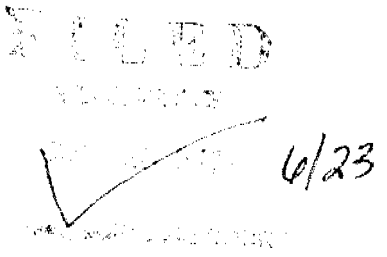

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v CASE NUMBER 88,276

BILL A. CORBIN,

Respondent.

_____/

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant in these proceedings, the Respondent below, will be referred to as Mr. Corbin or as the Respondent. Appellee shall be referred to variously as The Florida Bar, the Bar, or Complainant.

Because only The Florida Bar submitted exhibits at final hearing, all exhibits entered into evidence at that hearing will be designated by the symbol **Ex.** followed by the appropriate exhibit number. At the disposition hearing on January 21, 1997, Respondent submitted a composite exhibit consisting of 32 affidavits. That exhibit shall be referred to R. Comp. **Ex. A.**

References to the transcript of the final hearing will be by the symbol TR followed by the appropriate page number. References to the transcript of the dispositional hearing will be by the symbol TRD followed by the appropriate page number.

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ST TEMENT F THE C SE

This is an original disciplinary proceeding brought in the Supreme Court of Florida pursuant to Article V Section 15 of the Constitution of the State of Florida.

Pursuant to a finding of probable cause by the duly impaneled grievance committee, The Florida Bar served on June 19, 1996 its formal complaint charging Mr. Corbin with various acts of misconduct. Subsequently, the Honorable Nancy T. Gilliam was appointed referee to preside over these proceedings. As set forth in Section I of the Report of Referee, final hearing was held in this cause on November 26, 1996. Mr. Corbin represented himself at final hearing. On December 5, 1996, counsel for respondent filed a notice of appearance and appeared with Mr. Corbin at the dispositional hearing held on January 21, 1997. The Report of Referee was served by Judge Gilliam on February 20, 1997.

Mr. Corbin asks this Court to reverse those findings of fact by the Referee that form the basis for her conclusion that he be disciplined. Alternatively, he asks that the Court disregard the Referee's recommendation that he receive a six month suspension and that a public reprimand be administered instead.

STATEMENT OF FACTS

Respondent is a sole practitioner with offices in Blountstown, Calhoun County, and Marianna, Jackson County, Florida. He is 55 years old and was admitted to The Florida Bar on October 6, 1972. During the first week of December 1993, Respondent was retained by Mamie Elizabeth Reed to bring an action on her behalf for unpaid

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rent for the period from September 1990 to September 1991 and for damages to the property against Kathryn M. Register, aka Kathryn M. Williams and Arthur Lee Williams, III. (Because the defendants have divorced, they will be referred to as Ms. Register and Mr. Williams respectively.) Respondent filed a complaint on behalf of Ms. Reed on December 6, 1993 (Ex. 2).

Shortly thereafter, Mr. Williams without counsel filed on behalf of himself and Ms. Register an unsworn answer to the complaint. In general, the defendants denied all allegations.

Mr. Williams, who testified that he had been in law enforcement since 1972 and answered "of course" when asked if he had ever been in court before, filed the answer to Ms. Reed's complaint in the courthouse in the appropriate clerk's office himself. TR 35, 36. Mr. Williams testified that he was familiar with filing papers and various procedures in litigation because he had "had a few...." divorces in his life. TR 35.

On February 4, 1994, Ms. Register and Mr. Williams were deposed by Mr. Corbin jointly. At the deposition, Mr. Williams told Mr. Corbin that he had copies of five checks for rent that had been paid subsequent to August 1990. On or about March 1, 1994, Mr. Williams sent copies of the five checks (Ex. 3) to Mr. Corbin by facsimile.

After receiving the purported rent payment checks from Mr. Williams, Ms. Corbin presented them to his client, Ms. Reed, and her mother, Ann Crum, the individual who was in charge of receiving the rent payments. Both Ms. Reed and Ms. Crum were "shocked" to

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see the checks. Ms. Crum adamantly denied that she had received the checks or endorsed them. She continued her adamant denial of receipt and endorsement of the checks from the time she was first shown them through her testimony at final hearing. TR 133, 138.

Ms. Crum executed an affidavit (Ex. 4) on May 11, 1994 in which she swore that she had received no rent payments from either of the defendants since their last payment in August 1990. She further asserted that she kept a log of all payments made by the defendants, and attached it to the affidavit, indicating the last payment made was the August 1990 payment. At final hearing, Ms. Crum testified that the May 11, 1994 affidavit was correct. TR 135,

On June 17, 1994, Mr. Corbin filed on behalf of Ms. Reed a motion for summary judgment. Ex. 4. Attached to that motion were Ms. Crum's affidavit and her three page log. Mr. Williams testified that he received the motion for summary judgment with Ms. Crum's affidavit attached and that he saw her sworn statement that he had not made any rent payments after August 1990. TR 48-50.

In Ms. Reed's motion for summary judgment, Mr. Corbin used the language customarily used in such motions in paragraph 4 where he stated:

> There is no issue of any material fact in this cause, and Plaintiff is entitled as a matter of law to a judgment against Defendants.

Upon receipt of the motion, Mr. Williams "just sat back" and waited for a hearing before a judge. He did not file a counter affidavit to the motion nor did he call up Mr. Corbin to discuss the case

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with him. TR 50, 51.

Mr. Corbin did not set down a hearing on the motion for summary judgment until December 16, 1994, six months after the motion was served. The hearing was held pursuant to notice dated December 9, 1994. The Honorable Woodrow Hatcher, County Judge, continued the hearing on the motion for summary judgment for ten days to give Mr. Williams and Ms. Register time to file a counter affidavit to the motion for summary judgment. On December 20, 1994 Mr. Williams filed an affidavit in opposition to the motion for summary judgment. No significant action has occurred on the case since that time.

In July 1995, Mr. Williams filed a grievance against Mr. Corbin as a result of the motion for summary judgment. On September 14, 1995, Mr. Corbin filed a letter response to the grievance filed by Mr. Williams. In the second paragraph of that letter, Mr. Corbin stated to Bar Counsel that:

> To begin with, it probably would be best for you to have copies of all documents contained in the subject court file.... And, if you desire those copies I will be happy to provide them;....

In the third paragraph of the second page of that letter, Mr. Corbin stated:

> The Complainant's statement that I didn't file copies of the checks with the Court concerning the Motion for Summary Judgment is correct; however the 3-page attachments to Ms. Crum's Affidavit clearly shows the payments by those checks and thus credit for them. Paragraph 4 of the Affidavit clearly states that payments were made by the Defendants.

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In fact, Ms. Crum's affidavit did not reflect the payments made by the five checks at issue. Mr. Corbin testified that his letter was in error because it was prepared while he was **in** his Blountstown office and the file was in his Marianna office. TR 83-86. He based his answer, in part, on a file memo provided by his secretary.

Notwithstanding the clear and unequivocal testimony by Ms. Crum and Ms. Reed to the contrary, the Referee found that Mr. Corbin knew that the information contained in Ms. Crum's affidavit was untrue. Mr. Corbin adamantly denied that allegation.

At final hearing, Judge Hatcher was called to testify on Respondent's behalf. Judge Hatcher testified when asked about the propriety of Mr. Corbin's conduct regarding the motion for summary judgment that it was not Mr. Corbin's responsibility to bring up the five checks that Mr. Williams alleged had been submitted as rent payment after August 1990. TR 181, 182. Judge Hatcher went on to state that Mr. Corbin's conduct in the case at Bar did not make him a "dishonest lawyer" **in** Judge Hatcher's eyes. TR 182.

At the conclusion of Judge Hatcher's testimony, the following two questions were asked and answered:

> Q. In twenty years have you ever known Bill Corbin being deceitful or fraudulent or dishonest with the court in any way?
>
> A. If you had, you would have known about it. I think most lawyers know that I would not allow that if I knew about it. I would certainly take immediate steps.
>
> Q. You've never known of that?
>
> A. No sir.

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On January 21, 1997, a disposition hearing was held before Judge Gilliam for the purpose of taking evidence in mitigation and aggravation of discipline. Mr. Corbin was the only person to testify live at that hearing. On only one day's notice, however, he was able to gather 31 affidavits that were presented to the Court attesting to his good character. TRD 15. In a similar period of time, the Bar was only able to obtain three affidavits, from three lawyers practicing in two firms in Panama City, Florida. The Bar obtained no affidavits from any individuals in either of the two counties in which Respondent practices. Among Mr. Corbin's affidavits (Respondent's composite exhibit A) were favorable attestations from 30 individuals in his community. Among those testifying were a medical doctor, the Chief and the Assistant Chief of police, Mr. Cosbin's pastor, a deputy clerk of court and several lawyers. Among the non-lawyers testifying were clients and non-clients. Mr. Cosbin submitted his own affidavit outlining his community activities as part of the composite exhibit referred to above.

Mr. Corbin also testified about the three private reprimands that he had received. TR 24, Comp. Ex. A. Those three private reprimands, administered in 1978, 1984 and 1988 were for neglect, conflict of interest and neglect respectively.

SUMMARY OF ARGUMENT

Respondent asks this Court to reject the Referee's findings that he deliberately misrepresented material facts to the Court when he filed a motion for summary judgment and that he attached to

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that motion an affidavit that he knew was untrue. Respondent argues that the Bar failed to meet its burden of proving intent by clear and convincing evidence as to each of those allegations. Respondent argues in Point II of his brief that the Referee erroneously concluded that he deliberately tried to mislead the Bas when he made a misstatement in his initial response to the grievance filed in this cause. Respondent argues that the misstatement was unintentional and did not involve a material fact and, therefore, he did not violate the rule at issue. Finally, Respondent argues that, should this Court uphold the Referee's findings and conclusions as to misconduct, the Referee's recommendation of a six month suspension should be rejected and a public reprimand substituted therefore.

In Point I of this brief Respondent challenges the Referee's finding that he knowingly attached a false affidavit from Ann Crum to the motion for summary judgment that he filed on behalf of Ms. Crum's daughter, Mamie Reed. In that affidavit, Ms. Crum asserted that she had received no rent payments from the defendants after August 1990. She, and her daughter, Respondent's client, both testified at final hearing that they had never seen the purported rent payments prior to their seeing them at Mr. Corbin's office in May 1994. Neither individual could be shaken from their testimony. The Bar alleges that Mr. Corbin should not have relied on the assertions of his client and her mother, Ms. Crum, even though the latter submitted an affidavit. As justification for its position, the Bar submitted into evidence the five purported rent payment

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checks bearing signatures the Bar argued were Ms. Crum's. Neither of the Bar's two witnesses, however, could state under oath that Ms. Crum did, in fact, sign the checks. Neither witness was a hand-writing expert.

Respondent argues that he had the right to rely on Ms. Crum's sworn testimony and that he did not knowingly (in fact, to this day, there has been no determination as to whether Ms. Crum did or did not receive the checks) submit a false affidavit.

The Bar also alleges that Respondent engaged in misconduct when he stated in the motion for summary judgment filed on behalf of his client that there was "no issue of any material fact" in the case. The Bar bases its assertion on the fact that one of the defendants had presented Mr. Corbin with the five checks. Mr. Corbin argues that he had the right to rely on his client's and her mother's assertions that the checks were never provided to them. He points out that the defendants had submitted an unsworn answer denying the allegations which put the Court on notice that there may be issues of fact. He further argues that because the defendants did not file a counter affidavit to Ms. Crum's affidavit during the six months between the filing of the motion for summary judgment and its hearing, he had a right to take the matter to hearing before the judge. Finally, he points to the testimony of the judge that in 20 years of practice before him, Respondent had never lied to the Court and to the fact that the judge expressed no displeasure with Respondent at final hearing as evidence that the Court was not deceived.

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On both points the Bar has failed to prove by clear and convincing evidence that Respondent intentionally misled anybody. That failure to prove the allegations is fatal to the Bar's cause and, therefore, the guilty finding should be dismissed.

In Point 11, Respondent argues that the Referee improperly concluded that he deliberately intended to mislead The Florida Bar on a material fact. Unlike the arguments made in Point I, the facts as to this point on appeal are uncontroverted. In his initial response to the Bar's letter of inquiry, Mr. Corbin stated that the Defendants had been given credit for the five checks at issue. That statement was clearly a mistake. Respondent argues that it was an unintentional oversight due to the fact that he prepared his answer to the Bar's inquiry from an office different from the one in which the subject file was kept. He further argues that the misrepresentation was immaterial and, therefore, was not a violation of the Rule.

Finally, Respondent argues in Point III that, should this Court uphold the Referee's findings and conclusions, that a discipline of a six month suspension is unduly harsh. Rather, this Court should impose a public reprimand.

Respondent bases his arguments in part on the fact that the Referee disregarded material mitigation in the case and improperly found aggravating factors. Specifically, the Referee disregarded the 30 affidavits of good character Respondent obtained on one day's notice because The Florida Bar managed to obtain in a similar period of time affidavits from three lawyers in two firms in a

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county different from those in which Respondent practices. Respondent argues that the Referee should have considered as a mitigating factor his good reputation in his community because those 30 affidavits were from clients, non-clients and lawyers and included such representatives of the community as the chief and the deputy chief of police, a clerk of court, a physician and a clergyman. Respondent further argues that he had no dishonest motive in his representation of Ms. Reed and, therefore, that should have been a mitigating factor. Respondent disputes the Referee's conclusion that he did, in fact, have a dishonest motive and that he **refused** to acknowledge guilt as aggravating factors, The latter is clearly an improper factor for a referee to consider.

Based on the case law cited in the brief, Respondent submits that the appropriate discipline for his misconduct is a public reprimand.

ARGUMENT

POINT I

THE FLORIDA BAR DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT INTENTIONALLY MISREPRESENTED ANY FACTS OR THE LAW DURING HIS REPRESENTATION OF MS. REED.

The Referee made several crucial factual findings in her report which were not supported by clear and convincing evidence. The first finding was in paragraph 17 where the Referee found that Mr. Corbin knew Ms. Crum's affidavit contained untrue information. The second was her finding on page 5 that he made a material misrepresentation to the Court when he said there were no issues of material fact in his motion for summary judgment.

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In Ms. Crum's affidavi (composite exhibi 4) she stated in material part that:

> Paragraph 2. Affiant rented the property, which is the subject of the above-styled action, to the Defendants and their last payment was made during August of 1990.
>
> ....
>
> Paragraph 5. During the end of August 1990, or the first part of September 1990, defendant, Arthur Lee Williams, III telephoned affiant and said that since affiant had filed bankruptcy he did not feel he needed to pay her any more rent, and he did not pay any further rent, although Defendants were in exclusive possession of the subject property until August 1991.

Although the Referee did not specify what portions of Ms. Crum's affidavit were those which Respondent allegedly knew were untrue, in context it must be assumed to be the above two statements. Respondent did not know that Ms. Crum's statements were untrue. She was the mother of his client, Mamie Elizabeth Reed, and both Ms. Crum and Ms. Reed strenuously denied that they had received Mr. Williams' five checks (Ex. 3). Both Ms. Reed and Ms. Crum testified under oath to the Referee that they did not receive the checks. TR 138, 158. Their position before the Referee was consistent with their position when Mr. Corbin met with them in May 1994. Mr. Corbin testified that he questioned Ms. Crum closely and she convinced him that she was sincere in her assertions that she did not receive the checks.

Mr. Corbin was under no obligation to undertake an investigation in an effort to prove that Ms. Crum, his client's mother, was lying to him. No such obligation is required by the

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Rules of Civil Procedure or the Rules of Professional Conduct. In fact, the comment to Rule 4-3.3 states:

> However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.
>
> ....
>
> An advocate... is usually not required to have personal knowledge of matters asserted [in pleadings and documents], for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer.

While not on point, the comment to Rule 4-3.1 is equally instructive. When referring to the filing of frivolous pleadings, the rule notes that a lawyer does not act unethically by filing a cause

> even though the lawyer believes that the client's position ultimately will not prevail.

Similarly, a lawyer does not act unethically by filing an affidavit that *may* be untrue (as opposed to one that absolutely is untrue).

The primary evidence the Bar brought forth regarding Mr. Corbin's knowledge that Ms. Crum's affidavit was untrue was speculation by two bank employees, Mary Lynell Morris and Mary Joyce West. Both testified that the signatures on the backs of the checks appeared to be Ms. Crum's. Neither, however, would swear to that effect. TR *98,* 118.

Mr. Corbin had the right to rely on Ms. Crum's sworn assertion, i.e., her affidavit, when he attached that document to his motion for summary judgment.

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In proving intentional misrepresentations such as the one at Bar, the Bar has the burden to prove intent by clear and convincing evidence. The Florida Bar v Cramer, 643 So.2d 1069, 1070 (Fla. 1994); The Florida Bar v Neu, 597 So.2d 166, 268 (Fla. 1992). In the case at Bar, Mr. Corbin did not know that Ms. Crum was lying. In fact, even after the final hearing before the referee in this cause, nobody can say with certainty that Ms. Crum was lying. A suspicion does not automatically translate into knowledge. The Bar maybe, just maybe, proved a suspicion. It did not prove knowledge.

The Bar has failed to prove by clear and convincing evidence that Mr. Corbin knowingly submitted a false affidavit in this cause.

The Referee also found that Mr. Corbin made a material misrepresentation in Ms. Reed's motion for summary judgment when he alleged that there were no issues of material fact to be decided by the Court. In so doing the Referee overlooked the fact that a motion for summary judgment is a preliminary step in litigation which is designed to reduce the issues to be tried before a court. Just as a lawyer is not guilty of misconduct if, ultimately, the allegations in a complaint are not proven, a lawyer should not be disciplined for using standard language in a motion for summary judgment and it is ultimately not granted. (In fact, the motion still has not been ruled upon).

The language in paragraph 4 of the motion at issue is more akin to an averment than to a statement of material fact. A careful reading of the rule makes that clear. Rule 1.510 states in

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part (emphasis supplied):

> (c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall be served at least 20 days before the time fixed for the hearing. The adverse party may serve opposing affidavits by mailing the affidavits at least 5 days prior to the day of the hearing, or by delivering the affidavits to the movant's attorney no later than 5:00 p.m. two business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
>
> (d) Case Not Fully Adjudicated on Motion. On motion under this rule if judgment is not rendered upon the whole case or for all the relief asked and a trial or the taking of testimony and a final hearing is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall ascertain, if practicable, what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. On the trial or final hearing of the action the facts so specified shall be deemed established, and the trial or final hearing shall be conducted accordingly.

Paragraph (c) of Rule 1.510 makes it clear that a hearing is to be held on a motion for summary judgment. If the adverse party has served affidavits, they are to be considered at the hearing.

The judge is also to review all pleadings, including the answer filed by the defendants, in deciding if there is any genuine issue of material fact. Paragraph (d) also emphasizes that a hearing will be held on the motion, and that the presiding judge is to examine the pleadings and the evidence before the Court. The judge should also interrogate counsel in an effort to determine what facts exist "without substantial controversy" and what material facts are "in good faith controverted."

All Mr. Corbin did by including the boiler-plate language in paragraph 4 of Ms. Reed's motion for summary judgment is to set the machinery in action for determining what issues are controverted and what "good faith" controversies exist.

While the Referee repeatedly expressed her opinion that Judge Hatcher was misled by Mr. Corbin's filing of the motion for summary judgment, she completely ignored the fact that the trial court had before it the Defendants' answer denying all allegations made in the case. In other words, the Court was on notice that there were disputed issues of fact. The hearing to be held was designed, in part, to determine what "good faith" issues exist.

When Mr. Corbin filed his motion for summary judgment he had a good-faith belief that the checks submitted to him by Mr. Williams were questionable. His motion for summary judgment was a preliminary step to force Mr. Williams to assert under oath (Defendants' original answer was unsworn) that the checks were provided to Ms. Crum. Despite the fact that he had six months to do so, Mr. Williams did not submit any such affidavit to the Court.

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Respondent, then, had no alternative but to set the matter down for hearing.

It is significant that Judge Hatcher, the "offended" jurist, expressed no displeasure with Mr. Corbin's handling of the case and stated at final hearing that in 20 years of practice Mr. Corbin had never misrepresented anything to Judge Hatcher. TR 183. Judge Hatcher could have imposed sanctions pursuant to Rule 1.510(g) had he chosen to do *so.* He did not.

The Referee concluded that Mr. Corbin violated Rules 4-3.3(a)(1 (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal) and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation). The evidence did not support those conclusions. Both rule violations require the Bar to prove deliberate misrepresentation by clear and convincing evidence. Cramer, Neu, supra. As argued above, Mr. Corbin's presentation of Ms. Crum's affidavit did not involve misrepresentation. He had a good-faith basis to believe that the sworn testimony she gave in her affidavit was true. His representation in Ms. Reed's motion that there was "no issue of any material fact.,.." in the case was not made in an attempt to deceive the Court. First, an answer had been filed which alerted the Court of Defendants' posit on. Secondly, the statement was more an averment and put the adv rse party on notice that counter affidavits should be filed. Finally, a hearing had to be held during which the lawyers (or the unrepresented parties) would be interrogated.

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Under the Referee's construction of Rule 1.510 of the Rules of Civil Procedure, any time a lawyer uses the boiler-plate language contained in paragraph 4 of Mr. Corbin's motion for summary judgment and loses, that lawyer will be guilty of violating Rule 4-3.3(a)(1) and 4-8.4(c). Such a holding violates the statement in the preamble to the Rules of Professional Conduct that

> The Rules of Professional Conduct are rules of reason.

POINT II

THE REFEREE ERRED IN HER CONCLUSION THAT THE MISTAKE THAT RESPONDENT MADE IN HIS SEPTEMBER 14, 1995 LETTER TO THE FLORIDA BAR CONSTITUTED A VIOLATION OF RULE 4-8.1 (a) (A LAWYER IN CONNECTION WITH A DISCIPLINARY MATTER SHALL NOT KNOWINGLY MAKE A FALSE STATEMENT OF MATERIAL FACT).

As was argued in Point I above, The Florida Bar had the burden of proving by clear and convincing evidence that Respondent knowingly made a material false statement of fact in these proceedings. The Bar focuses on Mr. Corbin's admittedly mistaken assertion in the third paragraph of page two of his letter that the three page attachment to Ms. Crum's affidavit clearly reflected the payments and that Mr. Williams got credit for them. Mr. Corbin testified that when he drafted that response he was working in a different office from that in which Ms. Reed's file was located and that he was relying on a memo provided to him by the secretary from the other office. TR 85. In essence it was a good-faith mistake. A cursory review of the court file which Mr. Corbin should have done and did not) would have revealed to any Bar investigator that, in fact, Mr. Williams was not given credit for the five checks at

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issue in Ms. Reed's case. It defies logic to argue that Mr. corbin would have attempted to mislead the Bar on such a minor point.

If Mr. Corbin had been trying to deceive the Bar, he never would have offered to provide them with a copy of the entire file for their examination.

The Rule also requires that any misrepresentation be as to a "material" fact. Even the Bar conceded during final hearing that whether the defendants "paid rent or they didn't" was not the issue in these disciplinary proceedings. TR 44. Whether the defendants got credit for the rent was not the focus of the complaint; rather, Mr. Williams was asserting that the motion for summary judgment should not have been filed.

An analogous case is The Florida Bar v Bariton, 583 So.2d 334 (Fla. 1991). In Bariton, the accused lawyer filed a grievance against another lawyer. Mr. Bariton included with his complaint a copy of the letter to the other lawyer. The Bar subsequently discovered that Mr. Bariton's attachment to his grievance was not a "true and accurate copy" of the letter actually sent to the other lawyer. Mr. Bariton later testified that the copy attached to his complaint was a reconstruction from the notes he prepared while writing the original letter. It was agreed that "the difference in the letters was not material." Yet, the referee found that the lawyer had engaged in misconduct involving dishonesty, fraud, deceit and misrepresentation.

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This Court found the evidence was insufficient to support he Referee's conclusion in Bariton and it reversed his decision. In essence, the misrepresentation was immaterial to the matter at Bar. The same conclusion is warranted in the instant case. This Court should dismiss the Referee's conclusion that Mr. Corbin violated Rule 4-8.1(a). He did not deliberately try to deceive the Bar. Nor did he misrepresent a material fact.

POINT III

THE APPROPRIATE DISCIPLINE FOR THE MISCONDUCT AT BAR IS, AT MOST, A PUBLIC REPRIMAND.

Mr. Corbin should receive, at most, a public reprimand if the Referee's findings and conclusions are upheld. In recommending a six month suspension, the Referee chose to disregard substantial mitigating factors and erroneously attributed a dishonest or selfish motive to Mr. Corbin's actions in filing the motion for summary judgment. She also increased the severity of her recommended discipline because Mr. Corbin asserted his innocence.

Unlike its review of a referee's findings of fact, this Court is cloaked with broad discretion in reviewing the referee's recommended discipline. The Florida Bar v McCain, 361 So.2d 700, 708 (Fla. 1978). A review of the evidence before the Referee, together with a consideration of the mitigating factors involved, make it apparent that Mr. Corbin should receive nothing more than a public reprimand for any misconduct that occurred in this case.

At the outset, it should be emphasized what this case is not about. Mr. Corbin did not try to take advantage of Mr. Williams while representing Ms. Reed. Despite his protestations to the

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contrary, Mr. Williams is savvy in the courthouse. With 25 years experience in the legal system as a law enforcement officer and "a few" divorces under his belt, Mr. Williams knew what he was doing. TR 35. He personally filed an answer in his case that denied the allegations against him. While certainly not a trained lawyer, he was not intimidated by the legal system. TR 35, 36.

The time periods involved clearly rebut any allegation that Mr. Corbin was trying to take advantage of Mr. Williams and Ms. Register. Although Mr. Corbin filed Ms. Reed's motion for summary judgment on June 17, 1994, the motion was not heard until six months later, on December 16, 1994. Mr. Williams had six months to consult with counsel or to review the Rules of Civil Procedure as to what he had to do. He, however, chose to "just sit back" and wait for a hearing. TR 50. Although he knew how to contact Mr. Corbin (he called him before the motion was filed to discuss the five checks) he did not do *so.* TR 51.

While the Bar concedes that the issue of whether rent was paid or not paid was not germane to disciplinary proceedings, TR 44, it argues that Respondent made a material misrepresentation of fact to the Court when he used "boiler-plate language" in paragraph 4 of the motion to the effect there were no material issues of fact before the Court. First, this *was* not a misrepresentation to the Court: Mr. Williams had already filed an answer in which he specifically denied the allegation that no rent had been paid after August 1990. Therefore, the Court was on notice that Ms. Register and Mr. Williams were disputing this issue. Secondly, Respondent

had no reason to believe that Mr. Williams (who acknowledged receiving the motion and reading Ms. Crum's affidavit with attachment) would fail to advise the Court that he disputed Ms. Crum's position. It cannot be emphasized strongly enough that, if the checks that Mr. Williams presented to Mr. Corbin were, indeed, false, as Ms. Crum and Ms. Reed testified, there was a possibility upon receiving the motion that the defendants would abandon their improper tactics. Filing a motion for summary judgment would force the defendants, for the very first time, to submit under oath that they had made rent payments after August 1990. At the time of the hearing on the motion for summary judgment, neither Mr. Williams nor Ms. Register had testified under oath (their answer was unsworn) that they had, in fact, made the payments.

As argued in Point I above, Mr. Williams had the opportunity to apprise the Court of his position at the hearing. Or he could have done it during the six months between the filing of the motion and the hearing on it.

Mr. Corbin had the absolute right to rely an the testimony of his client and her mother in his presentation of evidence. As set forth in the Supreme Court's comments to Rule 4-3.3, lawyers are entitled to give their clients (and their mothers) the benefit of doubt in presenting evidence.

Respondent had no dishonest or improper motive in filing the motion for summary judgment. Notwithstanding the referee's strained finding that Respondent engaged in dishonest conduct simply to win his case, Respondent had no incentive for so doing.

The case did not involve a client he was close to, he was not working on a contingent fee, and he had no personal interest in the matter. TRD 12. There simply was no reason for him to make a deliberate, material misrepresentation to the Court in such a minor (albeit not minor to Ms. Reed) case. Such conduct would be inconsistent with Mr. Corbin's normal manner of practicing. In fact, Judge Hatcher testified that in 20 years of practice before him, Mr. Corbin had never engaged in deceitful, fraudulent or dishonest conduct. TR 183. Furthermore, Judge Hatcher expressed no displeasure with Mr. Corbin's handling of this case at all.

While there is no formal connection between disciplinary proceedings and contempt proceedings, this Court should note in its deliberations on discipline that Judge Hatcher expressed no displeasure over Mr. Corbin's handling of the Reed case and there is no evidence indicating any sanctions were imposed, or even sought. Such sanctions were available either under Rule 1.510(g) or in the inherent power of the court to govern proceedings before it.

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, the Supreme Court set forth 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

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> 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.

Respondent submits that the appropriate discipline in the case at Bar is, at most, a pub ic reprimand. At worse, it should be a suspension not requiring proof of rehabilitation. There has been no showing that Respondent is a threat to the public welfare. There is no showing that he is engaged in conduct that requires proof of rehabilitation in subsequent disciplinary proceedings. (Generally, requiring proof of rehabilitation before reinstatement adds five to ten months to a lawyer's suspension). Any discipline requiring proof of rehabilitation will be unfair to Respondent.

Standard 6.0 of the Florida Standards for Imposing Lawyer Sanctions covers violations of duties owed to the legal system. Respondent submits that Standard 6.13 is appropriate for the case at Bar. Specifically, that Standard states:

> 6.13 Public Reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

The Standards also set forth the appropriate mitigation to consider in disciplinary proceedings. Standard 9.32 includes as mitigating factors the absence of a dishonest or selfish motive and character and reputation in the community. As set forth by the 30 affidavits submitted as Comp. Ex. A, Respondent has an excellent reputation in his community. While there may be those that dislike him, particularly competitors in the legal field, the affidavits

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standing is a mitigating factor. The Florida Bar v Dougherty, 541 So.2d 610 (Fla. 1989). (The Court noted in Dougherty that his "naive appearance before the grievance committee without counsel and without adequate preparation...." showed good intent on the accused lawyer's part).

The Referee blithely rejected Respondent's evidence as to good character on page six of her report when she stated:

> Because the character evidence submitted by the parties was conflicting, it is considered a neutral factor.

While Respondent does not submit that a referee's consideration of character evidence is determined solely by number, when, as here, Respondent on less than one days' notice was able to secure 30 affidavits and the Bar in a similar time period was only able to secure three, that the evidence should not be considered a "neutral factor." This is particularly true when Mr. Corbin's affidavits came from individuals within his community, including the chief and chief deputy of police, a clerk of court and other professionals. The Bar's counter testimony included three affidavits from lawyers practicing in a different county and, at that, from only two firms. While the evidence may have been mildly conflicting, the overwhelming weight of the evidence showed that Mr. Corbin has an excellent reputation for good character in the community. The Referee should have considered that a mitigating factor.

The Referee also erred when she found as an aggravating factor

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the fact that Mr. Corbin had a "dishonest motive to advance...." his client's case at the expense of an unrepresented opposing party. As argued above, Mr. Corbin did not try to take advantage of Mr. Williams or Ms. Register. He gave them six months to secure counsel and to file a response to his motion for summary judgment. A lawyer trying to take advantage of the defendants would have set down a hearing for summary judgment in the minimum time frame allowed, i.e., 20 days. Furthermore, Mr. Williams was not an uneducated individual unfamiliar with the legal system. With 25 years of legal enforcement under his belt and several divorces, he was not intimidated by the legal system. In fact, he filed his answer on behalf of Ms. Register and himself personally.

For the Referee to find that Mr. Corbin had a dishonest motive based solely on a desire to win Ms. Reed's case takes an incredible leap of imagination. For her to find that Mr. Corbin was trying to take advantage of Mr. Williams is simply not warranted by any facts.

Rather than finding dishonest motive as aggravation, the Referee should have found the lack of such motive a mitigating factor.

The Referee's worse error regarding discipline, was her finding that Mr. Corbin's refusal to acknowledge the wrongful nature of his misconduct was an aggravating factor. Such a conclusion is flatly prohibited. The Florida Bar v Lipman, 397 So.2d 1165, 1168 (Fla. 1986). Merely asserting one's innocence throughout disciplinary proceedings is not refusal to acknowledge

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the wrongful nature of conduct. Requiring The Florida Bar to prove misconduct by clear and convincing evidence should not be an aggravating factor. The Referee's consideration of Respondent's defense of the allegations against him as an aggravating factor should be rejected.

Obviously, Respondent's prior three disciplinary offenses is an aggravating factor. However, because the misconduct was remote in time, and completely unrelated to the charges before the Bar in the instant case, they should not be so aggravating as to advance what is a public reprimand case to a long term suspension. There is no pattern of misconduct before the Court today.

While Respondent continues to contend that The Florida Bar did not show intent to misrepresent, or any intentional misconduct, for that matter, by clear and convincing evidence, (see e.g., The Florida Bar v Cramer, supra) for the purposes of this argument Respondent must assume that the Referee's conclusions will be upheld by the Supreme Court. Accordingly, he argues that a public reprimand, or at most, a suspension not requiring proof of rehabilitation, is the appropriate sanction for the misconduct found by the Referee. Conduct of this ilk should be considered an isolated instance that does not warrant the harsh punishment of a long-term suspension. Similar cases have not resulted in such Draconian sanctions. For example, in The Florida Bar v McLawhorn, 535 So.2d 602 (Fla. 1988) and The Florida Bar v Sax, 530 So.2d **284** (Fla. 1988) public reprimands were ordered for false statements to the Court. (McLawhorn had received another public reprimand one

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year earlier). In The Florida Bar v Story, 529 So.2d 1114 (Fla. 1988), the respondent received a 30 day suspension for improperly notarizing wills. See also, The Florida Bar v Fatolitis, 546 So.2d 1054 (Fla. 1989) where the accused lawyer received a public reprimand for forging his wife's name as a witness; and The Florida Bar v Morrison, 496 So.2d 820 (Fla. 1986), ten day suspension and one year probation in part for discrepancy in testimony before the grievance committee and for neglect.

Deliberate lies during legal proceedings have only resulted in public reprimands or short term (i.e., less than 91 days) suspensions. For example, in The Florida Bar v Batman, 511 So.2d 558 (Fla. 1987) the lawyer received a public reprimand for testifying falsely regarding practicing while suspended for nonpayment of dues. In The Florida Bar v Wright, 520 So.2d 269 (Fla. 1988), the lawyer received a public reprimand for lying during discovery in his own case. In The Florida Bar v Shapiro, 456 So.2d 452 (Fla. 1984), a lawyer got a 90 day suspension with two years probation and the ethics exam for filing a false motion to dismiss with a forged signature.

In a case far more serious than the one at bar, a lawyer was given 60 days suspension for twice deliberately lying to a judge to get a continuance. The Florida Bar v Oxner, 431 So.2d 983 (Fla. 1983).

The fact that Respondent has a prior disciplinary history does not automatically warrant a suspension. This is particularly true where there is no relationship between the past misconduct, as is

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true here, and the current misconduct. For example, in The Florida Bar v Kaplan, 576 So.2d 1318 (Fla. 1991) a lawyer received a public reprimand despite his having received public reprimands in three prior disciplinary proceedings. In The Florida Bar v Riskin, 549 So.2d 178 (Fla. 1989) the lawyer received a public reprimand in spite of the fact that he had received a private reprimand in the past. See also The Florida Bar v Brennan, 508 So.2d 315 (Fla. 1987).

The Referee's recommendation that Respondent be suspended for six months is too harsh a discipline for the conduct before the Court this date. Similar misconduct has resulted in but public reprimands or very short term suspensions. The Referee based her recommendation, in part, on erroneous interpretations of the aggravating and mitigating standards relating to lawyer sanctions. Specifically, she found as aggravating factors a dishonest motive and a refusal to acknowledge wrongful conduct. Both of those conclusions are erroneous. Furthermore, she refused to consider as mitigating factors Mr. Corbin's lack of dishonest motive and his good reputation in the communities in which he practices.

When this Court gives Mr. Corbin credit for the mitigation denied him by the Referee, and disregards the aggravating factors improperly found by her, it becomes apparent that her recommendation of a six month suspension is improper. Respondent urges this Court to substitute as a discipline a public reprimand.

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CONCLUSION

The Florida Bar did not prove by clear and convincing evidence that Mr. Corbin intentionally made any misrepresentations. Their failure to prove intent is fatal to their cause and, accordingly, this case should be dismissed. If it is found that Respondent did engage in misconduct, this Court should substitute a public reprimand for the six month suspension recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief were mailed to Luain T. Hensel, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 28th day of May, 1997.

JOHN A. WEISS