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IN THE SUPREME COURT OF FLORIDA

Supreme Case No. 88-254

Florida Bar No. 96-70,369 (11N)

THE FLORIDA BAR,

Complainant,

vs.

JULIO V. ARANGO,

Respondent,

_____/

FILED
SID J. WHITE
JAN 14 1998
CLERK, SUPREME COURT
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Chief Deputy Clerk

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RESPONDENT'S REPLY BRIEF AND CROSS-PETITION FOR REVIEW

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent was charged by the Bar with a single violation of Rule 4-1.3, Diligence, of the Rules of Professional Conduct. A final evidentiary hearing was held by the Referee, the Honorable Robert Raye on February 24 through 26, 1997. The Report of Referee was issued on October 23, 1997, almost nine (9) months after the final hearing concluded.

Since it was a three day trial and the Referee has alluded to conflicting testimony and to a lack of credibility of the party who brought The Florida Bar complaint, Maria Morales, the Respondent has prepared an appropriate Appendix (App.), which essentially contains applicable portions of the transcript of the trial and appropriate trial exhibits admitted into evidence. The Respondent will cite both to the transcript (T.) and to the Report of the Referee (ROR) and any exhibits which appear in the Appendix will be cited (App.).

The Referee found that Respondent was guilty of violating Rule 4-1.3, and recommended admonishment as an appropriate discipline and payment of costs. The Referee's findings and conclusion as to Respondent's guilt of minor misconduct are undisputed. However, notwithstanding The Bar's suggestions to the contrary, Respondent, does not accept several of the Referee's findings of fact (see Cross-Petition for Review). Those factual findings are in direct conflict with subsequent comments and final rulings made by the Referee.

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Specifically, the Referee commented in his report (See page 7 of ROR, App. 8), that he had ". . . a great deal of difficulty in resolving what appears to be conflicting testimony of some of the witnesses. It also is very appar[e]nt that Mrs. Morales had been less than candid and forthright with her attorney, and that Dr. Herdocia[]'s [o]ffice procedure and inexperience in dealing with such matters caused a great deal of confusion to all parties concerned." These comments are consistent with the Referee's recommendation as to discipline ultimately imposed and with his conclusions that at best he found a "submission of suspected (emphasis added) false evidence, suspected (emphasis added) false documents . . .." (ROR page 8, App. 8). Accordingly, earlier fact findings contained in the October 23rd Report (ROR pages 6-7, paragraph 24(a) through (e), App. 8) are directly inconsistent with the Referee's recommendations and conclusions and thus, said inconsistent fact findings should be modified, deleted, or given minimal or no weight or consideration as to this Court's ultimate review process.

The factual findings that are relied on and set forth as a basis for aggravation by the Referee did not rise to a sufficient level of proof based on the Referee's subsequent "Comment" section set forth and quoted above. Obviously, the Referee's findings of fact did not become the basis of his final result, which was discipline of minor misconduct with an admonishment as the punishment.

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Even though Respondent acknowledges that the minor misconduct was an appropriate disciplinary finding, there was substantial record testimony from employees of the Respondent (See testimony of Caridad Rodriguez (T. pages 372-406, App. 3) and Marlene Arce (T. pages 410-446, App. 4)), that Respondent did nothing wrong relative to creating "false evidence" or "false documents". For example, Caridad Rodriguez, the employee that had established a personal relationship with Mrs. Morales and had substantial contact with Mrs. Morales, made it clear that Mrs. Morales was very hard to get in touch with. (See T. pages 372-406, App. 3). Ms. Rodriguez would leave messages for the client, and the client would call when she was in town, and on a number of occasions came to the office without scheduling an appointment and was seen by Mr. Arango. (T. page 427, App. 4) She frequently traveled back and forth from Nicaragua to Miami, and vice-versa.

With regard to the issue of her and her family owned automobiles, in Caridad Rodriguez's testimony, she stated that ". . . Mr. Arango asked the client [Mrs. Morales] if they have another automobile, and they said no. . . . [s]he said there was no other automobiles in the household." (T. pages 382-383, line 22, App. 3). Ms. Rodriguez had also written numerous letters to Dr. Herdocia's office and talked with his secretary on numerous occasions to get Mrs. Morales' dental records: "I tried many times to get a hold of that office [Dr. Herdocia's]. The times that I would get a hold of them, every day they said they would be sending

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me something, but they never did. I even spoke to Mrs. Morales and I told her that the case was being held up because of these papers and that we needed these documents in order for the attorney to proceed." (T. page 382, line 5, App. 3). No credible direct evidence was presented by the Bar at trial to dispute the aforesaid testimony.

Another employee, Marlene Arce, also had written and requested several letters to Dr. Herdocia requesting Mrs. Morales' dental records, but to no avail. (See T. pages 410-446, App. 4). She also stated that "[m]any times during the course of the representation, Maria Morales would leave, be out of the state, and it was difficult to contact her." (T. page 423, line 14, App. 4). Ms. Arce is also the employee who was present when the medical authorization form for Mrs. Morales was executed and sent it to Geico. (T. pages 434-438, App. 4).

Even the liability carrier[1], Geico, and its representative, indicated that ". . . a cursory review of the file concerning Maria Morales' claim did not reveal any particular lack of diligence or attention on the part of Respondent . . .." (App. 10). Some of the Geico log entries also reflect that on or about September 11, 1995, she (successor attorney, Elena Vigil-Farinas) began representing Maria Morales. (App. 9). Settlement discussions began between Geico and successor counsel on or about October 19,

[1] Fidelity National Insurance Company was Mrs. Morales' Personal Injury Protection ("PIP") carrier.

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1995, after most of the required documents had been previously supplied to Geico by Arango, enabling these discussions to commence. (App. 9). A settlement agreement was reached on the Morales case with Geico on or about mid to late January, 1996. Respondent's work and effort in getting medical records to the liability carrier contributed to a quick settlement by the successor counsel to Respondent once she was substituted in the case for Mr. Arango.

The Respondent's expert, Tomas Gamba, Esq., (no expert testimony was presented by The Bar's counsel herein), also testified to the effect that Respondent did nothing wrong. "My opinion is that Mr. Arango exercised reasonable diligence in his prosecution of the case up until the time he was discharged by the client in . . . late August of 1995." (T. page 543, line 7, App. 6). He further testified that "They, [Geico] . . . have taken pretty much of a hard line in the defense of bodily claims in Florida. So I think they're tough to negotiate with, and I think they're tough to settle with." (T. page 538, App. 6). In addition, the expert testified that "I'm not aware of any harm whatsoever that the client sustained as a result of Mr. Arango's actions." (T. page 554, App. 6).

The delay in obtaining dental records was primarily caused by Dr. Herdocia's inexperience. Respondent wrote a letter to Geico advising Geico to request the dental records from Dr. Herdocia, (Paragraph 13 of the ROR, App. 8) , after he had attempted to obtain

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those records on multiple occasions from the dentist (Herdocia) himself, a dentist who was totally inexperienced in the area of personal injury claims and did not know what a "PIP" claim was. (ROR page 7, App. 8; T. page 36, App. 1).

Respondent Arango received two checks from Fidelity National Insurance. Respondent placed the checks in Mrs. Morales' file because Respondent Arango was not authorized by Mrs. Morales to place the PIP checks into his trust account and reimburse all of the medical providers. Therefore, the Referee's suggestion in his Comments that he believed the better procedure regarding the two Fidelity PIP checks would have been to place them in Respondent Arango's trust account (ROR page 8, App. 8), was not appropriate since Mrs. Morales would not so endorse the checks, but wanted them directly without them first being put in a trust account. At the time the case was finally settled in January 1996, Mrs. Morales' successor attorney never distributed any of the settlement proceeds to medical providers who had not yet been paid in connection with their services provided to Mrs. Morales, which was consistent with Mrs. Morales' instructions to Arango. (App. 15). (See, Receipt signed by Mrs. Morales indicating that she would have full responsibility for payment of medical providers with the checks delivered to her.) (See T. 702, App. 7; and App. 16).

This testimony was influential in the Referee's decision to reach an ultimate determination of admonishment. The aforedescribed testimony (along with applicable law), was the

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reason that in the comment section, references were made to ". . . a great deal of difficulty in resolving what appears to be conflicting testimony of some of the witnesses." (ROR page 7, App. 8).

"It also is very appar[e]nt that Mrs. Morales had been less than candid and forthright with her attorney, and that Dr. Herdocia[]'s [o]ffice procedure and inexperience in dealing with such matters caused a great deal of confusion to all parties concerned." (ROR page 7, App. 8).

Maria Morales' testimony was inconsistent and not credible. (See T. pages 454-494, App. 5). For instance, when Mrs. Morales filled out her settlement forms with Geico, she referred to herself as being single (App. 11), although she has been legally married for over forty years, and stated to her attorney that she was married. (App. 12). When asked "Did you ever tell anyone that you and your husband were not really legally husband and wife, after being with him as you husband for 43 years?" She replied, "If it's a legal thing, there is no reason for me to deny it." (T. page 461, App. 5). However, she later states that "I told her [Ms. Betancourt] that I was single because I did not want to involve my husband in this . . .." (T. page 465, App. 5). Further, Mrs. Morales was not credible when she listed herself as single on the release to Geico to acquire immediate control of the funds when her husband was in Nicaragua. (App. 11). This constituted outright dishonesty toward the insurance company as to the effectiveness of

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the release. Geico's representative, Phyllis Allen indicated that Mr. Morales' signature would have been required by Geico as an additional signatory on the settlement releases, and that she thought that Mrs. Morales was in fact "single". (App. 10, page 43).

Another area of lack of credibility was when asked if she indicated to Respondent Arango that she did not own any vehicles when she first came to his office, she stated, "Me personally, no" (T. page 481, App. 5), and goes on to say that she does not specifically remember if she was asked if anyone in her family owned a vehicle. (T. pages 481-482, App. 5). Later, she signed an affidavit stating that "[a]t the time of the accident, I owned the following vehicles: a 1985 Ford." (T. page 482, App. 5). Subsequently, Respondent Arango found out that there were two other cars owned by Mr. Morales. (T. pages 482-483, App. 5 and App. 13).

The referee, after carefully reviewing Mrs. Morales' incredulous testimony, and that of other witnesses, which conflicted with multiple witnesses presented by the Respondent, modified his earlier position with regard to the evidence, when among other things, he opined in the recommendation section of his report that he merely "suspected" false evidence, etc., but that he could not conclusively determine that false evidence was submitted, and so ruled.

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UNDISPUTED FINDINGS OF FACT

Contrary to the Bar's assertion, the Respondent takes issue **with the** Bar's "undisputed" findings of fact. Respondent's recitation of **facts in its Statement of the Case and of the Facts,** as well as elsewhere in this Brief, contradict and allude to transcript references that are inconsistent with several of the specific Bar references to findings that are in dispute.

In addition thereto, the Respondent takes exception to the one-sided early statement of facts involving aggravating factors set forth by Bar's counsel under this section. Though the Referee found certain aggravating factors that were alluded to by the Bar's counsel, those factors were offset by the mitigating factors that were also found, which included: "(a) absence of a prior disciplinary record; (g) character or reputation (good), and (j) apparent interim rehabilitation." (ROR page 9, App. 8).

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SUMMARY OF ARGUMENT

The Referee's recommendation of admonishment was the appropriate discipline for a minor misconduct violation. The ninety-one (91) days suspension recommended by The Bar is far too harsh and is unreasonable and inappropriate, particularly in light of the Record on this Appeal, and the inapplicability of the facts in all of The Bar's case law to the facts and Record in the instant case.

ARGUMENT

The Referee has recommended that Respondent be found guilty of failing to act with reasonable diligence in representing his client.

The Bar's cases are all clearly distinguishable because the violations in those cases were not minor misconduct, but multiple violations, or alternatively involved dishonest and fraudulent acts, none of which were ever charged herein by The Bar, nor ultimately proven at the trial of this case.

As to the false documents issue, the Referee "suspected" possible false evidence and acknowledged that the record contained substantial conflicting evidence to the contrary. Further, there was much doubt expressed by the Referee as to the credibility and lack of candor of Mrs. Morales, who was the Complainant at The Florida Bar's Committee level and who testified for The Bar at trial. It is also clear that Dr. Herdocia's office procedure and inexperience in dealing with personal injury claims "caused a great

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deal of confusion to all parties concerned." (ROR page 7, App. 8).

THE BAR'S LEGAL PRECEDENTS INAPPLICABLE

In its brief, the Bar initially refers to The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990), in which the Referee recommended a private reprimand and this Court then recommended a public reprimand. In Price, the respondent failed to consult with his clients about dismissing their bankruptcy action, dismissed the action without their knowledge or consent, and failed to tell them of the dismissal. He was found guilty of violating multiple Disciplinary Rules, including engaging in conduct prejudicial to the administration of justice and failing to seek the lawful objectives of his client. The respondent in Price received a public reprimand for violating three rules, yet the Bar in the instant case is requesting a suspension of ninety-one (91) days for violating one rule, i.e., diligence, where an admonishment is the appropriate punishment.

The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992) is not applicable to the instant case because in Poplack, the respondent was charged with conduct involving misrepresentation and dishonesty and appropriate proof was presented to support it. The respondent lied to a police officer regarding a vehicle which turned out to be stolen, respondent was arrested, and subsequently charged with grand theft, and thereafter referred to a pretrial intervention program. The Referee recommended a thirty day suspension, followed by an eighteen month probation. Poplack's facts are clearly

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distinguishable from the instant case because the respondent in Poplack was dishonest, and Respondent Arango's rule violation in no way involved dishonesty, nor had The Bar ever charged Arango with same.

In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), the respondent in Lord was charged and pled guilty to five rule violations, all stemming from respondent's failure to file federal income tax returns for twenty-two years. The Referee recommended a suspension for three months, and this Court raised that period to six months. Respondent Arango is guilty of violating only one disciplinary rule which is far less severe than those which the respondent violated in Lord, and he has never engaged in long term criminal misconduct as the respondent in Lord.

The Florida Bar v. Kleinfeld, 648 So.2d 698 (Fla. 1994) case cited by The Bar involved a respondent who was charged with five violations, stemming from his failure to appear in court numerous times and his lying in a sworn affidavit claiming that a judge threatened him. The respondent was found guilty of all of these violations, and the recommended discipline was a suspension of thirty-six months, followed by twenty-four months probation. The violations ranged from failure to act with diligence, engaging in conduct prejudicial to the administration of justice, and making a false statement to a tribunal. All of these charges were far more serious, both individually and cumulatively than the one violation which constituted minor misconduct in the instant case, and this

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case is completely inapplicable to the instant case.

Another distinguishable case is The Florida Bar v. Adler, 505 So.2d 1334 (Fla. 1987). In Adler, the respondent was found guilty of knowledge or complicity in the fraudulent backdating of tax documents, which the Bar found reflected upon his fitness to practice law. The Respondent had full knowledge of the backdating of documents by other participants in the investing group. The Referee recommended a public reprimand and payment of costs. This Court then suspended the respondent for ninety days. The conduct of the respondent in Adler is much different from the conduct of Respondent in the instant case. The respondent's behavior in Adler was intentional, as opposed to the behavior of Respondent Arango, which was completely unintentional. The severity of Respondent Arango's penalty should in no way be compared to the intentional acts of misconduct in Adler, especially in view of the conflicting record and testimony herein, the lack of candor of the Complainant witness, Maria Morales, and the lack of experience and understanding of Dr. Herdocia (the dentist) about what to do in personal injury claims as a medical provider.

In addition to the above, further mitigating factors in the instant case are strong and compelling: "(a) absence of a prior disciplinary record; (g) character or reputation (good), and (j) apparent interim rehabilitation." (ROR page 9, App. 8). Respondent Arango is guilty of violating one disciplinary rule, and this is his first offense; yet the Bar is seeking the same punishment that

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the respondent in Adler received, which is totally unreasonable and inappropriate from the Record of these proceedings and the ROR.

The Bar's citation of The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), is again totally inapplicable to the instant case because the respondent was found guilty of violating multiple disciplinary rules, and yet only a private reprimand was recommended. This Court subsequently recommended that a public reprimand and six months probation was the more appropriate punishment. In Vernell, the respondent was charged and convicted in federal district court of failure to file income tax returns, and such offense led to the disciplinary rules being violated. The respondent in Verne11 was guilty of committing a crime and violated multiple disciplinary rules, which is completely unlike the facts in the present case in which Respondent Arango was found guilty of minor misconduct after being charged with violating the diligence rule, and that violation was appropriately addressed by punishment of an admonishment.

The Bar next refers to The Florida Bar v. Jones, 543 So.2d 751 (Fla. 1989), where the respondent was charged with and found guilty by the Referee of violating six disciplinary rules including: (1) conduct that reflects adversely on his fitness to practice law; (2) intentionally failing to seek the lawful objectives of his client; (3) neglecting a legal matter entrusted to him; (4) intentionally failing to carry out a contract of employment with his client; (5) failing to act with reasonable diligence; and (6) failing to keep

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his client reasonably informed as to the status of his case. Furthermore, the respondent did not cooperate with the Bar during the proceedings, and did not file a brief after three notifications by this Court that his brief was overdue. The Referee recommended a ninety-one day suspension, which this Court felt was appropriate. The Jones case is totally distinguishable from the subject case.

In The Florida Bar v. Fath, 368 So.2d 357 (Fla. 1979), the respondent was found guilty of violating three disciplinary rules stemming from his failure to represent his client despite acceptance of a fee.[2] The respondent failed to appear in court on behalf of his client and failed to advise his client that the court issued a bench warrant for his client's arrest and suspended the client's driver's license for five years. The respondent told his client that he would take care of the matter and then made no attempt to rectify the court's actions. The Referee recommended a public reprimand and a three month suspension, which this Court upheld. The Fath case is distinguishable from the case at bar in that the conduct, or intentional absence of conduct, by the

[2]Respondent Arango never received any fees in connection with his representation of Mrs. Morales. Rather, he paid certain expenses and was never reimbursed. Moreover, Attorney Betancourt had agreed in writing to hold back in trust $1000 to be paid in fees to Respondent Arango pending the outcome of the Florida Bar proceeding. (See App. 14 and T. page 131). Attorney Betancourt subsequently conferred with Bar's counsel who told her she did not have to comply with her agreement with Respondent Arango and could distribute the $1000 as part of the settlement proceeds to Mrs. Morales and the payment of the attorney's fees and costs. (See T. page 134).

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respondent in Fath was much more severe than the minor misconduct of Respondent Arango. In Respondent Arango's handling of the PIP case, he could not follow "the better procedure" of placing the PIP funds in his trust (ROR page 8, App. 8) because Mrs. Morales never authorized Arango to pay any of the medical providers who had outstanding bills. Even when she settled her personal injury claim with Geico, she did not authorize her successor attorney to pay any of the medical providers out of the settlement proceeds notwithstanding outstanding provider liens that should have been discharged.

The Bar's cite of The Florida Bar v. Harper, 518 So.2d 262 (Fla. 1988) is also not applicable to the instant case. In Harper, the respondent knowingly and willfully overdrew trust accounts, failed to keep trust account records, and used the trust account funds for improper purposes. The respondent pled guilty to violating six disciplinary rules and the Referee recommended a suspension of three months. This Court felt that a six month suspension followed by a two year probationary period was more appropriate under the circumstances. The respondent in Harper acted knowingly and intentionally, unlike Respondent Arango. Considering the facts in Harper, there are no similarities to the facts in the case at bar, and therefore, said case is not applicable,

The Florida Bar v. Schilling, 486 So.2d 551 (Fla. 1986) is also distinguishable from the instant case in that the respondent

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was found guilty of neglecting his responsibilities as an attorney in two separate cases. The Referee recommended a public reprimand and a six month suspension. A key factor in this case was that the respondent had past misconduct. Though this Honorable Court did not specifically outline the nature of that prior misconduct, it was probably quite serious or was similar in nature to his current violations based on the severity of the penalty rendered therein. The respondent in Schilling neglected two matters that were entrusted to him, as opposed to the single violation for which Respondent Arango was found guilty. Any "pattern of neglect" concept alluded to by The Bar's counsel must involve separate cases such as the facts in Schilling. Furthermore, since Respondent Arango had no previous misconduct, the Schilling case is not applicable.

The Florida Bar v. Jones, Jr., 457 So.2d 1384 (Fla. 1984), is not applicable to the case at bar because the respondent was charged and found guilty of violating two disciplinary rules, including engaging in conduct involving "intentional" misrepresentation and neglecting a matter entrusted to him. The Referee recommended a six month suspension based on previous misconduct by Jones, which this Court upheld. The respondent in Jones, Jr. had intentionally misrepresented to a hospital regarding a settlement for his client. In Jones, Jr. the respondent had cumulative misconduct, unlike the present case where this diligence violation is Respondent Arango's first such disciplinary finding

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against him. The Bar claims that the type of violation in Jones, Jr. is similar to the instant case. However, there are no similar elements of neglect and intentional misrepresentation in Arango that existed in the Jones, Jr. case.

The Florida Bar v. Gunther, 390 So.2d 1192 (Fla. 1980), is distinguishable from the instant case because the respondent had multiple rule violations. The respondent failed to notify the client of a granting of the charter, failed to have shares of stock issued, failed to have his client named as president, and failed to deliver certified articles of incorporation to client. The Referee recommended that the respondent be suspended for one year. These violations for which the respondent was found guilty of, were much more numerous and damaging than the single violation for which Respondent Arango was found guilty. Mrs. Morales suffered no damage or lost money, but rather, took money due to medical providers. Therefore, this case is not applicable hereto.

Next, the Bar refers to The Florida Bar v. Sesal, 441 So.2d 624 (Fla. 1983), where the respondent was charged with and found guilty of violating three disciplinary rules, including neglecting a legal matter, failing to carry out a contract of employment, and failing to pay promptly to client funds belonging to client. Furthermore, the respondent did not file an answer and failed to respond to the Bar's request for admissions. The Referee recommended a twelve month suspension. The Sesal case is distinguishable from the instant case in that the respondent was

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found guilty of violating three disciplinary rules as opposed to the one minor misconduct rule that Respondent Arango violated, and the respondent in Segal was not cooperating with the Bar, an aggravating factor not applicable to Respondent Arango.

Similarly, The Florida Bar v. Hotaling, 470 So.2d 689 (Fla. 1985) is not applicable to the case at bar because of the respondent's multiple rule violations. The respondent was charged with and found guilty of violating thirteen disciplinary rules, including misrepresentation, dishonesty, neglect, failure to deliver property to client, handling a matter in which she was not competent, handling a matter without adequate preparation, and intentionally prejudicing or damaging a client just to name a few. The Referee recommended that the respondent be suspended for eighteen months. There are no similarities between the instant case and Hotaling. The respondent in Hotaling was found guilty of many more severe violations than the one minor misconduct violation for which Respondent Arango was found guilty.

REFEREE'S RECOMMENDATION AS TO DISCIPLINE (MINOR MISCONDUCT) AND PUNISHMENT (ADMONISHMENT) ARE SUPPORTED BY HIS REPORT AND ITS FINDINGS AS WELL AS BY FLORIDA LAW AND THE TRANSCRIPT OF PROCEEDINGS HEREIN

This Court has stated in numerous cases that although the Referee's recommendations for discipline of a member of the bar are subject to a broader scope of review by this Court, recommendations come to this Court with a presumption of correctness. The Florida Bar v. Roberts, 626 So.2d 658, 659 (Fla. 1993).

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A Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Poplack, 599 So.2d 116, 118 (Fla. 1992); The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994); The Florida Bar v. Fields, 482 So.2d 1354, 1359 (Fla. 1986). Though the facts and the holdings of the aforesaid cases are distinguishable from the facts and holdings of the instant case, the language in those cases are applicable to show the appropriateness of the Referee's discipline of admonishment.

This Court has further stated:

> "as to discipline, we note that the referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations -- such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation . . . . Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law . . .."

The Florida Bar v. Lecznar, 22 Fla. L. Weekly S168, S169 (Fla. 1997).

The Referee's recommendation of an admonishment is appropriate under the circumstances of this case. The Referee conducted a three day trial and made his recommendation. The testimony and exhibits support his recommended ruling of minor misconduct and justify an admonishment.

The recommendation by the Referee is supported by the evidence and testimony in the case, as well as by the mitigating factors herein. Respondent has not had any prior disciplinary actions

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filed against him. Under no circumstances can the Referee's findings, comments and determination of a minor misconduct violation justify a ninety-one day suspension that the Bar seeks.

The Referee's recommendation is also supported by the Florida Statutes Annotated, Rules Regulating the Florida Bar, Rule 3-5.1(a) and (b). Under subsection (b), the rule reads:

> "Minor Misconduct. Minor misconduct is the only type of misconduct for which an admonishment is an appropriate disciplinary sanction. (Emphasis added)
> (1) Criteria. In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:
> (A) the misconduct involves misappropriation of a client's funds or property;
> (B) the misconduct resulted in or is likely to result in actual prejudice (loss of money, legal rights, or valuable property rights) to a client or other person;
> (C) the respondent has been publicly disciplined in the past 3 years;
> (D) the misconduct involved is of the same nature as misconduct for which the respondent has been disciplined in the past 5 years;
> (E) the misconduct includes dishonesty, misrepresentation, deceit, or fraud on the part of the respondent; or
> (F) the misconduct constitutes the commission of a felony under applicable law."

Pursuant to aforestated Rule, the proper penalty against Respondent Arango is admonishment. None of the above criteria are present in this case. Any argument by the Bar that there was a finding or determination of dishonesty, fraud, or misrepresentation, is simply not the case herein. At most, the Referee merely found a "suspicion" of fraud, but could not make a legal finding of same since the transcript of these proceedings was replete with testimony and evidence that did not support fraudulent

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behavior by Arango in this case, and since the complainant to The Bar, Maria Morales, totally lacked credibility as a witness.

In The Florida Bar v. Price, 569 So.2d 1261 (Fla. 1990), and The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990), this Court indicated that a private reprimand is the appropriate disciplinary sanction when the misconduct is categorized as minor misconduct. In an attorney disciplinary proceeding, an admonishment is the equivalent of the former sanction of private reprimand. The Florida Bar v. Dubbeld, 594 So.2d 735 (Fla. 1992).

Based on the Referee's recommendation, Respondent Arango's conduct should be categorized as minor misconduct pursuant to Rule 3-5.1, and admonishment is the appropriate sanction.

On numerous occasions, this Court has ruled that:

> "Bar disciplinary proceedings must serve three purposes: 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; 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; and third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." (emphasis added)

Poplack, *supra,* 599 So.2d at 118.

The Referee's recommendation of admonishment meets the criteria set out in Poplack. First, an admonishment is fair to society. Secondly, the judgment is fair to the Respondent. Lastly, the judgment is severe enough to deter others.

The Bar's argument that the punishment is not severe enough

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has no merit. The Referee judiciously determined that the testimony and evidence presented at trial did not justify discipline beyond minor misconduct nor any punishment other than an admonishment.

MINOR MODIFICATIONS, DELETIONS AND/OR LACK OF ACCEPTANCE IS NECESSARY AS TO SEVERAL OF THE REFEREE'S EARLY SPECIFIC FINDINGS OF FACT

The findings of fact disputed by the Respondent are those which by the Referee's own words merely created a "suspicion" of intentional misconduct. (ROR page 8, App. 8). In fact, the overwhelming evidence and testimony set forth in the trial transcript was contrary to the Referee's early inconsistent findings of fact (ROR paragraph 24(a) through (e), App. 8) based on his Comment section. (ROR page 7, App. 8), and based on his remarks set forth in the recommendation section of his report. (ROR page 8, App. 8).

The Referee also noted in his comment that "it also is very appar[e]nt that Mrs. Morales had been less than candid and forthright with her attorney, and that Dr. Herdocia's [o]ffice procedure and inexperience in dealing with such matters caused a great deal of confusion to all parties concerned . . .." (Page 7 of the ROR, App. 8). The Referee goes on to say that he believes that Respondent Arango could have been more diligent in the handling of this matter. (Pages 7-8 of the ROR, App. 8). The only expert testifying in this case disagreed with the Referee on this conclusion. (T. pages 534-554, App. 6).

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CONCLUSION

Although the record could well have supported a conclusion that Respondent Arango did nothing wrong, it is obvious that there was also a factual basis for the Referee to conclude that minor misconduct was an appropriate sanction and therefore admonishment is the proper punishment. Respondent feels that the Report of Referee should be modified by a change or qualification, deletion or nonacceptance of paragraphs #24, (a) through (e), since those findings are inconsistent with the Referee's Comments section, his ultimate findings and qualifications of the aforesaid findings of fact and with most, if not all of the testimony and evidence presented at trial. These inconsistencies may be partially due to the lengthy delay that took place from the end of Respondent's trial to the date on which the Referee drafted his Report.

However, assuming this Honorable Court decides to uphold the Referee's Report, the appropriate punishment is admonishment because of the conflicting evidence, the complainant Morales' complete lack of credibility, (see Testimony of Maria Morales, T. pages 453-494, App. 5), and the mere "suspicion" of false evidence not supported by the record herein.

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Supreme Court Case No. 88-254
Florida Bar No. 96-70,369

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, mailed to Billy J. Hendrix, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, and mailed to John T. Berry, Staff Counsel, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 12th day of January, 1998.

By _____
Jerome H. Shevin

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