991); The Florida Bar v. Levkoff, 511 So.2d 556 (Fla. 1987).

In making its recommendations, the Referee also cited and the Bar relied upon the following cases for the blanket assertion that the unauthorized practice of law, while an attorney is under suspension, warrants disbarment:

In the case of The Florida Bar v. Jones, 571 So.2d 426, 428 (Fla. 1990), the Respondent, who was under suspension, "knowingly misrepresented his compliance with the suspension order" and engaged in the unauthorized practice of law on numerous occasions" by appearing in court, preparing interrogatories, preparing and signing summons, pleadings, and financial affidavits for multiple clients. In the case at bar there were no *multiple clients*, the only *client* Mr. Weisserr represented was his son, and that was in a single case.

In the case of The Florida Bar v. Bauman, 558 So.2d 994 (Fla. 1990), the Respondent, who was under suspension for prior misconduct, "engaged in at least five distinct acts of

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practicing law" and willfully, deliberately, and continuously refuses to abide by an order of this Court." In particular, the Respondent was "held in contempt by a circuit judge for holding himself out as an attorney". Yet, subsequent to the contempt citation, he again represented clients in court.

In The Florida Bar v. Dykes, 513 So.2d 1055 (Fla. 1987) the Respondent was disbarred for ten years for failing to notify a client of his suspension and acting as a personal representative while suspended. However, Dykes is readily distinguishable from the instant case in that there, the Respondent was also found guilty of misappropriating the funds of an estate with the intent to convert the funds to his own use. Further, Respondent had also been found guilty of willfully disregarding a court order to turn over the assets of the estate to a successor personal representative. These are two acts, which standing alone, warrant disbarment.

In short, the cases cited in the Referee's Report and relied upon by the Bar as authority for the proposition that disbarment is the appropriate sanction when a suspended attorney engages in the unauthorized practice of law fails to take into consideration the underlying facts of each case and are easily distinguishable from the case at bar. It is disingenuous for the Bar to rely upon these cases for their desired result of disbarment, without consideration the facts upon which they are predicated. The misconduct committed by these Respondents was far more eggregious than the misconduct of Mr. Weisser, and bear no resemblance to the instant case.

Next, the Referee cites and the bar relies upon the following cases for the proposition that disbarment is warranted in this case because of Mr. Weisser's prior disciplinary history:

In The Florida Bar v. Cotton, 187 So.2d 33 (Fla. 1966) the Referee found that the

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Respondent accepted a retainer fee and agreed to collect certain funds due his client or to file a law suit if necessary. Respondent then did not pursue his client's claim, did not file a law suit and allowed his client's claim to be barred by the statute of limitations. He also refused to return the retainer until two days prior to the hearing. At the time of this misconduct was continuing, Respondent was under prosecution by The Florida Bar for similar misconduct in an earlier case for which he was suspended for six months. Respondent's actions here presented a direct threat to the public and this Court stated that "the protection of the public requires that this punishment be severe". The facts of this case are at variance with the case at bar and bear no comparison to Mr. Weisser's actions.

In The Florida Bar v. Neely, 587 So.2d 465 (Fla. 1991), the Respondent obtained title to his client's mother's home, without providing any advice to the mother to seek independent counsel and executing a note and mortgage on the home in favor of a third party, failing to preserve the funds that should have been held in escrow for another client, and making false representations about costs reimbursable to third client. Here, the Respondent had an extensive disciplinary history which included: (1) a ninety day suspension and six month probation for self dealing in a real estate transaction in 1979; (2) a public reprimand and a one year probation for failure to prosecute a criminal appeal in 1982; (3) a sixty day suspension and two year probation for trust account record-keeping violations in 1986; (4) a three month suspension and two years probation for failure to deposit client funds into escrow account in 1987; and (5) a ninety-one day suspension with proof of rehabilitation require prior to reinstatement for allowing client's personal injury claim to be dismissed. for failure to prosecute and failure to promptly deliver money to clients in 1989. Clearly, this case has very little in common with the case at bar.

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In The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1993), the Respondent was found guilty of eight separate instances of violations of the Code of Professional Responsibility. This court held that although separate instances of violations of rules, standing alone, would not require disbarment, the cumulative effect of eight violations warrant disbarment. In the case at bar, Respondent has only been found guilty of a single instance of the unauthorized practice of law in representing his son in a single case and therefore the concept of *cumulative violations* does not apply here.

In The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1983) Respondent, with others incorporated a non-existent bank and engaged in the following acts of misconduct: (1) deposited a check for $24,100.00 from the non-existent bank in another bank and then withdrew the funds; (2) received $11 O,OOO.OO in Turkish currency from a client and then gave the client a check in that amount from the non-existent bank; (3) purchased $ 146,6 10.00 worth of diamonds with a check from the non-existent bank; (4) a client gave Respondent $25,000.00 to invest and he kept the money; (5) received $2,500.00 from a client in legal fees to be refunded if client's husband was ordered to pay said legal fees, client's husband was ordered to pay $2,000.00, however, he kept the money; and (6) opened an account with a $25,000.00 check which was not genuine and drew down on the account. This Court ordered a twenty year disbarment. It is outlandish for the Referee and the Bar to assert that this case can be in any be correlated to Respondent's actions in the instant action. The misconduct in Cooper was a major criminal endeavor which caused colossal injury to clients, the general public, and the legal profession as a whole.

In The Florida Bar v. Davis, 379 So.2d 942 (Fla. 1980), the Respondent was under a prior 12 month suspension for committing the following violations: (1) conviction of a misdemeanor

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for issuing worthless checks; (2) failing to satisfy a judgment on a promissory note given to an employee; (3) obtaining an unsecured loan from a client and failing to repay the loan; and (4) commingling of personal funds with in his client's trust account. While still suspended the Respondent engaged in further violations of: (1) failing to demonstrate holding of certain moneys as instructed by the client, and; (2) issuing worthless trust account check to the clerk of the circuit court. This Court looked at the total circumstances and found rehabilitation to be improbable and disbarment the only appropriate discipline. These facts involved injury to clients and the public, and do not relate to the case at bar at all.

In The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981), the Respondent was found guilty of misappropriating funds from his clients' trust account for personal use and commingling private funds. This Court also considered his prior disciplinary history of a private reprimand by The Florida Bar's Board of Governors in 1966 and a public reprimand in 1975 and disbarred him. The Court stated that his present misconduct [misappropriation of funds from his clients' trust account for personal use] was reprehensible and one of the most serious offenses a lawyer can commit. Respondent's misconduct alone, without consideration of his prior disciplinary record, merits disbarment, This case has nothing to do with the case at bar.

In The Florida Bar v. Greene, 589 So.2d 281 (Fla. 1991), the Respondent was found guilty of engaging in the unauthorized practice of law on four separate occasions while under suspension. This Court disbarred the Respondent because of his long disciplinary history and the belief that further suspensions would be fruitless. Respondent had been disciplined in 1970, 1985, 1986, 1987, 1988 and 1990. Weisser's disciplinary history does not come near to that of Greene. Further, he engaged in only a single instance of unauthorized practice law while

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suspended and that was representing his son in a single case.

In The Florida Bar v. Barlett, SO9 So.2d 287 (Fla. 1987), the Respondent was found guilty of retaining a fee paid by a client and then neglecting the matter. The Respondent had been suspended on two prior occasions for thirty days in 1985 for neglect and trust account violations and for fifteen months in 1986 for neglect and misappropriation of client funds. The gravamen of this case was not necessarily the disciplinary history but rather, the Respondents refusal to participate in the disciplinary process. Id. at 289.

In The Florida Bar v. Merwin, 636 so.2d 717 (Fla. 1994), the Respondent was found guilty of failing to attend a pretrial conference, failing to return telephone calls from the opposing counsel and from the judge, as well as lying under oath. Respondent also had two prior public reprimands.

Finally, in The Florida Bar v. Golden, 561 So.2d 1147 (Fla. 1990), the Respondent was found guilty of wrongfully returning funds held in escrow and thereby violating his duties as a fiduciary and an escrow agent, negotiating in bad faith directly with the client of an attorney, and making false representations. His prior misconduct involved insurance fraud, and violations as a fiduciary and escrow agent. The Referee recommended a two year suspension, but this Court found that his cumulative misconduct required a more severe sanction than suspension and ordered disbarment.

The cases relied upon by the Bar deal with situations involving multiple instances of the unauthorized practice of law, multiple clients, serious injuries to clients, the public and the legal profession, and misconduct which is far more eggregious than Mr. Weisser's misconduct. Mr. Weisser's misconduct involved a single client (his son,), a single instance of unauthorized

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practice of law in a minor county court case, with no injury to the client and no injury to the public. The Bar, however, makes the blanket assertion and the Referee concluded that because there was similar prior misconduct, it is an aggravating circumstance and ergo, that is enough for disbarment! This type of rational, without distinguishing between the severity of the misconduct will inevitably lead to illogical results, and that is what has happened in the case at bar. The Bar has failed to evaluate all of the relevant factors of Mr. Weisser's misconduct in crafting a punishment which will be fair to society, fair to the attorney and sever enough to deter other attorneys from similar misconduct. See Neu *supra.*

The purpose of the Florida Standards for Imposing Lawyer Sanctions is to set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among the jurisdictions. *See* Florida Standards for Imposing Lawyer Sanctions 1.3.

It is apparent that the Referee's Report did not consider all of the relevant factors such as the fact that Mr. Weisser's misconduct involved a single client (his son), and a single instance of misconduct (single case). It failed to consider that fact that there was no injury to the client and there was no injury to the public (Mr. Weisser was not taking in clients off the street). It failed to consider Mr. Weisser's mental state and the fact that he had lost all perspective and

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objectivity Mr. Weisser was very emotional and volitile during the trial. [1] It failed to consider that fact that although Mr. Weisser's misconduct was serious, it was not as eggregious or rise to the level of engaging in twenty-one instances of unauthorized practice of law *See* Winter; engaging in the unathorized practice of law on numerous ocassians *See* Jones; engaging in at least five distinct acts of the unauthorized practice of law and being held in contempt of court, *See* Bauman; misappropriating funds of an estate and then disregarding order to turn over assets of the estate *See* Dykes; failing to pursue a client's claim, allowing the statute of limitations to run and then refusing ta return the client's retainer *See* Cotton; obtaining title to a client's mother's home, executing a note and mortgage on the home, failing to preserve fund that should have been in held in escrow and making false representations as to casts reimbursable to client *See* Neely; engaging in eight separate instances of violations of the Code of Professional Responsibility See Mavrides; engaging in bank fraud and embezzling over $330,000.00 from clients and banks *See* Cooper; failing to hold moneys as intructed by client and issuing worthless checks from trust account to the Clerk of the Court *See* Davis; misappropriating funds from clients' trust account for personal use and commingling private funds *See* Leopold; engaging in four separate instances of the unauthorized practice of law while suspended *See* Greene; retaining fee from client and then neglecting the matter and refusing to participate in the disciplinary process *See* Barlett; failing to attend prtrial conference, failing to return the judge's telephone calls, and lying under oath See Merwin; and violating duties. as fiduciary and escrow agent, negotiating in bad faith directly with a person represented by counsel and making false

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'During the trial Mr. Weisser became very emotional as times, requiring the Referee to admonish him to "calm down". See Trial transcript at pages 265-267.

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representations.

In conclusion, we would like to emphasize and draw the Court's attention to the fact that prior to instant case the Respondent was and still remains suspended from The Florida Bar. Irrespective of this case, in order for the Respondent to ever practice law again in the State of Florida he must go through the Florida Board of Bar Examiners and be certified by them to this Court as being suitable to practice law. Based upon the Referee's decision in this case, even if he had recommended a public reprimand, it will be a very difficult road to travel for the Respondent to be reinstated. Therefore, is not disbarment at this juncture *overkill:?* Why not allow this lawyer one final opportunity to prove rehabilitation and not shut the door forever on his professional life?

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CONCLUSION

In view of the Florida Standards for Imaosina Lawyer Sanctions, together with the authority cited herein, the Referee's Disciplinary recommendation of disbarment should be rejected by this Court, and in its place, this Court should order a public reprimand or a suspension, based upon the unique set of circumstances involved in this case.

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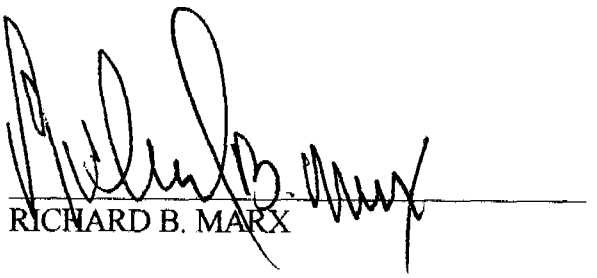
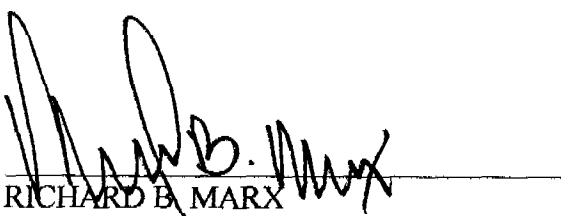
Respectfully submitted,



RICHARD B. MARX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the original and seven copies of Respondent's Initial Brief was sent via U.S. Mail to Sid White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32399; and a copy was sent to Billy J. Hendrix, Esq., Branch Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33 1.3 1; John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 20 of October, 1997.



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