IN THE SUPREME COURT OF **FLORIDA**

THE FLORIDA BAR,	
Complainant-Appellee,	Supreme Court Case No. **07,463**
v.	
BRIAN JAY GLICK	The Florida Bar File No. 96-50,243(15F)
Respondent-Appellant.	

THE FLORIDA BAR'S ANSWER BRIEF

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RULES REGULATING THE FLORIDA BAR

PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar". Brian Jay Glick, Appellant, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMRNT OF CASE AND FACTS

This is a straight forward neglect case with misrepresentation overtones. In February 1989, Ruth and David Schiller were involved in a motor vehicle accident and shortly thereafter, on February 27, 1989, they retained the respondent to pursue their claim for personal injuries sustained in the accident. RR2. The referee found that the respondent "did not pursue the Schiller's claims with reasonable diligence nor provide the thoroughness and preparation reasonably necessary for representation of the Schillers." RR2. The best example of this lack of diligence and lack of competent representation was that the respondent allowed an action commenced on behalf of the Schillers to be dismissed for a lack of prosecution on February 25, 1993, at a time when the statute of limitations had run on the Schillers' claim. RR2.

Compounding this neglect was the respondent's failure to inform the Schillers that their case had been dismissed for a lack of prosecution. RR2. Furthermore, the respondent failed to respond to status inquires made by Mrs. Schiller until after August 21, 1995 and therefore, the referee found that the respondent failed to adequately communicate with the Schillers. RR2-3. It is clear from the record that respondent refused to communicate with

Mrs. Schiller (so she would not find out about the neglect) until she filed her bar grievance.

In addition to the foregoing lack of communication, the respondent failed to convey, to his clients, 'an offer **and/or** indication of settlement range in the sums of between $1,500.00 to $2,000.00 each for Mr. and Mrs. Schiller which offer was given to the respondent by defense counsel prior to the dismissal of the Schillers' law suit". RR2.

Lastly, upon being notified that Mrs. Schiller had filed a grievance against him, the respondent finally disclosed that the case had been dismissed and entered into a financial settlement with the Schillers. RR3. In reaching the settlement, the respondent advised Mrs. Schiller, who was unrepresented, that a non-disclosure clause should be incorporated into the parties' agreement. RR3. Mrs. Schiller agreed to the provision. RR3. In a November 6, 1995 letter to the bar, the respondent represented that "Mrs. Schiller has asked that the settlement remain confidential." RR3. The referee specifically found that at "the time respondent made such representation to the bar, respondent knew that it was he and not Mrs. Schiller who requested that the settlement agreement remain confidential". RR3.

The referee has found the respondent guilty of four distinct counts of unethical activity.[1] As a sanction therefor, the referee is recommending a ten (10) day suspension from the practice of law. The respondent is appealing the referee's findings of fact and guilt as to Count V (misrepresentation) and Count III (failure to inform the client of a settlement offer) and the referee's recommendation of a ten day suspension.

SUMMARY OF ARGUMENT

The respondent asks this Court to overturn two of the referee's findings of guilt and then reduce the referee's recommended ten day suspension to an admonishment. The respondent's brief attempts to sow confusion where no confusion exists and further attempts to downplay the significance of the respondent's unethical activity. In this case, the Court is asked to evaluate a lawyer who failed to convey a settlement offer to a client, but more importantly neglected a client's case to the extent that the case was dismissed for a lack of prosecution at a time when the statute of limitations had already expired. The client's case was therefore irreparably damaged. The client was

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[1] The referee found the respondent not guilty of Count IV of the bar's complaint after the bar withdrew same by stipulation.

not informed of this event. Instead, the client's request for information on the case was ignored for years and it was not until the client, finally fed up with being ignored, filed a grievance with the **bar**. In an effort, not only to finally do right by his client, but also to sweep the unethical activity back under the rug, the respondent entered into a financial settlement with his client and insisted upon a confidentiality agreement. When pressed to file an answer to the grievance, the lawyer lied by telling the bar that the client had asked that the settlement **remain** confidential. There is more than ample evidence in the record to support the referee's findings of fact and guilt.

The respondent would also have this Court reduce the referee's recommendation of a ten day suspension from the practice of law. He would prefer an admonishment, but argues that a public reprimand is sufficient punishment for all four counts of misconduct. However, it is the lie to the bar that drives this case into the suspension category. The overwhelming precedent from cases where a lawyer has engaged in acts of misrepresentation or out right perjury during the disciplinary process are suspension cases. The majority of the cases are significant suspensions. Taken in this light the referee's recommendation of a ten day suspension is a

well reasoned balance between the unethical conduct and the aggravating and mitigating factors present in this case.

ARGUMENT

I. A TEN DAY SUSPENSION IS AN APPROPRIATE SANCTION FOR A LAWYER WHO PURPOSEFULLY FAILED TO COMMUNICATE WITH A CLIENT AFTER THE CLIENT'S CASE WAS DISMISSED AND THE STATUTE OF LIMITATIONS HAD RUN, WHO FAILED TO CONVEY A SETTLEMENT OFFER TO THE CLIENT WHILE THE CASE WAS STILL VIABLE AND WHO MADE A MISREPRESENTATION OF FACT IN RESPONSE TO A BAR INVESTIGATIVE INQUIRY.

While the bar requests that the referee's recommendation of a ten day suspension be upheld, respondent seeks this Court to overturn the referee's recommended sanction along with the referee's factual findings and determination of guilt as to two counts of misconduct. A referee's report caries a strong presumption of correctness and as such these factual findings "should be upheld unless clearly erroneous or without support in the record". The Florida Rar v. Wasserman, 654 So. 2d 905, 906 (Fla. 1995); The Florida Bar v. Wheeler, 653 So. 2d 391 (Fla. 1995). "Where the referee's findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgement for that of the referee." The Florida Bar v. Garland, 651 So. 2d 1182, 1183 (Fla. 1995). The respondent has failed to demonstrate how the challenged factual findings of the

referee are "clearly erroneous or without support in the record" and therefore his appeal must fail.

A. **The lie to the bar.**

In order to fully understand the motivation for respondent's lie to the bar, it is important to review the respondent's representation of the Schillers. In February 1989 respondent commenced his representation of the Schillers and initiated **a** suit for personal injuries arising form an automobile accident. **RR2.** For a time, things proceeded normally and the respondent attended to the prosecution of this **case.** However, all record activity ceased in 1992 and this lack of activity caused the February 25, 1993 dismissal of the Schillers suit for **a** lack of prosecution. RR2. This dismissal occurred after the statute of limitations had run and therefore the Schillers' claim was lost. RR2. The respondent, when given an opportunity to reveal the dismissal while discussing with Mrs. Schiller, after the Schillers were served with a post judgement **subpoena** in aid of execution, that he would satisfy the cost award for the defendants, did not reveal that the underlying case had been dismissed. TT84-85. From that date forward, Mrs. Schiller would periodically call to ascertain the status of her case and respondent would ignore her and would not even allow her to set an office appointment. TT24-25. It was Mrs.

Schiller's testimony at trial that this failure to communicate with her for years eventually caused her to file a bar grievance. TT23-25. It is at this point in time that the respondent finally decides to come clean, invites Mrs. Schiller into his office, fully explains what occurred and reaches a financial accommodation with Mrs. Schiller. TT25-26. It is with the foregoing background of the years of keeping Mrs. Schiller at bay so she would not find out her case had been dismissed as a direct result of the respondent's neglect, that we approach the issue of the confidentiality clause.

Respondent admits that the confidentiality clause was his idea and that Mrs. Schiller agreed to same. TT91. Mrs. Schiller agrees with respondent's trial testimony. TT16. Yet when the respondent finally responds to the bar's inquiry,[2] he states **that** "Mrs. Schiller has asked that the settlement remain confidential". RR3.

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[2] After the respondent had received the bar's letter of inquiry, after he finally met with his client to **reveal** his malpractice, **after** he settled the malpractice claim with his client and after he requested that the settlement remain confidential, Mrs. Schiller wrote **a** letter to the bar asking that her complaint be withdrawn. TT40. The respondent **was** dismayed that the bar continued to seek a response to Mrs. Schiller's initial complaint, so on September 6, 1995, the respondent sent a letter to bar counsel inquiring under what authority did the **bar** continue looking for **an** answer to a grievance when the complaining witness asked to withdraw the complaint. TT42. Bar counsel provided the respondent with the appropriate authority and shortly thereafter the respondent submitted his letter of November 6, 1995. TT42-43.

This is just not true for the respondent is the one who "asked (Mrs. Schiller) that the settlement remain confidential". RR3. More than likely the respondent hoped that if the settlement remained confidential and Mrs. Schiller was satisfied with her legal malpractice settlement, the bar would not discover the irreparable damage caused to the Schillers' case. While there appears to be no quid pro quo concerning the settlement and the withdrawal of the grievance, a broad interpretation of the confidentiality clause would run afoul of The Florida Bar v. Fitzgerald, 541 So. 2d 602 (Fla. 1989), wherein the Court found that agreements that prevented an individual from bringing a matter to The Florida Bar's attention were void for public policy reasons and were not enforceable.

The respondent raises several arguments in his brief to explain away his lie or to convince the Court that he should be found not guilty of lying to the bar. Firstly, he raises two burden of proof arguments which are readily dispatched. Respondent contends that the bar failed to prove by clear and convincing evidence that the respondent intentionally lied. The respondent correctly points out that the bar must prove intent in a misrepresentation case. The Florida Bar v. Cramer, 643 So. 2d 1069 (Fla. 1994); The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992).

However, a mere assertion that he did not intend to lie is insufficient to rebut the bar's presentation on this issue. For example in The Florida Bar v. Simring, 612 So. 2d 561 (Fla. 1993), the lawyer claimed that he did not intend to steal his client's money, but the Court, after reviewing **all** of the facts and circumstances, found that the totality of the situation clearly indicated that there was an intentional theft, notwithstanding the respondent's protestations to the contrary. In this case all you need to do is look at the pattern of concealment. Respondent neglect the case and then actively avoided Mrs. Schiller until she went to the bar. After becoming **aware** of the grievance and left with no alternative but to reveal his neglect, he finally met with his client, effectuated a financial settlement, insisted upon a confidentiality clause, and even had his office type up Mrs. Schiller's withdrawal letter. TT91-92. However the bar insisted upon a response to Mrs. Schiller's complaint and rather than file an answer, the respondent demanded that the bar provide authority for its continued inquiry. When he had no other alternative but to respond to the grievance, he provides **a** carefully constructed letter in which he explains that he has settled his differences and that his client asked him not to reveal the contents of that

settlement, even though he knew that the confidentiality clause was his idea,

The respondent also claims that the bar failed to carry its burden of proof on materiality. The respondent points to The Florida Bar v. Rariton, 583 So. 2d 334 (Fla. 1991) to support his position. In Bariton, the lawyer had filed a grievance against another member of the bar and as attachment thereto he included an exhibit which was a letter he claimed to have sent to the other lawyer. During the grievance process it was discovered that the exhibit was not a true copy of the original letter. Rather it was a reconstructed copy that had differences from the original letter (i.e. on different stationery). In Bariton, both parties agreed that the changes were not material. The Court went further and found that "the language omitted from the original letter was totally irrelevant to any issue." Bariton at 335. In the case at hand, the confidentiality clause and who had asked for its creation was certainly a relevant issue. It became a material issue because the clause may have helped conceal respondent's neglect and it almost did, except that a bar counsel was being thorough in his review of the matter.

The respondent's first factual challenge to the referee's findings on the confidentiality clause is that Mrs. Schiller has

consistently said that she agreed that the settlement should remain confidential. See Initial Brief at p.12. While it is true that Mrs. Schiller has consistently lived by her agreement by not revealing the contents of the settlement agreement and by testifying that she has no intention of abrogating that agreement, agreeing that something should remain confidential is not the same thing as asking that it remain confidential. Respondent's argument therefore misses the mark. The question presented is who asked that the agreement remain confidential and not who was willing to live up to the agreement.

Respondent's real factual challenge is his assertion that he was apprised, by his lawyer prior to sending his November 6, 1995 letter, that the bar had interviewed Mrs. Schiller and that she refused to reveal the settlement because of the confidentiality clause and thus his statement that his client asked that the settlement remain confidential was not misleading because he was only complying with his client's wishes. This is extremely tortured logic for it once again rephrases the basic question (who asked that the settlement remain confidential) by attempting to have the reader ask a different question (who is living up to the agreement) to get the correct answer. In any event the following time line completely refutes this argument:

August 21, 1995	Schiller complaint received by the bar (TFB ex. 3)
August 30, 1995	Schiller withdrawal letter sent (Resp. ex. 1)
August 31, 1995	Barnovitz[3] letter to respondent asking for a response (Resp. ex. 2)
September 6, 1995	Respondent's letter asking for bar's authority to continue with the case (Resp. ex. 3)
September 11,1995	Barnovitz's reply to September 6, 1995 letter (Resp. ex. 4)
November 6, 1995	Respondent's answer to the grievance (TFB 1)
November 9, 1995	Respondent's November 6, 1996 letter received by the bar (TT38)
November 11, 1995	Bar investigator Emrich assigned to the file (TT31)
November 16, 1995	Emrich reaches Schiller on the phone and schedules an appointment for November 20, 1995 (TT31-33)
November 20, 1995	Emrich personally interviews Mrs. Schiller (TT33)
November 21, 1995	Emrich renders written report of Schiller interview (TT39)

It is respondent's position that his November 6 statement, vis-a-vis the confidentiality clause, was predicated upon his conversation with his lawyer who told him that Mrs. Schiller was interviewed by a bar investigator and she refused to reveal the details of the settlement. However, it is evident that there could have been no conversation on this topic between the respondent and

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[3] David Barnovitz was the initial bar counsel who investigated this file.

his lawyer, Mr. McClosky until well after November 6, 1995.[4] Mr. Barnovitz testified that:

> It was impossible that (he) conveyed to Mr. McClosky prior to November 6th the results of an investigation done by Mr. Amrich (sic) . It **was** absolutely impossible because the investigation was not done until November 20 . . . (TT p.51, 1.10-14)

The respondent attempts to create smoke where there is no fire by postulating that it must have been another bar employee - a secretary or another investigator or any employee of the Ft. Lauderdale office of the bar. But there was no other investigator (TT36), the secretary **was** only confirming an address (TT50) and there is no testimony or documentary evidence to indicate any other employee of the bar (other than Barnovitz, Emrich and a secretary) had any contact with Mrs. Schiller, the respondent, or his counsel prior to November 6, 1996. Unfortunately there is no testimony on the exact date of the conversation between Barnovitz and the respondent's lawyer, but Barnovitz testified that "To the best of

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[4] The fact that Barnovitz, prior to reviewing Emrich's written report and in particular the dates referenced therein, was willing to stipulate that the conversation between lawyer and client occurred prior to the respondent's November 6, 1995 letter does not create any confusion in the bar's position. Once Barnovitz had an opportunity to analyze the dates in Emrich's report, the consent for **a** stipulation was withdrawn and certainly no stipulation **was** made during the trial on this point.

(his) present recollection it (the conversation) took place very, very shortly after I received Mr. Amrich's (sic) November 21 written report." TT p. 39, 1.22-24.

The referee had an opportunity to examine all of the witnesses, considered their credibility and she determined that based upon the totality of the circumstances that the respondent's statement was a misrepresentation. Any post hoc attempt at rationalization should be ignored. The respondent lied about the confidentiality clause and the reason he lied was his hope that the bar's investigation would go no further. The referee's findings on this misrepresentation are supported by competent, substantial evidence, this Court should not reweigh the evidence and substitute its judgement for that of the referee. Garland.

B. The settlement offer.

At issue in Count III of the bar's complaint is whether the respondent failed to convey, to his client, a settlement offer made by the defendant in the underlying litigation. The respondent's position is that the bar failed to meet its burden of proof on this issue.

Both sides agree that the respondent did not convey any offers of settlement (or settlement ranges) to the Schillers. The parties disagreement lies in whether or not the defense counsel provided a

settlement offer that needed to be conveyed to the client. The bar's case rests on respondent's own statements in his letter of November 6, 1995 to the bar. In pertinent part the letter reads:

> It is my recollection that the Defendants in this ***case*** had ***offered*** Mr. and Mrs. Schiller in the range of $1,500,00 to $2,000.00 each to resolve this matter prior to Dismissal. (Emphasis supplied).

It is respondent's own admission that establishes the case against him.

Respondent attempts to get out from under his admission by claiming that the offer was not in writing and was merely a discussion of a settlement range or just "courthouse talk" between adverse counsel. Firstly, R. Reg. Fla. Bar 4-1.2(a) does not require that a settlement offer must be in writing before a lawyer is obligated to inform his client that a settlement had been offered. Secondly, if the respondent meant to say that there was merely a discussion of settlement values, why did he use the word 'offer"? Once again the respondent attempts to explain away a statement in his November 6, 1995 letter. The referee had an opportunity to evaluate the respondent's trial testimony against his written word and correctly found that he failed to convey to his clients a definitive settlement offer of $1,500.00 to $2,000.00.

The respondent next raises a public policy argument by contending that every time a lawyer has a "courthouse talk" with adverse counsel concerning a potential settlement the lawyer could be disciplined if the lawyer did not convey the contents of that "courthouse talk" to his clients. The respondent's argument is flawed in that in this case we have a definitive amount of money being offered. It is not a vague discussion of value and it is certainly more than the dime referenced in respondent's brief. Accordingly the referee's findings of guilt as to Count III should be upheld.

C. **The sanction.**

The referee's recommended sanction of a ten day suspension is the appropriate sanction for this case. The bar agrees with the respondent that a first time (and even a second time) neglect case normally results in a public reprimand. See for example The Florida Bar v. Kinney, 606 So. 2d 367 (Fla. 1992); The Florida Bar v. Harris, 526 So. 2d 54 (Fla. 1988); The Florida Bar v. Riskin, 549 so. 2d 178 (Fla. 1989). The respondent correctly points out a "public reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgement". The Florida Bar v. Welty, 382 So. 2d 1220 (Fla. 1980). However, this is more than a

simple neglect case.[5] It is the lie to the bar that pushes this case up to a ten day suspension. The Florida Bar v. Lund, 410 So. 2d 922 (Fla. 1982).

We start with the basic proposition that: "Dishonesty and a lack of candor cannot be tolerated in a profession built upon trust and respect for the law." The Florida Bar v. Williams, 604 So. 2d 447, 451 (Fla. 1992). It is for this reason lawyers are suspended for lying to grievance committees or for making false statements during the disciplinary process. The Florida Bar v. Saphirstein, 376 So. 2d 7 (Fla. 1979) [Sixty day suspension for attempting to unethically influence a referee and making a false statement in his initial response to the bar]; The Florida Bar v. Neely, 372 So. 2d 89 (Fla. 1979) [Ninety day suspension, plus probation, for lying under oath before a grievance committee and for self-dealing]; The Florida Far v. Langford, 126 So. 2d 538 (Fla. 1961) [Lawyer

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[5] The bar concedes, that should the Court overturn the guilty findings on Counts III and V, a public reprimand would be the appropriate sanction for this case. However, you could also analyze this case as a neglect case coupled with a concealment of this neglect by failing to respond to the client's requests for information. See The Florida Bar v. Bazley, 597 so. 2d 796 (Fla. 1992) [Eighteen month suspension for neglect and making misrepresentations to hide the neglect]; The Florida v. Palmer, 504 So. 2d 752 (Fla. 1987) [Neglect, lying to the client to hide the neglect and allowing a statute of limitations to run warranted an eight month suspension.].

suspended for eighteen months for testifying falsely before a grievance committee and for attempting to have another lawyer do likewise to corroborate the false testimony].

Any discussion of the appropriate disciplinary sanction should consider the mitigation and aggravation present in a case. The referee, in her report, did not make reference to either category. The respondent, at page 21 of his brief, urges the Court to find the following mitigating factors which the bar concedes are present in this case: lack of a disciplinary record; otherwise good character and reputation; interim rehabilitation and remorse. However, the bar disagrees with three other factors championed in respondent's brief. The respondent contends that there is an absence of a dishonest or selfish motive, but this only applies to the neglect count because of the lie to the bar and the failure to communicate so the neglect could remain hidden. The respondent also wants the Court to accept his malpractice settlement as a timely good faith effort at restitution. While the fact that he settled with his client is commendable and worth consideration, it was certainly years after the neglect occurred. Lastly, the mitigating factor of cooperation with the bar is incompatible with a finding of guilt regarding the lie to the bar. Yet, it must be noted that at the trial stages of this case there was significant

cooperation between the parties. In terms of aggravation the bar contends that the Court should consider the following: a dishonest or selfish motive, multiple offenses, submission of a false statement during the disciplinary process and substantial experience in the practice of law. It is the bar's position that the mitigation does not significantly outweigh the aggravation to the extent necessary to have this suspension case now warrant the public reprimand or admonishment urged by the respondent.

The bar seeks the same ten day suspension that was meted out in Lund. The lawyer in the Lund case gave false testimony before a grievance committee. Lund, while admitting that "a small portion of his testimony turned out to be untrue" but he contended that the lie was unintentional and therefore, like the respondent in this case, urged the Court to find him not guilty of the offense. The Court, without any discussion, rejected the respondent's claim of an unintentional misrepresentation, found him guilty and gave Lund a ten day suspension.

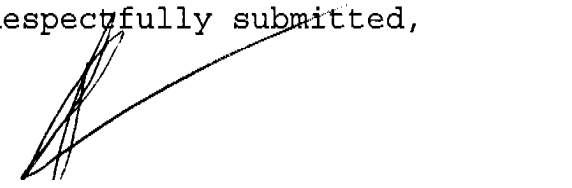
CONCLUSION

The respondent has failed to meet his appellate burden by not demonstrating how the referee's findings of fact and guilt were clearly erroneous or without support in the record. On the contrary, there is ample support in the record for the referee's

findings that the respondnet lied about the confidentiality clause and further that he failed to convey a settlement offer to his client. Upon affirming the factual findings of the referee, this Court must evaluate what the appropriate sanction should be for a lawyer found guilty of neglect, lack of communication, lying to the bar and failing to convey a settlement offer to a client. It is the bar's and the referee's position that a ten day suspension is that appropriate sanction.

WHEREFORE, The Florida Bar respectfully request this court to accept the referee's findings of fact and of guilt and affirm the referee's sanction recommendation of a ten day suspension from the practice of law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing answer brief of The Florida Bar has been furnished via regular U.S. mail to John A. Weiss, attorney for respondent, at 2937 Kerry Forrest Parkway, Suite B-2, Tallahassee, FL 32308-6825; and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 12th day of December, 1996.

KEVIN P. TYNAN