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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 87,463

BRIAN JAY GLICK,

Respondent.

_____/

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RESPONDENT'S INITIAL BRIEF

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TABLE OF AUTHORITIES

Other Citations

Florida Standards for Imposing Lawyer Sanctions

SYMBOLS OF REFERENCES

Respondent shall be referred to as such or as Mr. **Glick** throughout this Brief. The Florida Bar will be referred to variously as complainant, the Bar or The Florida Bar.

References to the transcript of final hearing will be by the symbol TR followed by the appropriate page number. Bar exhibits will be designated as BEX followed by the appropriate number. Respondent's exhibits will be referred to by the symbol REX.

STATEMENT OF THE CASE AND OF THE FACTS

This is a matter of original jurisdiction before the Supreme Court of Florida pursuant to Article V, Section 15 of the Constitution of the State Florida.

Subsequent to The Florida Bar filing its formal complaint charging Respondent, Brian Jay Glick, with five counts of misconduct, this Court appointed the Honorable Miette K. Burnstein, Circuit Judge for the Seventeenth Judicial Circuit, referee to preside over these proceedings. Final hearing was held before Judge Burnstein on June 21, 1996. The report of referee was signed by Judge Burnstein on August 5, 1996. In her report, the referee found Respondent guilty of all four counts not withdrawn by the Bar and recommended a ten day suspension.

Prior to final hearing, Respondent admitted the allegations and rule violations contained in Counts I and II of the Complaint. The Bar dropped Count IV. After listening to the evidence on Counts III and V, the facts of which were virtually undisputed, the referee concluded that Respondent violated those counts also.

Respondent timely petitioned this Court for review of the referee's findings and conclusions as to counts III and V and the referee's recommendation that Respondent be suspended from the practice of law for ten days.

On February 27, 1989, Ruth Schiller and her husband, David Schiller, retained Respondent to represent them in a claim for damages resulting from personal injuries they sustained in a motor vehicle crash occurring on or about February 11, 1989. On April

10, 1990, Respondent filed a lawsuit against the defendant and the owner of the motor vehicle striking the Schillers. BEX 1. Discovery then commenced. TR 70, 71. On February 25, 1993, the Schillers' action was dismissed for want of prosecution. At the time of the dismissal, the statute of limitations had run on their claim and, accordingly, the suit could not be refiled.

Exactly one month before the dismissal, on January 25, 1993, Respondent's paralegal and chief assistant in the office, Monica Bruce, lost her young son in a tragic drowning accident. The loss of Ms. Bruce's son completely disrupted Respondent's practice. TR 72, 73, BEX 1.

During the summer of 1995, Mrs. Schiller attempted to communicate with Respondent regarding the status of her case. Since the onset of the litigation, her husband had passed away. An appointment to meet with her was apparently set and canceled and, subsequently, Respondent left for vacation. TR 78. Mrs. Schiller, being unable to communicate with Respondent, filed a grievance against him on August 21, 1995. BEX 3.

On August 30, 1995, Respondent met with Mrs. Schiller in his office pursuant to an appointment made the day before. TR 79. During that meeting, Respondent advised Mrs. Schiller that the suit had been dismissed for want of prosecution, that she had the right to sue him and to seek the advice of independent counsel for remedies against him, and, most importantly, he admitted fault. TR 18, 27, 28, 79 and 84. Respondent settled Mrs. Schiller's claim for monetary damages at that meeting in excess of the $3,000.00 to

$4,000.00 total settlement figure discussed by adverse counsel. TR 96. In addition, he paid for the costs of the prosecution of Mrs. Schiller's claim and the costs incurred by the defendant in defending her case. TR 84.

During the settlement discussion with Mrs. Schiller, Respondent included language in the ralease making the terms of the settlement confidential. TR 79. The monetary figure of that settlement has not been disclosed to the Bar to this date. TR 49, 50.

Immediately after the settlement discussion, Mrs. Schiller sent a letter dated August 30, 1995 to The Florida Bar REX 1, withdrawing her complaint. In that letter, Mrs. Schiller stated that:

> I met with Mr. Glick today and we discussed my case as well as the complaint I filed. Mr. Glick was honest and forthcoming and we reached a resolution which I am satisfied with.
>
> I do not know what steps are to be taken from here by the Bar but I would like to withdraw my complaint and suggest that no further action be taken against Mr. Glick.
>
> I have not been forced in any way to send you this letter and I am doing it voluntarily.

The Bar refused to terminate the grievance proceedings. Subsequently, on November 6, 1995, Respondent filed a response to Mrs. Schiller's August 21, 1995 grievance. BEX 1. In that letter, Respondent acknowledged the case being dismissed for lack of prosecution. He further stated that:

> 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.

It is that statement that formed the predicate for the Bar's charges in Count III of the complaint (failure to inform client of an offer of settlement).

Respondent further stated in his November 6, 1995 letter that:

> In an effort to make Mrs. Schiller whole and to avoid any further proceedings and/or complications in this matter, Mrs. Schiller voluntarily accepted a substantial financial settlement from me and executed a Release in favor of myself and my firms. This was done knowingly, freely and voluntarily but Mrs. Schiller has asked that the settlement remain confidential. BEX 1, p. 2.

The last half of the last sentence in the quoted paragraph above formed the basis for the Bar's allegations in Count V of their complaint. Respondent sent a copy of his November 6, 1995 letter to Gregg W. McClosky, the lawyer representing him in the grievance proceedings. On February 12, 1996, Respondent further communicated with Bar Counsel, David M. Barnovitz, and the members of the grievance committee by letter dated February 12, 1996. BEX 2. In that letter, Respondent clarified statements made in the November 6, 1995 letter. Specifically, as to Count V, Respondent stated that:

> It is my recollection of the facts that when the inquiry was first filed and before I responded to the allegations, I was informed by my counsel that an investigator from the Bar had interviewed Mrs. Schiller and when questioning Mrs. Schiller concerning the circumstances of our settlement she told the investigator that our settlement was confidential.
>
> In my subsequent response to the Bar, I could

> not disclose the settlement sum to the Bar since I was advised by my counsel that Mrs. Schiller had refused to disclose the settlement sum. Accordingly, **based** upon these factual circumstances, my statement **and** response to the complaint was accurate. If my client wants this to remain confidential then I must comply with her wishes. I, of course, first asked her to keep this settlement confidential for **all** the obvious reasons.
>
> Finally, although at the time of this dictation, my entire file has been delivered to my attorney for review by Mr. Barnovitz, it is my recollection that the reference of a **$1,500.00** to **$2,000.00** settlement of Mr. and Mrs. Schiller's claims during the time that their claim was pending, were (sic) not a specific written offer of settlement by the insurance company to my client, but merely **an** estimate as to settlement value and my conversations with the attorney who was for the insurance company.

At final hearing, the Bar elicited testimony from Elmer **Emrich** (throughout the transcript of final hearing, Mr. **Emrich's** name is misspelled **Amrich.** Respondent will refer to Mr. **Emrich** by his proper name throughout this brief). Mr. **Emrich** testified that he **was** first contacted by Bar Counsel Barnovitz on this matter on November 13, 1995 and that he interviewed Mrs. Schiller on the 20th of that month. TR 31, 33.

Bar Counsel Barnovitz testified that he had clear recollection of not referring the case for investigation to Mr. **Emrich** until after he had received Respondent's November 6, 1995 letter (BEX 1) on November 9, 1996. TR 38, 39. Mr. Barnovitz acknowledged, however, that there are seven lawyers and approximately 22 support personnel in the Bar's Ft. Lauderdale office. TR 49.

Mr. Barnovitz acknowledged that, prior to final hearing, there

had been confusion in his mind over the issue of whether Bar personnel had talked to Mrs. Schiller before Respondent's November 6, 1995 letter. He acknowledged that as recently as the Monday before final hearing (the hearing occurred on Friday, June 21, 1996) he had told Mr. McCosky that Bar personnel had talked to Mrs. Schiller before November 6th and that she refused to disclose the settlement because of confidentiality. TR 47.

Mr. Barnovitz also testified that as recently as June 17, 1996 he had prepared a stipulation stating that Bar Counsel had informed Mr. McClosky prior to November 6, 1995 that Mrs. Schiller had been interviewed and that she had refused to disclose the confidentiality provision of her settlement with Respondent. TR 50, 51.

Respondent testified that the idea for a confidentiality provision was his own. TR 79, BEX 2. He testified that, however, prior to writing the November 6, 1995 letter to the Bar he had been advised by his counsel that Mrs. Schiller had been interviewed by personnel from the Bar prior to November 6, 1995 and that she refused to divulge the terms of her settlement. It was based on those representations from his counsel that he based his statement in his November 6, 1995 letter that, at Mrs. Schiller's request, he could not disclose the terms of the settlement. TR 93, 95.

Respondent also testified that no formal offer of settlement was ever made on Mrs. Schiller's case. TR 76, 77, 87. The only discussions regarding a dollar figure were "courthouse talk" and were not firm offers. TR 77, 89, 90, BEX 2. Accordingly, he never

relayed those offers to Mrs. Schiller.

At final hearing Respondent also testified that he had never had any statute of limitations problems before Mrs. Schillers. He testified, however, that he had a new computer tickle system set up that would preclude any such oversight happening again. TR 71. Respondent has practiced law since October 1981 without any prior disciplinary history. TR 67, 80.

Respondent is board certified by The Florida Bar in civil trial work, has been on the Board of Directors of the Academy of Florida Trial Lawyers for seven or eight years and is currently a national delegate on the Board of the Association of Trial Lawyers of America. He has been involved with the Palm Beach County Bar Association in numerous matters and chaired various committees for that organization. He does pro bono work and was recently appointed vice-chair of the Tort and Product Liability Committee of the American Bar Association. TR 68, 69.

Respondent called as a character witness Richard Roselli, attorney at law. Mr. Roselli is the president elect of the Academy of Florida Trial Lawyers. He has practiced law since 1981 and has known Respondent for over eight years. TR 55, 56. Mr. Roselli is on the Board of the Broward County Trial Lawyers and is a founding member of the Southern Trial Lawyers.

Mr. Roselli testified that Respondent has an excellent reputation as a trial lawyer and has "very high ethical ideals" regarding the manner in which he obtains cases. TR 57. Mr. Roselli believes that Respondent "is an ethical lawyer.,.." and he

has had Respondent appointed to the Medical Malpractice Task Force for the Academy of Florida Trial Lawyers. TR 59. He knows of no other instances where Respondent has been involved in any conduct involving neglect, malpractice or malfeasance. To the best of Mr. Roselli's knowledge, the Schiller case was a "isolated incident" by Respondent. TR 61.

Mr. Roselli also pointed out that he has discussed the Schiller case with Respondent and that he knows that the whole case has "upset him greatly,...." Part of Respondent's unhappiness stems around the fact that his misconduct occurred "with a very nice client." TR 62.

SUMMARY OF ARGUMENT

Respondent asks this Court to dismiss the guilty findings made by the referee in Counts III (failure to convey an offer of settlement) and Count V (misrepresentation) of the complaint. He further asks this Court to reject the referee's recommendation that he be suspended for ten days and that this Court substitute an admonishment for minor misconduct instead. In the alternative, Respondent argues that, even should the guilty findings in Count III and V stand, he should receive no more than a public reprimand.

In Point I, Respondent argues that the referee's finding of misconduct as to Count V should be dismissed because the Bar failed to prove intent to mislead by clear and convincing evidence. The Florida Bar v Cramer, 643 So.2d 1069 (Fla. 1994). The Bar's entire case is focused on the last half of one sentence, constituting nine words, in his initial response to the Bar's grievance. The clear

focus of the response was an explanation, and an admission, of his allowing Mrs. Schiller's case to be dismissed and his failure to communicate with her. Prior to writing the Bar, Respondent and Mrs. Schiller had settled their differences with a substantial financial payment by Respondent settling any claim she had against him or his firm. Mrs. Schiller then voluntarily dismissed her grievance; an action the Bar refused to accept.

Respondent testified that he advised the Bar in his November 6, 1995 letter that Mrs. Schiller did not want him to discuss the terms of their confidential settlement (which was entered into on August 30, 1995) at her request. He made that statement because he was told such was the case by the lawyer representing him in Bar disciplinary proceedings. The Bar agreed with that statement up until four days before trial. At that time, the Bar took the position that no personnel from the Bar discussed with Mrs. Schiller her settlement until November 20, 1995, two weeks after Respondent wrote his letter.

In light of the fact there was confusion surrounding the date Mrs. Schiller was interviewed by the Bar, and that Respondent's mental state was not contradicted by any direct evidence, the Bar failed to meet its burden of proving intentional misconduct by clear and convincing evidence as to this Count.

In Point II Respondent argues that the referee improperly concluded that he received an offer of settlement as to the Schillers' case and that he did not disclose that to his clients. In fact, the evidence is unrebutted that no offer was made by

defendants' counsel. The only discussions regarding settlement were "courthouse talk" and were nothing more than defense counsel's off the cuff opinion of the value of the claims. Such discussions were not **"offers"** of sufficient import to be mandatorily communicated to the client.

Respondent argues in Point III that the mitigation involved in this case, coupled with the fact that his conduct in the **Schillers'** case was an isolated incident, makes an admonishment for minor misconduct the appropriate sanction to be imposed in his case. While admonishments for minor misconduct, and their forerunner, private reprimands, are generally not published, there are numerous cases in which lawyers have received public reprimands for neglect and failure to communicate only after previously receiving private reprimands or admonishments. These cases show that first offenses receive admonishments. Second offenses, and sometimes third, get public reprimands. Even should Counts III and V be upheld, the case law shows that the appropriate sanction for an isolated incident such as the case at Bar is a public reprimand.

ARGUMENT

POINT I

THE FLORIDA BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT KNOWINGLY ENGAGED IN CONDUCT CONSTITUTING DISHONESTY, FRAUD, DECEIT OR MISREPRESENTATION (COUNT V) AND, THEREFORE, HE SHOULD BE ACQUITTED ON THAT COUNT.

The Florida Bar has the burden in disciplinary proceedings of proving misconduct by clear and convincing evidence. The Florida Bar v Ravman, 238 So.2d 594 (Fla. 1970). Furthermore, in misrepresentation cases, The Florida Bar must prove that the misrepresentation was material, The Florida Bar v Bariton, 583 So.2d 334 (Fla. 1991) and that it was intentional, The Florida Bar v Catalano, 644 So.2d 86, (Fla. 1994) and The Florida Bar v Cramer, 643 So.2d 1069 (Fla. 1994). The Florida Bar has proven neither element by a preponderance of the evidence, let alone clear and convincing evidence. Accordingly, this Count should be dismissed.

In Count V, The Florida Bar alleged that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation because he stated in his November 6, 1995 letter to the Bar (BEX 1) that "Mrs. Schiller has asked that the settlement remain confidential". Respondent has always freely acknowledged that it was he, not Mrs. Schiller who originally thought to make the settlement confidential. TR 79. In his February 12, 1996 letter to the Bar, BEX 2, Respondent explained the statement that he made in his November 6th letter. In that letter, Respondent pointed out that he made the statement regarding Mrs. Schiller's requesting

confidentiality as follows:

> In my subsequent response to the Bar [BEX 1], I could not disclose the settlement sum to the Bar since I was advised by my counsel that Mrs. Schiller had refused to disclose the settlement sum. Accordingly, based upon these factual circumstances, my statement in response to the complaint was accurate. If my client wants this to remain confidential then I must comply with her wishes. I, of course, first asked to keep this settlement confidential for all the obvious reasons. (e.s.)

Both of the aforementioned letters sent to the Bar by Respondent were copied to his lawyer, Gregg W. McClosky, who represented him at trial. The Bar presented no evidence contradicting Respondent's assertions in his February 12, 1996 letter and which were repeated by him at final hearing. TR 93, 95.

If Mr. Glick's testimony regarding Mr. McClosky's statements to him were not true, Mr. McClosky had the obligation to advise the Court of their falsity. R. Regulating Fla. Bar 4-3.3.

The Bar's position is, basically, that at the time Respondent wrote his November 6, 1995 letter he had no information indicating that Mrs. Schiller had asked that the terms of the agreement remain confidential. Their position is contradicted by the agreement signed by Mrs. Schiller and ratified by her at final hearing. TR 23. Mrs. Schiller testified that she advised the Bar representative of that fact and that it has always been her position. TR 23.

The Bar put on evidence which seemed to indicate that Mrs. Schiller had talked to nobody from The Florida Bar until after Respondent wrote his letter on November 6, 1996. See, for example,

the testimony of Bar Investigator Elmer Emrich TR 33 and Bar Counsel David Barnovitz TR 39. However, even the Bar had to acknowledge there was a great deal of confusion about when Bar representatives spoke to Mrs. Schiller. TR 47, 51. Bar Counsel Barnovitz testified that as recently as the Monday before the final hearing that he had acknowledged to Mr. McClosky that they had conversations prior to November 6, 1995 regarding Mrs. Schiller's refusal to disclose her settlement. TR 47. In fact, Mr. Barnovitz prepared a stipulation and forwarded it to Mr. McClosky on June 17, 1995, four days before trial, stating that Bar Counsel had informed Mr. McClosky prior to November 6, 1995 that the Bar had interviewed Mrs. Schiller prior to November 6, 1995 and she refused to disclose the confidentiality provision. TR 50, 51.

Respondent's firm recollection was that he was told by Mr. McClosky prior to November 6, 1995 that Mrs. Schiller was refusing to divulge the terms of her settlement. TR 93, 95, BEX 2. The Bar acknowledged confusion on the issue. In light of Respondent's firm recollection, the fact that he copied his letters to his lawyer (who advised him of conversations with the Bar prior to November 6th), and the Bar's confusion over the matter (no less than 29 individuals work at the Bar's Ft. Lauderdale office TR 49), the Bar **cannot prove by clear and convincing** evidence that Respondent wilfully made misrepresentations to the Bar. Accordingly, the Referee's finding on Count V must be reversed.

The entire issue on Count V is that the grievance committee regarded Respondent's statement that Mrs. Schiller asked that the

settlement remain confidential as "constituting an attempt by Mr. Glick to mislead The Florida Bar." TR 45. They focused on nine words in a three page letter. Respondent has specifically rebutted those allegations. Even the Bar is confused over the sequence of events regarding Mrs. Schiller's interviews and her advising the Bar's investigator that she would not reveal the terms of her settlement with Respondent.

Simply stated, the Bar has failed to prove any intent to mislead the Bar. Without such proof this count must fail. The Florida Bar v Cramer, 643 So.2d 1069, 1070 (Fla. 1994).

> In order to find that an attorney has acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element on intent must be proven by clear and convincing evidence. The Florida Bar v Neu, 597 So.2d 266 (Fla. 1992).

Other decisions by this Supreme Court support the proposition. For example, in The Florida Bar v Bariton, 583 So.2d 334 (Fla. 1991) the Supreme Court reversed a referee's finding of misconduct and dismissed the complaint against him. The facts of Bariton were rather straight forward:

> Respondent, a member of The Florida Bar, filed a grievance against another member of the Bar.... Included with his complaint was a copy of a letter to the accused attorney. It was later revealed that respondent's attachment to his grievance was not a true and accurate copy of the letter.... A copy of the original was never made and the letter attached to respondent's Bar complaint was a reconstruction from respondent's notes.

Both the Bar and Mr. Bariton agreed that "the difference in the letters was not material." Respondent had never represented that the two letters were verbatim copies and, in fact, some of the

missing language in the letter would have served to strengthen Mr. Bariton's grievance. The Court found insufficient evidence to support a conclusion of misconduct and dismissed the complaint.

Similarly, in The Florida Bar v Marable, 645 So.2d 438 (Fla. 1994) the Supreme Court dismissed a charge that a lawyer committed the crime of solicitation of burglary because the Bar did not prove intent. The referee found Mr. Marable guilty based on the tone of voice that Mr. Marable used in an intercepted conversation. Mr. Marable testified at final hearing that he was not serious about the comments and his explanation of the circumstances constituted "a reasonable hypothesis of innocence not negated by the circumstantial evidence of his guilt." Id., p. 443.

In the case at Bar, Respondent's testimony at final hearing completely negates the Bar's evidence that he intentionally misled the Bar. Clearly there was confusion. Maybe a misunderstanding. But not a deliberate lie.

The Bar equates Respondent's case to that of The Florida Bar v Lund, 410 So.2d 922 (Fla. 1982). Mr. Lund was given a ten day suspension for lying while testifying before a grievance committee. Mr. Lund's case is different from the case at Bar because he admitted that "a small portion of his testimony turned out to be untrue,...." His admission distinguishes his case from Respondent's. It should also be noted that Mr. Lund was testifying (and therefore was under oath before a quasi-judicial body) at the time of his misrepresentation. One would have to be somewhat more circumspect in one's testimony while under oath.

While the Bar makes much of one-half of one sentence in Respondent's November 6, 1996 letter, when viewed in the totality of circumstances surrounding Mrs. Schiller's complaint, that sentence is not significant. The thrust of Respondent's November 6, 1995 letter was his response to the allegation that her case had been dismissed for lack of prosecution after the statute of limitations had run and that she did not find out about the dismissal until after her grievance was filed. Respondent's November 6, 1995 letter admits those facts.

The sentence that the Bar focuses upon was in a paragraph in which Respondent explained that he had made restitution to his client. She signed a release in favor of Respondent and his firm and in fact, Mrs. Schiller suffered no harm from Respondent's lapse. (The Florida Bar withdrew any allegations that the release was obtained through overreaching. The evidence is unrebuttedthat Respondent advised Mrs. Schiller of her right to sue him, that he was guilty of wrongdoing, that she had the right to independent legal counsel and that she signed the release voluntarily. In fact, Mrs. Schiller sent a letter to The Florida Bar dated August 30, 1995 attempting to withdraw her grievance, REX 1, but the letter was ignored. Respondent charged Mrs. Schiller nothing for his services or his out-of-pocket costs and picked up the costs awarded to the defendants after the dismissal of Mrs. Schiller's case. Mrs. Schiller's settlement exceeded the figures tossed about by defense counsel in the courthouse hallway.)

In light of the fact that even the Bar was confused about

whether Mrs.Schiller told them before or after Respondent's November 6, 1996 letter that she wouldn't discuss her settlement, that Respondent's lawyer told him before November 6, 1995 that Mrs.Schiller wouldn't discuss her settlement, that the agreement was, in fact confidential, and that the focus of Respondent's November 6, 1995 letter was addressing the merits of the grievance, it cannot be shown that he intentionally misled the Bar. Accordingly, the complaint against him should be dismissed. The Florida Bar v Catalano, 644 So.2d 86 (Fla. 1994), Bariton, supra, Marable, supra, Cramer, supra.

POINT II

THE REFEREE IMPROPERLY CONCLUDED THAT THE EVIDENCE BEFORE HER SHOWED THAT RESPONDENT FAILED TO CONVEY AN OFFER OF SETTLEMENT IN VIOLATION OF RULES 4-1.2 AND 4-1.4(a) AND (b) AS TO COUNT III.

The gravamen of the Bar's case as to Count III was that Respondent received "an offer and/or indication of settlement range...." of $1,500.00 to $2,000.00 each for Mr. and Mrs. Schiller. They presented no evidence from adverse counsel to support their allegations. The Bar's only evidence on this count were Respondent's letters dated November 6, 1995 (BEX 1) and February 12, 1996 (BEX 2) and Respondent's testimony. Respondent adamantly denied that any "offer" was made from adverse counsel. TR 76, 77, 89, 90, BEX 2. Accordingly, there was no obligation to relay such information to the Schillers.

Respondent stated, and there is no evidence whatsoever to rebut his position, that the defendants never made any offer of

judgment or written offer to settle. The only discussions regarding figures of settlement were "courthouse talk" while talking to the lawyers in the hall in the courthouse. The conversation with adverse counsel was, in fact, not any serious discussion on settlement but was rather a declaration by adverse counsel that they didn't value cases such as the Schillers' very high. The figure $1,500.00 to $2,000.00 was tendered in that context, not in the context of an offer.

The Bar would ask this Court to take the enforcement of Rules 4-1.2 and 4-1.4(a) and (b) to the extreme. If the Bar's position is adopted, the slightest discussion involving dollar figures ("I do not think your client's case is worth a dime") would be considered an offer that would have to be communicated immediately to the client. A failure to do so would result in discipline1 Respondent argues that vague discussions on values are not "offers" that must be relayed to the client.

Black's Law Dictionary, Fourth Edition, defines offer as "a proposal; a proposal to do a thing. An attempt; endeavor". No such communications were made to Respondent in the case at Bar.

Respondent has acknowledged failing to communicate with his client in Counts I and II of the complaint at Bar. When he is wrong, he has admitted it. In Count III, however, the charges are without merit and do not warrant an admission of wrongdoing. No offer was made. There is no evidence to show that there was anything enforceable about the "courthouse talk" from adverse counsel. Hence, it was not an offer. The "settlement range"

argument of the Bar is without precedent. The purpose of the rule is requiring the communication to clients of offers is to give them the right to reject valid offers to settle the case. No such offer was made in the case at Bar.

The Bar predicates its entire case on this Count on Respondent's November 6, 1995 letter to the Bar, BEX 1. Respondent was attempting to respond to Mrs. Schiller's complaint and was giving background information on the case when he first discussed settlement proposals. While he did state that defendants had "offered" the Schillers settlement in the range of $1,500.00 to $2,000.00 each to resolve the matter, in his February 12, 1996 letter (BEX 2) he explained his prior communication by pointing out that there was "no specific written offer of settlement" but merely an estimate as to the settlement value of the case. At final hearing, Respondent further elaborated and pointed out that adverse counsel had pointed out that the Schillers "would be lucky" to get $1,500.00 or $2,000.00 out of the case.

There appears to be no law available to show lawyers being disciplined solely for failing to relay off the cuff comments by adverse counsel to their clients. No such precedent should be set.

This Court has stated that it has wider discretion to reverse a referee's conclusions of law than her findings of fact. The Florida Bar v Jov, 679 So.2d 1165, 1167 (Fla. 1996). In the case at Bar, the referee's conclusion was flawed. No offer was made and, therefore, there was no obligation to relay the figures casually mentioned by adverse counsel to the Schillers. There is

no obligation whatsoever to relay courthouse talk regarding a range of settlement to one's clients.

The referee's conclusion that Respondent is guilty under Count III should be reversed.

POINT III

RESPONDENT'S MISCONDUCT, IN LIGHT OF THE MITIGATION INVOLVED AND THE FACT THAT IT IS AN ISOLATED INSTANCE IN AN OTHERWISE UNBLEMISHED CAREER, WARRANTS AN ADMONISHMENT FOR MINOR MISCONDUCT OR, AT MOST, A PUBLIC REPRIMAND.

Respondent's misconduct in the case at Bar can best be characterized as an isolated event in a legal career spanning 15 years. Extensive mitigation was presented at trial, including an explanation for Respondent's allowing Mrs. Schiller's case to be dismissed for lack of prosecution. Specifically, Respondent's primary assistant's son drowned on January 25, 1993, one month before the Schillers' case was dismissed for lack of prosecution on February 25, 1993. As Respondent testified, his office was thrown into turmoil by the tragic death of the young boy. (Appellant's counsel has been advised that the January 25, 1993 date was communicated to the referee after final hearing was concluded).

Respondent has acknowledged the misconduct that warrants discipline. He admitted Counts I and II of the complaint in that he did not properly represent the Schillers because their case was dismissed for lack of prosecution and because he did not promptly advise the Schillers of the dismissal. For these acts, the only blemishes on his record since he was admitted in October 1981, he should receive an admonishment for minor misconduct.

Even if this Court should uphold the referee's finding that Respondent is guilty of Counts III and V, his misconduct warrants but a public reprimand.

The mitigation in this case is extensive. Numerous elements of mitigation, as set forth in Standard 9.32 of the Florida Standards for Imposing Lawyer Sanctions, are present in this case. They include an absence of a prior disciplinary record, an absence of a dishonest of selfish motive (as to the dismissal of the Schillers' case), timely good faith effort to make restitution, cooperation with The Florida Bar, good character and reputation, interim rehabilitation and remorse.

Respondent was admitted to The Florida Bar in October 1981. It is undisputed that he has no prior disciplinary history. He is board certified by The Florida Bar in civil trial work, has been on the Board of Directors of the Academy of Florida Trial Lawyers for seven or eight years and was recently voted to be a national delegate on the Board of the Association of Trial Lawyers of America. He has lectured for both the Academy of Florida Trial Lawyers and for the Association of Trial Lawyers of America on various occasions. He has chaired committees for both of those organizations. He does pro bono work for the Palm Beach County Bar Association and participates in fund raisers for various community endeavors. Last year he was appointed by the ABA to the Vice-Chair of its Tort and Product Liability Committee. TR 68, 69.

Respondent has an excellent reputation in the legal community. Richard Joseph Roselli, the president elect of the Academy of

Florida Trial Lawyers so testified. Mr. Roselli has practiced law in Broward County since 1981 and has known Respondent for eight years. He first met Respondent at a leadership retreat in Boston for the Academy of Florida Trial Lawyers. Since then their relationship has expanded both professionally and socially. Mr. Roselli recently had Respondent appointed to the Medical Malpractice Task Force for the Academy of Florida Trial Lawyers. TR 56, 61.

Mr. Roselli testified that Respondent "has an excellent reputation as a trial lawyer." He has "very high ethical ideals in terms of his obtaining cases." TR 57. Mr. Roselli considers Respondent "an ethical lawyer." TR 59. In Mr. Roselli's opinion, Respondent is "absolutely" a competent, qualified lawyer and the conduct at Bar is an "isolated incident...." TR 60, 61.

Mr. Roselli has spoken to Respondent about the conduct in questions and he knows that:

> It's upset him [Mr. Glick] greatly, not so much that he's just involved in a Bar action, but that this happened with a very nice client. She's a very nice woman. It's a circumstantial [sic] isolated event that I know he is very upset about. And I know that it's -- it's out of character for this to have happened from what I know of Brian and his practice. It's something which I know upsets him greatly from what he told me and what I can see. TR 62.

Mr. Roselli concluded his testimony by asserting his belief that the conduct before the Court was "an isolated event." TR 63.

Notwithstanding the testimony regarding Respondent's clean prior record, his excellent reputation in the community and his

remorse for his misconduct, the most important mitigation before this Court is Respondent's immediate acknowledgement of his wrongdoing and his exceedingly prompt and, apparently generous settlement with Mrs. Schiller of her malpractice claim against him. It is undisputed that shortly after receiving Mrs. Schiller's complaint, Respondent contacted her and asked her to meet him in his office. On August 30, 1995, they met in Respondent's office and effected a settlement of her claims against Respondent. It is undisputed that Mrs. Schiller was advised of the dismissal, was advised of Respondent's wrongdoing, was advised that she could sue him, was advised that she had the right to independent counsel, and was advised that she did not have to settle her claim with him. TR 18, 27, 28, 79 and 84. In addition to quite properly not requiring any reimbursement to the firm for the costs of representing her, and paying defense counsel the costs they were assessed after the dismissal of Mrs. Schiller's case, Respondent remitted to Mrs. Schiller a settlement of her malpractice claim that was more than the figures listed in his November 6, 1995 letter. TR 84, 96.

Mrs. Schiller has been made whole. She has not been prejudiced by Respondent's actions.

Respondent takes full blame for his misconduct as set forth in Counts I and II. TR 27, 84, BEX 1, BEX 2. An acknowledgement of wrongdoing, and an acceptance of the blame is not only important in determining remorse, but it is the first step towards showing interim rehabilitation. In the case at Bar, that rehabilitation is

evidence showing that past misconduct will not happen again.

Mrs. Schiller's case being dismissed was an isolated, perhaps unique, event in Respondent's career. It was due to numerous reasons, not the least of which was Respondent's setting up a new law firm. Also significant was the death of the young son, Cody, of Respondent's primary paralegal, Monica Bruce on January 25, 1993. Clearly, Respondent's office was in utter turmoil during that period of time. Ms. Bruce's absence resulted in numerous temporaries coming into the office. TR 73.

Instances like that which arose in Ms. Schiller's case will not happen again. Respondent has implemented a computer tickle system that will prevent his ever missing a statute of limitations or having a case dismissed for lack of prosecution again. TR 71.

Although it is not specifically mentioned as a mitigating circumstance, the Court should be aware that Respondent did prosecute Mr. and Mrs. Schiller's case. A complaint was filed on their behalf on April 10, 1990, approximately one year after Respondent was retained, and discovery was exchanged. Apparently, depositions were set but canceled. TR 70, 71. This case was not an instance of utter disregard of a clients rights, it simply fell between the cracks.

Respondent acknowledges both allowing the case to be dismissed for want of prosecution and his failure to communicate promptly to Mrs. Schiller that fact. He has admitted the counts relating to that misconduct and understands that discipline will be imposed. The mitigation presented, however, reduces this case from one

warranting a suspension, to one warranting either an admonishment or a public reprimand.

The starting point in assessing sanctions in Bar disciplinary proceedings is The Florida Bar v Pahules, 233 So.2d 130, 132 (Fla. 1970). In that case, this Court stated the three primary purposes of attorney discipline:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

It is axiomatic that the primary purpose of disciplinary proceedings is to protect the public. In the case at Bar, the public does not need to be protected from Brian Glick. In fifteen years of practice he has made but one mistake. He has never been disciplined by the Bar. TR 80. He has never had a statute of limitations problem before. TR 71. He has acknowledged his wrongdoing, made the injured party whole and taken steps to insure that it will not happen again. This is, at most, a isolated incident that does not warrant extreme discipline.

Regardless of the sanction imposed, Respondent has learned his lesson. Misconduct will not be repeated. An admonishment for minor misconduct, the appropriate sanction for an isolated lapse, is sufficiently stern to punish Respondent while encouraging rehabilitation. At most, a public reprimand should be imposed.

This would be the appropriate sanction only if Counts III and V were upheld by the Court. Anything harsher would be unfair to Mr. Glick and in violation of Pahules.

Finally, any discipline will be severe enough to deter like misconduct. First, in situations like this, deterrence is not an issue. This was not intentional misconduct. More significantly, however, by reducing the discipline from a suspension to an admonishment or a reprimand, this Court is sending a clear message to lawyers that prompt acknowledgement of wrongdoing and rectification of error is substantial mitigation. In other words, if you slip up, making your client whole is the best course of conduct to embark on.

Generally cases of neglect, negligence and failure to communicate warrant at most a public reprimand. This is true even where there are multiple instances of misconduct. See for example, The Florida Bar v Robinson, 654 So.2d 554 (Fla. 1995). There, the Supreme Court imposed a public reprimand for Mr. Robinson's neglect on three separate cases. They involved failing to communicate with one client, negligently failing to file a notice of appeal on behalf of a second client, and failing to adequately prepare for a third clients trial.

In The Florida Bar v Lowery, 522 So.2d 27 (Fla. 1988) a lawyer received a public reprimand for two separate counts of neglect. Mr. Lowery's neglect in one case potentially subjected his client to 60 days in jail. In the second case, Mr. Lowery neglected a case and even refused to refund fees paid for work not done.

Despite two counts of misconduct, and after considering Mr. Lowery's "financial and personal difficulties, his cooperation with the Bar and his "positive steps to correct the underlying problems...." that contributed to his misconduct, Mr. Lowery received but a public reprimand.

This Court has imposed public reprimands for neglect even where there have been prior disciplinary sanctions imposed. For example, in The Florida Bar v Kaplan, 576 So.2d 1318 (Fla. 1991), a lawyer received a public reprimand for neglect, failure to communicate and improper withdrawal despite his having received private reprimands in three prior disciplinary proceedings.

In The Florida Bar v Littman, 612 So.2d 582 (Fla. 1983) the accused lawyer received a public reprimand for providing incompetent representation despite his previously having received a prior admonishment for minor misconduct.

The Littman case is pertinent to the case at Bar not only because it shows that lawyers with prior disciplines receive but public reprimands, but because the Court to some degree outlined when admonishments for minor misconduct is appropriate. Specifically, the Court stated that:

> Normally, the worst discipline for a case of this type would be a private admonishment. Florida Standards for Imposing Lawyer Sanctions 4.44 (admonishment appropriate for negligent advice resulting in little or no injury.

In the case at Bar, while there was not negligent advice, there was negligent conduct which resulted in no injury to Mrs. Schiller.

In The Florida Bar v Riskin, 549 So.2d 178 (Fla. 1989) the

lawyer received a public reprimand for failing to file a cause of action until after the expiration of the statute of limitations, failing to recognize worker's compensation implications and failing to oppose the adverse party's motion for summary judgment. Mr. Riskin received but a public reprimand notwithstanding the fact that he had received "a private reprimand [now an admonishment for minor misconduct] in the past for neglect of a legal duty." (e.s.) The Court went on to note that "evidentially the respondent has not taken this reprimand to heart."

The Respondent at Bar has taken these disciplinary proceedings to heart. He should receive an admonishment for minor misconduct for this isolated instance of neglect.

Finally, Respondent points to The Florida Bar v Kinney, 606 So.2d 367 (Fla. 1992) to show that public reprimands are imposed for missing statutes of limitation despite a prior discipline for exactly the same kind of misconduct.

This Court has also publicly reprimanded lawyers for neglect even when there is severe aggravation present. In The Florida Bar v Harris, 526 So.2d 54 (Fla. 1988) a lawyer received a public reprimand for processing a client's estate in a dilatory manner. Respondent ignored numerous contacts by his clients and, basically, did nothing on a case over many months. He then failed to respond to The Florida Bar's complaint and failed to appear at final hearing before the referee. The Court specifically found in aggravation that Respondent's ignoring the Bar showed "a lack of responsibility...." Notwithstanding that aggravation, Mr. Harris

received but a public reprimand.

This Court has on many occasions cited to The Florida Bar v **Welty**, 382 **So.2d** 1220 (Fla. 1980) for the following proposition:

> Public reprimand is an appropriate discipline for isolated instances of neglect or lapses of judgment.

In the case at Bar, Respondent's misconduct is clearly isolated and encompasses, at worst, lapses of judgment. He should be disciplined by no more than a public reprimand.

As indicated by the cases cited above involving repeated misconduct, first time instances of misconduct similar to Respondents result in admonishments for minor misconduct. This is true even in instances where there has been more than one instance of minor misconduct. See e.g., Kaplan and **Riskin** above. In the case at Bar, Respondent's actions should result in nothing more than an admonishment for minor misconduct.

CONCLUSION

In the case at Bar, Respondent was found guilty of neglect and failure to communicate on one case. He promptly made the client whole. The conduct at issue is clearly isolated and is very unlikely to be repeated. Suspension is clearly not appropriate in instances such as this, particularly in light of the numerous mitigating factors involved. They include absence of a prior disciplinary record, remorse, good reputation in the community, prompt restitution to the client, interim rehabilitation and the turmoil surrounding Respondent's practice in 1993.

Respondent should not be found guilty in Count III of failing to convey an offer or range of settlement to Mr. and Mrs. Schiller. There is no requirement that the latter be communicated to the client. In the **case at Bar,** no offer was ever made; there was nothing more than "courthouse talk" between two lawyers discussing the case in very general terms. Because there **was** no offer, there is no requirement that the discussion be relayed to the client.

Respondent did not intend to deceive The Florida Bar as alleged in Count V when he stated in his November 6, 1995 letter that Mrs. Schiller asked that the agreement be kept confidential. There is no dispute that Mrs. Schiller signed an agreement calling for confidentiality and that she wanted her grievance withdrawn. That fact alone takes the deception out of Respondent's statement in his November 6, 1995 letter. More significantly, however, is the fact that Respondent was told by his lawyer prior to writing the November 6, 1995 letter that Mrs. Schiller had already told a Bar investigator that she would not discuss her settlement. While the Bar denies now that any such discussion took place, it is clear that up until four days before final hearing they were acknowledging that such a discussion did, in fact, take place. In light of Respondent's reliance on what his lawyer told him, and the Bar's confusion on the facts, as a matter of law it cannot be found that the Bar proved by clear and convincing evidence that Respondent intentionally misled the Bar.

If Respondent is found guilty only on Counts I and II, the two counts he admitted, he should receive an admonishment fox minor

misconduct. If he is found guilty of Counts III and V also, in light of the substantial mitigation that exists in this case, he should receive at most a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Respondent's Initial Brief was mailed to Kevin P. Tynan, Esquire, Bar Counsel, The Florida Bar, Cypress Financial Center, Suite 835, 5900 N. Andrews Avenue, Ft. Lauderdale, FL 33309 and to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL this 26th day of November, 1996.

JOHN A. WEISS