IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court
Case No. 88,384

v.

MARK D. GREENSPAN

Respondent.
_____/

On Petition for Review
of
the Referee's Report
in a Disciplinary
Proceeding.

INITIAL BRIEF OF RESPONDENT

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INTRODUCTION

In this brief, MARK D. GREENSPAN is referred to as either "Respondent" or "Greenspan"; The Florida Bar will be referred to as either the "Complainant" or "the Bar"; and Counsel for The Florida Bar will be referred to as "Bar Counsel".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee.

"RR" refers to the Report of Referee dated October 9, 1996.

"MEM" refers to the Bar's Memorandum of Law in Support of Discipline.

STATEMENT OF THE CASE AND FACTS

This disciplinary proceeding commenced on July 2, 1996 with the filing of a three-count complaint against Respondent. Count I of the Bar's Complaint alleges that Respondent failed to file a 1995 Yellow Page advertisement with The Florida Bar in violation of Rule 4-7.5(b) (filing copy of advertisement) of the Rules Regulating The Florida Bar. Counts II and III of the Complaint allege that Respondent failed to reply to investigative inquiries from The Florida Bar concerning Respondent's failure to file the advertisement in violation of Rules 4-8.4(g) (failing to respond, in writing, to inquiry by disciplinary agency) and 3-4.8 (obligation to respond) of the Rules Regulating The Florida Bar.

A Referee was appointed on July 15, 1996.

Respondent did not answer the Bar's Complaint. The factual basis for this disciplinary proceeding is not disputed: Respondent did not file a copy of his Yellow Page advertisement with The Florida Bar standing committee on advertising and did not respond to Bar inquiry concerning his failure to file a copy of the advertisement. The Bar's complaint does not allege that Respondent's Yellow Page advertisement was either improper or would not have been approved had timely filing been made. Accordingly, the content of the advertisement is not an issue in this proceeding.

A final hearing on disciplinary sanctions was held before the Referee on October 4, 1996. Respondent appeared at the final hearing and apologized to both the Referee and the Bar for his lack of response. Respondent testified that he had been "ill and depressed", was "coming out of . . . depression" and had not "been dealing with much of anything" (TR 3).

Respondent testified that his incapacity began just over a year ago (TR 4). Respondent was practicing law out of his home (TR 4). Respondent was "not really" practicing law (TR 3) but had clients in a small private practice (TR 4).

Respondent had medical problems involving a temporal mandibular joint disorder and with his diabetes in controlling his blood sugar level (TR 4). As a result of depression, in the end of September, beginning of October [1995], Respondent voluntarily admitted himself to a mental hospital for ten-days. He began seeing a therapist on a weekly basis and taking antidepressants and anxiolytic medication (TR 4).

Respondent acknowledged receiving the Bar inquiries, but explained that he did not respond because of depression (TR 5). "Depression makes you not function." (TR 5). Respondent explained that "if you are seriously depressed sometimes you can't deal with things as simple as grocery shopping." (TR 5). Respondent believes that he has made a "reasonable recovery". He interviewed with a law firm "two and a half weeks ago",

joined the firm and "is in the process of trying to become a fully functional human being again" (TR 4,5).

The Florida Bar confirmed to the Referee that it was the Bar's position to proceed with the default and argument as to sanctions (TR 5, 6). The Bar responded to Respondent's testimony concerning his incapacity by acknowledging that the "medical basis" for Respondent's "non-responsiveness" could be considered as mitigation of any sanction that the Referee would impose (TR 6). The Bar recommended a thirty-day suspension from the practice of law and argued that Respondent's "non-responsiveness" alone warrants at least a 10-day suspension under the Grosso case (TR 7).

The Bar did not present any testimony or evidence to either refute the mitigation testimony of Respondent or to support any argument in aggravation.

As to discipline, Bar Counsel recommended that Respondent receive a thirty-day suspension from the practice of law and that Respondent be ordered to file the advertisement, pay the appropriate fees and undergo a psychiatric evaluation before he is permitted to return to the practice of law (TR 7, 8). As support for this disciplinary recommendation, Bar Counsel presented to the Referee a Memorandum of Law, together with a proposed Report of Referee, which provided for the terms of discipline recommended by the Bar (TR 7, 15).

Respondent identified his therapist and the psychiatric hospital where he was admitted (TR 8). In response to the Bar's recommendation for a suspension, Respondent made an ore tenus motion requesting an opportunity to present evidence to the Referee concerning his current situation (TR 10). The Referee offered to delay the signing of the Bar's proposed Report of Referee to allow Respondent to provide the Bar with a psychological evaluation within thirty days (TR 10, 17).

The Bar maintained that even if Respondent's representations are "accurate in every way", which the Bar acknowledged it had "no reason to doubt that they are", Respondent's "failure to respond warrants a sanction nonetheless" (TR 11). The Bar stated that it "cannot concede" to Respondent's "request for an abeyance" of a suspension based upon case law (TR 11).

The Bar reiterated that it was seeking a thirty-day suspension and a psychological evaluation as a condition precedent to reinstatement (TR 13). Respondent again inquired whether there was "nothing short of a suspension that would satisfy the Bar?" (TR 15). The Referee explained that there has to be a minimum ten day suspension under case law. Bar Counsel reconfirmed that this case law was the Grosso case (TR 15). The Bar objected to withholding [a decision with regard to sanctions] (TR 17), arguing that "finality is required" (TR 17). Bar Counsel stated that she has "other cases to get

onto" and argued that it would not make any difference anyway because avoidance of a suspension was "contrary to existing law" (TR 17).

The Referee agreed that under case law the ten-day minimum could not be avoided anyway (TR 18). Accordingly, no consideration was given to any disciplinary sanction other than a suspension.

Respondent inquired whether there was a possibility of a "mitigating viewpoint" from the Referee as to the length of the suspension. (TR 18). The Referee responded that he would recommend a suspension for less than thirty (30) days, (e.g., ten or fifteen days) if the Bar agreed; if the Bar did not stipulate, the Referee stated that he would sign the "order" (i.e. the Bar's proposed report of referee) which provided for a thirty-day suspension. (TR 18, 21). Bar Counsel directed Respondent to present to her by Monday (the next business day following the final hearing) "any and all documentation, medical records, whatever [Respondent had] in mitigation that [Respondent] would have presented [to the Referee]" (TR 21).

Although the Bar did not challenge any of the testimony concerning Respondent's incapacity, the Bar requested that Respondent furnish copies of documentation concerning Respondent's psychiatric and medical history with TMJ so that the Bar could have a "clear idea of what happened" when the Bar reviewed the psychiatric evaluation (TR 15-16). This

documentation was furnished to Bar Counsel subsequent to the final hearing and was considered by Bar Counsel in determining the Bar's final recommendation as to discipline. This evidence was not furnished to or considered by the Referee in determining an appropriate disciplinary recommendation in this case. It was, therefore, not introduced into evidence and is not included in the record of this proceeding.

On October 8, 1996, Bar Counsel forwarded to the Referee an amended proposed Report of Referee. Bar Counsel's letter transmitting the amended proposed report to the Referee confirms that the proposed report was prepared after reviewing the materials which Respondent had submitted. The amended proposed Report of Referee provided for the following disciplinary sanction:

> twenty (20) day suspension from the practice of law, followed by a one year term of probation. . . . [A] psychiatric evaluation . . . obtained not more than thirty (30) days after the Supreme Court of Florida order is entered . . . [which] should be provided to The Florida Bar . . . not later than 40 days after the Supreme Court of Florida's Order is entered. . . If [the] evaluation recommends a period of treatment, such treatment shall be an intrinsic requirement and an essential element of respondent's probation. . . . [N]ot later than thirty (30) days after the Supreme Court Order is entered in this cause, respondent should be compelled to fully respond to the Bar's investigative inquiries in this cause, to file the subject print advertisement, and to pay all appropriate filing fees. He should also be compelled to pay the costs of these disciplinary proceedings. (RR 5,6).

On October 9, 1996, the Referee executed the amended proposed Report of Referee which was prepared by Bar Counsel.

The Report of Referee was considered and approved by the Board of Governors of The Florida Bar at its November 1996 meeting.

On November 6, 1996, Respondent served a Motion to Remand for further proceedings before the referee on sanctions. Respondent's motion contained a proffer of the testimony and evidence in support of mitigation which he would present to the Referee if the proceeding was remanded. The Bar filed a Response to Respondent's Motion to Remand and Motion to Strike Proffer Contained Therein.

On December 10, 1996, Respondent filed a Motion to Toll Time for the filing of a petition for review. By order dated December 12, 1997, Respondent's Motion to Toll Time for filing a petition for review was granted nunc pro tunc to the date that Respondent's Motion for Remand was filed.

By order dated February 27, 1997 the Supreme Court denied Respondent's Motion for Remand and The Florida Bar's Motion to Strike. In addition, this order approved the report of referee suspending Respondent for twenty-days as an uncontested report. On March 4, 1997, Respondent filed a Motion for Rehearing of the Supreme Court's order dated February 27, 1997.

On March 25, Respondent filed a Motion to Expedite Consideration of Respondent's Motion for Rehearing or Motion to Stay the effective date of the suspension. By order dated

April 1, 1997, the Court stayed the effective date of the suspension ordered on February 27, 1997 pending disposition of Respondent's Motion for Rehearing.

By Amended Order #2, this Court granted Respondent's Motion for Rehearing. Pursuant to this amended order, the February 27, 1997 order of suspension was vacated and the case was reinstated.

Respondent petitioned for review of the Report of Referee. Respondent seeks dismissal of these proceedings or alternatively, an admonishment with probation as a disciplinary sanction, considering the nature of allegations and evidence of mitigation which is present in this case. [1]

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[1] Subsequent to the final hearing, Respondent's Yellow Page advertisement was filed with and approved by the The Florida Bar's standing committee on advertising and all required filing fees were paid. Accordingly, the referee's recommendation that Respondent be ordered to respond to the Bar's investigative inquiries, file the advertisement and pay all filing fees within thirty days is moot and, therefore, is not the subject of this petition for review.

SUMMARY OF ARGUMENT

This disciplinary proceeding is the result of Respondent not filing a copy of his 1995 Yellow Page advertisement with The Florida Bar standing committee on advertising and not responding to the inquiry from The Florida Bar concerning his failure to file. Although Respondent did not answer the complaint, he appeared before the Referee at final hearing and testified as to his medical problems and mental disability, including his hospitalization. Respondent apologized and offered his condition as an explanation for his lack of response.

The Bar acknowledged that the medical basis offered by Respondent to explain his lack of response could be considered in mitigation of discipline. Nevertheless, the Bar recommended a thirty-day suspension from the practice of law as a disciplinary sanction and in support thereof presented a memorandum of law which cited The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) as authority. In actuality, however, Vaughn does not support a suspension and, in fact, provides for a public reprimand. The Bar did not advise the Referee of this error.

The Bar argued that a suspension was mandated and that Respondent's lack of response, alone, warranted at least a ten-day suspension, citing The Florida Bar v. Grosso, 647 So.2d 840 (Fla. 1994). The Bar did not, however, disclose to

the Referee the existence of The Florida Bar v. Grigsby, 641 So.2d 1341 (Fla. 1994) which provides support for a public reprimand. Grigsby is significant in that it represents case law involving a disciplinary sanction for an attorney's failure to respond to the Bar which is contrary to the Bar's stated position that a suspension is mandated. In addition, Grigsby has clear applicability to this case in that the respondent's mental disability was offered as a mitigating factor to explain a lack of response. The Bar had a duty of candor to disclose Grigsby to the Court.

Based upon the Bar's representations and omissions, the Referee was under a misapprehension that he was required to recommend a suspension as a disciplinary sanction. The referee authorized the Bar to consider additional material pertaining to Respondent's medical and psychological condition subsequent to the final hearing to determine if the Bar would agree to a suspension for less than the thirty-days, as originally recommended. The referee's report incorporates the Bar's final recommendation as to discipline after review of this evidence, to wit a twenty-day suspension. The report, however includes inaccurate case law as authority and sets forth findings which do not have any evidentiary basis. The report should be rejected.

Respondent requests that this disciplinary proceeding be dismissed based upon the Bar's failure to disclose to the

Referee error in the case law which it cited as authority for its argument as to discipline, failure to disclose the existence of case law which was contrary to the Bar's position concerning discipline, and failure to advise the referee that he was not required to recommend a suspension, but could consider any discipline set forth in the Rules Regulating The Florida Bar.

Alternatively, Respondent requests that Court approve an admonishment with a one-year probation as the appropriate disciplinary sanction in this case. The terms of probation would provide for certification, on a quarterly basis, from a licensed therapist that Respondent is receiving treatment for his psychological condition and that he is able to practice law.

ARGUMENT

I. DISMISSAL OF THIS DISCIPLINARY PROCEEDING IS WARRANTED BASED UPON THE BAR'S FAILURE TO DISCLOSE TO THE REFEREE ERROR IN THE CASE LAW CITED BY THE BAR AS WELL AS THE BAR'S FAILURE TO DISCLOSE THE EXISTENCE OF LEGAL AUTHORITY WHICH WAS CONTRARY TO THE BAR'S ARGUMENT PERTAINING TO DISCIPLINE

At final hearing, the Bar recommended a thirty-day suspension from the practice of law as a disciplinary sanction (TR 7, 13) and represented that a sanction other than a suspension is contrary to existing law (TR 17). In support of its position, the Bar cited The Florida Bar v. Grosso, 647 So.2d 840 (Fla. 1994). Based upon the representations of Bar Counsel, the Referee was clearly under a misapprehension that he was required to recommend a minimum ten-day suspension as a disciplinary sanction in this case:

[Referee]: I have to recommend that. Under the rules, I have no choice.

* * * *

[Respondent]: . . . Is there nothing short of a suspension that would satisfy the [sic] Florida Bar?

[Referee]: Well, under the case law there has to be a ten-day suspension, has to be under that one case in regards to -

[Bar Counsel}: Right, the Grosso case.

[Referee]: There has to be on a finding of the violation.

[Respondent]: I'm just asking.

[Referee]: Yeah, that's the case. I have to impose a minimum of ten days under that case alone.

* * * *

[Referee]: I don't know any way around that, Mr. Greenspan, as far as the suspension. (TR 14 -15)

* * * *

[Bar Counsel]: . . .If the point is to avoid suspension, that's contrary to existing law.

[Referee]: Well, we can't avoid that. I know that. Under the case law, I can't avoid the ten-day minimum anyway. (TR 17-18)

The Referee's understanding that case law mandated a suspension or any other particular disciplinary sanction is incorrect.

First, case law does not **mandate** a disciplinary sanction. A referee has the authority to recommend **any** of the disciplinary measures set forth in Rule 3-5.1, Rules Regulating The Florida Bar. A disciplinary recommendation should be based upon consideration of **all** facts relevant to the case as well as Florida's Standards for Imposing Lawyer Sanctions.

In the instant case, the Referee should have been advised by Bar Counsel that although the Bar was recommending a suspension, consideration could be given to sanctions other than a suspension, such as an admonishment, [Rule 3-5.1(a)], public reprimand [Rule 3-5.1(d)] or probation, alone or in

conjunction with either an admonishment or a public reprimand [Rule 3-5.1(c)] as the appropriate disciplinary sanction,

Second, even if assuming, ***arguendo,*** that case law determined discipline, the Bar's representations that existing case law supports only a suspension in this case is inaccurate. The Bar's recommendation to the Referee for a thirty-day suspension based upon The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) (MEM 5; TR 7) is clearly erroneous in that the respondent in Vaughn received a public reprimand.

Further, the Bar failed to bring to the Referee's attention The Florida Bar v. Grigsby, 641 So.2d 1341 (Fla. 1994). Grigsby clearly supports a public reprimand as a sanction where the respondent's failure to respond to the Bar's inquiry was likely to have been caused by a psychological condition. Respondent's testified at final hearing that his failure to respond was caused by his psychological condition. (TR 5) Accordingly, Grigsby unquestionably had applicability to the instant case. However, Bar Counsel failed to mention Grigsby to the Referee at final hear-ing, in its memorandum of law or in transmitting the amended proposed report of referee to the Referee for consideration. Instead, Bar Counsel's statements to the Referee created the misapprehension that there was **no** authority which supported any sanction other than a suspension.

An attorney has a duty of candor to the tribunal; legal argument which fails to disclose contrary authority or is based upon incorrect authority is misleading and destroys the integrity of the adjudicatory process. Assuming that the Bar's reliance upon Vaughn as support for a suspension was due to inadvertent error, Bar Counsel was clearly **obligated** to promptly advise the Referee of the error in the Bar's position and specifically, that the case **law** cited by the Bar supported a sanction other than a suspension. Bar counsel was further obligated to advise the Referee of **all existing case law,** such as Grigsby, which supported a position that was adverse to the Rar, even if the Bar believed that Grigsby was distinguishable and did not apply.

The duty of Bar Counsel to disclose to the Referee both the error in the cited authority as well as the existence of case law such as Grigsby is firmly established in the Rules of Professional Conduct. See Rules 4-3.3 (a) (1) and (3), Rules Regulating The Florida Bar which provide:

> (a) a lawyer shall not knowingly:
>
> (1) make a false statement of material . . . law to a tribunal.
>
> * * *
>
> (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel

In the instant case, the Bar breached its duty of candor to the tribunal by failing to disclose to the Referee the Grigsby

case as well as by failing to disclose its error with regard to Vaughn which was cited by the Bar as authority in support of a thirty-day suspension. The Bar's duty of candor was further breached by failing to clearly advise the Referee that no specific sanction was mandated by case law and that he could recommend any disciplinary sanction set forth in Rule 3-5.1, Rules Regulating The Florida Bar. The result of the Bar's actions was the Referee's misapprehension as to the case law and disciplinary measures which were applicable to this proceeding.

The Bar's violation of its duty of candor warrant dismissal of the charges against Respondent. In dismissing disciplinary proceedings based upon violations by the Bar in its prosecution of attorneys, this Court has stated:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.

The Florida Bar v. Rubin, 362 So.2d 12, 16 (1978).

II* THE REFEREE'S REPORT IS CLEARLY ERRONEOUS AND SWOULD BE REJECTED BASED UPON THE CITED CASE LAW AND FIN-DINGS WHICH LACK EVIDENTIARY SUPPORT

The referee's report which was prepared by Bar Counsel and executed by the Referee recommends a twenty-day suspension from the practice of law. This disciplinary recommendation

relies upon case law which does not support the recommended sanction and is based upon findings which lack evidentiary support. The referee's report is clearly erroneous and should be rejected.

The referee's report cites only The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) as **legal** authority for a suspension from the practice of law. However, the respondent in Vaughn received a public reprimand, not a suspension, for a "continuing pattern of not cooperating or participating in the disciplinary proceedings." The Florida Bar v. Vaughn, 608 So.2d 18, 20 (Fla. 1992). The case law cited by the referee does not support the recommended discipline. The referee's report is, therefore, clearly erroneous.

Further, the referee's report cites to Standard 7.2, Florida Standards for Imposing Lawyer Sanctions as support for a suspension. The applicability of this standard, however, requires an evidentiary basis to support a finding that the respondent **"knowingly"** engaged in conduct that is a violation of a duty owed as a professional, **and** causes **injury** or **potential injury** to a client, the public or the legal system" (Emphasis added). Standard 7.2, There is no such evidence in the record of these proceedings.

First, the Referee finds potential injury based upon "respondent's inappropriate advertisement had (and continues to have) broad exposure in the Broward County area" (RR 8).

However, this disciplinary proceeding is based only upon a failure to comply with the advertising filing requirement set forth in Rule 4-7.5(b), Rules Regulating The Florida Bar. There is no allegation in the Bar's complaint that Respondent's advertisement was in any way "inappropriate" and there was no testimony or evidence presented at final hearing concerning the content of the advertisement. In fact, Respondent's Yellow Page advertisement was neither introduced into evidence at the final hearing nor was the content even mentioned in these proceedings. In the absence of any evidence concerning content, there can be no finding that Respondent's advertisement was "inappropriate" or caused injury or potential injury to the public. The referee's finding as to injury or potential injury based upon an "inappropriate" advertisement is without any factual basis and should be rejected.

Second, the referee's report indicates that the referee is "unable to determine with any certainty whether Respondent suffers (or suffered) from any mental disability which actually impaired his judgment in electing not to respond to the bar's investigative inquiries" (RR 7). The transcript of this hearing contains no such finding by the referee nor is there any statement made by the referee from which such finding could be presumed.

On the contrary, a review of the final hearing transcript establishes that the unrebutted testimony of Respondent concerning his psychological condition **and** incapacity as an explanation for his failure to respond was readily accepted by both the Bar and the Referee. In fact, after Respondent disclosed his incapacity as an explanation for his actions, Bar Counsel specifically acknowledged to the Referee that Respondent's "medical-basis for his non-responsiveness [could be taken into] account in terms of mitigation of any sanction that [the Referee] would impose." (TR 6).

The Bar's acceptance of Respondent's testimony concerning his condition is evidenced by statements of Bar Counsel such as, "Even if Mr. Greenspan's representations are accurate in every way, and I have no reason to doubt that they are . . . ."[Emphasis added] (TR 11). In fact, the Bar even admitted to the Referee that it had been concerned that "something like the scenario which [Respondent] has just advised . . .that such a thing perhaps existed . . . ."(TR 7). Moreover, not only did the Bar accept the testimony concerning Respondent's incapacity due to his psychological condition, but it used Respondent's testimony as a basis to request a psychiatric evaluation before Respondent is permitted to return to the practice of law. (TR 7, 13, 15)

The Referee's acceptance of Respondent's testimony concerning Respondent's medical and psychological condition is

evidenced by the Referee's statements in support of the Bar's request for a psychological evaluation as well as by the statements expressing concern that Respondent's psychological condition, specifically his hospitalization and amount of "ongoing therapy", be disclosed to his firm (TR 11-13). In addition, the Referee's comments are clearly sympathetic to Respondent's condition:

> . . . I think we need to give him all the help we can because he's obviously getting back on his feet, and - -
>
> * * *
>
> . . .you hate to hold somebody back that's just getting back on their feet. (TR 17)

There is no statement made by the Referee from which any finding as to uncertainty, with regard to Respondent's mental disability or Respondent's explanation for his failure to respond, could be presumed.

The referee's report references aggravating factors suggested by Florida Standards for Imposing Lawyer Sanctions. However, the report cites several factors which are clearly not applicable or have no proper evidentiary basis, to wit:

> Standard 9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency

The record contains no evidence of bad faith obstruction or an intentional failure to comply with any rules of the disciplinary agency. The evidence establishes psychological

disability rather than bad faith. There is no statement made by the Referee at final hearing from which such finding of bad faith could properly be presumed.

Standard 9.22(g) refusal to acknowledge wrongful nature of conduct

This finding is directly contrary to Respondent's testimony at the commencement of the final hearing, to wit: "I'd offer nothing in the way of an excuse. I simply offer as an explanation that I have been ill and depressed . . . and I apologize to the Bar, to this Court and to you individually for the inconvenience that my non-responsivity has caused." (TR 2-3).

Standard 9.22(i) substantial experience in the practice of law

This finding simply does not apply to the facts of this case and is irrelevant as a factor in this proceeding. Further, the record does not reflect any testimony or evidence relating to respondent's experience in the practice of law from which any finding of "substantial experience" could be made.

Finally, there is no justification for any statement in the referee's report that discipline less that the recommended suspension is necessary to send a message that "callous disregard for clients, The Florida Bar, and the attorney disciplinary process are serious infractions which may not be committed with impunity" (RR 9). The evidence in this case establishes only that an attorney failed to comply with a Bar

advertisement filing requirement which ordinarily warrants an admonishment by a grievance committee (RR 8) and that he did not respond to Bar inquiries concerning the filing because of mental disability. While this statement may be necessary to justify a suspension as a sanction in other cases, it does not fit the "crime" or the evidence in this proceeding.

Moreover, the referee's report is deficient in that it does not include any of the mitigating factors which clearly have an evidentiary basis, such as:

Standard 9.32(a)	absence of a prior disciplinary record, [See statement as to prior discipline (RR 10)]
Standard 9.32(c)	personal or emotional problems [See Respondent's testimony concerning his medical and psychological condition (TR 3-5)]
Standard 9.32(h)	physical or mental disability or impairment [See Respondent's testimony concerning his medical and psychological condition (TR 3-5)]
Standard 9.32(l)	remorse [see Respondent's apology (TR 3)]

The referee's report reflects findings to support the recommended discipline which cannot be presumed based upon the record of the proceedings. The Bar initially recommended a clearly excessive disciplinary sanction (30 day suspension) (TR 7, 13). Respondent plead for a lesser sanction (TR 15). The Bar was permitted an opportunity to evaluate additional material not presented to or considered by the referee (TR 18,

21) and to essentially pick the length of the suspension which the referee would then adopt as recommended discipline. The amended referee's report, which includes the Bar's final disciplinary recommendation of a twenty-day suspension, was drafted by the Bar with a view towards justifying a clearly excessive disciplinary sanction. The referee's report recommending a twenty-day suspension relies upon case law which does not support its position and sets forth findings which lack evidentiary support. The referee's report is clearly erroneous and should be rejected.

III. A VIOLATION OF THE BAR'S ADVERTISEMENT FILING REQUIREMENT CONCERNING ONE YELLOW PAGE ADVERTISEMENT AND A FAILURE TO RESPOND TO BAR INQUIRY CONCERNING THE REQUIRED FILING DO NOT JUSTIFY A SANCTION GREATER THAN AN ADMONISHMENT WITH PROBATION

This Court has utilized a broad scope of review in reviewing a referee's recommendations for discipline in order to ensure that punishment is appropriate. The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989). The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) sets forth the purposes of discipline and establishes the standards used to evaluate a disciplinary sanction:

> 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.

Id. at 132.

The substantive charge involved in this disciplinary proceeding is respondent's failure to file a 1995 Yellow Page advertisement with The Florida Bar standing committee on advertising as required by Rule 4-7.5(b). In its Memorandum of Law in Support of Discipline, the Bar concedes that a violation of Rule 4-7.5(b)(failure to file advertisement), Rules Regulating The Florida Bar, warrants an admonishment by the grievance committee as an appropriate sanction. In support thereof the Bar cites The Florida Bar v. Doe, 634 So.2d 160 (Fla. 1994) (MEM 4-5).

However, in considering Doe for purposes of determining an appropriate disciplinary sanction in this case, it should also be noted that in addition to failing to file the advertisement, the respondent in Doe was also found guilty of violating Bar rules relating to the content of the advertisement, specifically, Rules 4-7.2(d) (failing to contain the required disclosures) and 4-7.3(f) (potentially false or misleading in stating that it was not an advertisement) of the Rules Regulating The Florida Bar. Nevertheless, this court approved an admonishment in Doe, notwithstanding these additional rule violations pertaining to the content of the advertisement.

Unlike Doe, however, the case *sub judice* does not involve an allegation that the advertisement which was not filed was in any way improper or would not have been approved, if filed. The violation in this case is merely a failure to file the advertisement with the advertising committee. There are no reported cases which involve only a violation of a failure to file. The absence of reported cases suggests that grievances which allege a failure to file an advertisement are considered relatively minor in nature and are resolved by either an admonishment for minor misconduct pursuant to 3-5.1(b) or the issuance of a grievance committee Letter of Advice pursuant to Rules 3-7.4(j) and (k) of the Rules Regulating The Florida Bar. A letter of advice is not a disciplinary sanction and is not reported; an admonishment, which does constitute a disciplinary sanction, is generally not published.

Considering Doe and the lack of other reported cases involving a failure to file an advertisement, it would appear that an admonishment is the most severe sanction which would be appropriate as a disciplinary sanction for Respondent's failure to file his 1995 advertisement with the standing committee on advertising (Count I).

In its Memorandum of Law in Support of Discipline and at final hearing before the Referee, the Bar argued that a thirty-day suspension was warranted based upon Respondent's

failure to respond (MEM 8; TR 7). In fact, in its memorandum, the Bar stated that the "only sanction that fits" is a thirty-day suspension (MEM 5). The Bar cited The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992) in support of a thirty-day suspension. (MEM 5)

The respondent in Vaughn was found not guilty of the charges alleging misconduct relating to the representation of a client. However, Vaughn failed to appear before the grievance committee, failed to communicate with any **Bar** authority that he was involved in a criminal trial during the period of the grievance hearing, and failed to appear in person before the referee. Vaughn only attended the hearing before the referee by telephone after the referee called him at home. Vaughn was found guilty of violating 4-8.1(b) of the Rules Regulating The Florida Bar based upon his failure to cooperate with the disciplinary authority. In determining discipline, the Court considered the fact that Vaughn was found not guilty of any other substantive violation. Notwithstanding Vaughn's prior disciplinary record, which included both a private reprimand and a public reprimand, Vaughn did **not** receive a thirty-day suspension, as suggested by the Bar, and in fact, did not receive **any** suspension. Vaughn received a **public reprimand** for actions which this Court recognized as constituting a "continuing pattern of not

cooperating or participating in the disciplinary proceedings". Vaughn 608 So.2d 18, 20, 21.

In its Memorandum of **Law as well** as in the Report of Referee which the Bar prepared and submitted to the Referee, the Bar inaccurately referenced Vaughn as legal authority that supports a suspension for a lack of cooperation and participation in the disciplinary proceedings. At final hearing, the Bar continued to argue that the case law cited in the Bar's Memorandum of Law supported a thirty-day suspension (TR 7). The Bar represented that Respondent's "non-responsiveness" alone warrants a ten-day suspension based upon the Grosso case (TR 7) and continued to maintain that suspension is the only appropriate sanction (TR 13-15, 17-18).

In The Florida Bar v. Grosso, 647 So. 2d 840 (Fla. 1994), the respondent admitted that he failed to respond to an investigative inquiry in violation of Rules 3-4.8 and 4-8.4(g) of the Rules Regulating The Florida **Bar.** Grosso requested that this Court reject the referee's recommendation of a sixty-day suspension and in lieu thereof approve the ten-day suspension which was originally recommended by the Bar. The Court agreed and suspended Grosso for ten-days. However, it does not appear that the Court was requested to consider any sanction less than a ten-day suspension. Grosso does not support an argument that the only disciplinary sanction for an

admitted failure to respond to an investigative inquiry is a suspension.

The two cases cited by the Bar, i.e. Grosso (at final hearing) and Vaughn (in the Bar's Memorandum of Law), establish that the Bar's representation that case law for failure to respond supports a suspension of at least ten (Grosso) or thirty days (Vaughn) is erroneous. In fact, the only argument that the Bar could have properly presented to the Referee is that the two cases cited by the Bar support a disciplinary sanction of either a **public reprimand or** a ten-day suspension. Accordingly, the Bar's final disciplinary recommendation which was included in the referee's report prepared by the Bar and signed by the Referee, to wit, a twenty-day suspension, is clearly excessive based only upon the two cases cited by the Bar.

In presenting relevant case law to the Referee, the Bar failed to disclose The Florida Bar v. Grigsby, 641 So. 2d 1341 (1994). Grigsby involves a respondent's failure to respond to the Bar's repeated requests for information from a disciplinary authority in violation of Rules 4-9.1(b) and 4-8.4. Grigsby is similar to the instant case in both the nature of the violation and the mitigation. Both respondents suffer from clinical depression for which they have voluntarily sought treatment and both respondents have offered their illness as an explanation for their conduct. In Grigsby, this

Court rejected the suspension sought by the Bar and recommended a public reprimand and probation as the appropriate disciplinary sanction, notwithstanding Grigsby's prior disciplinary history which consisted of an admonishment (which included similar misconduct of failing to respond to Bar inquiries) as well as a three-month suspension, In approving a public reprimand in Grigsby, this Court recognized that the respondent's "failure to respond to the Bar's requests was likely caused by this mental disability". The Florida Bar v. Grigsby, 641 So.2d 1341, 1343,

Unlike Grigsby, however, Respondent has no prior disciplinary history. Accordingly, Respondent should not receive a sanction greater than an admonishment when considering the discipline imposed in Grigsby (public reprimand) in conjunction with the additional mitigation of the absence of a disciplinary record. As further support for an admonishment in the absence of a disciplinary record, Respondent notes that the first discipline which Crigsby received was an admonishment for conduct which included failing to respond to Bar inquiries. See The Florida Bar v. Grigsby, 641 So.2d 1341.

Applying the purposes of discipline set forth in Pahules to the instant case, it is apparent that a suspension, as recommended by the Referee, is clearly excessive. Respondent would urge the Court to reject the discipline recommended by

the Referee **and in** lieu thereof order an admonishment together with one-year probation pursuant to Rule 3-5.1 (c), Rules Regulating The Florida Bar. Further, instead of the probation recommended by the Referee, Respondent's probation would be subject to the following terms:

- Respondent shall continue to actively participate in therapy with a licensed mental health counselor.
- The mental health counselor shall submit quarterly reports to The Florida Bar which shall confirm respondent's active participation in counseling and that he has the ability to engage in the practice of law.

Unlike the discipline recommended by the Referee, the discipline suggested by Respondent meets all of the criteria established by Pahules: it protects the public, it encourages rehabilitation (continuing treatment for a medical and psychological conditions) and it is severe enough to act as a deterrent to others.

CONCLUSION

This disciplinary proceeding should be dismissed based upon the Bar's failure to disclose to the Referee legal authority which was contrary to the Bar's position and failure to disclose error with regard to argument and case law cited in support of the Bar's disciplinary recommendation. Alternatively, this Court should reject the referee's recommendation for a twenty-day suspension from the practice of law, as recommended by the Bar and set forth in the

referee's report prepared by the Bar, and, in lieu thereof, approve an admonishment and probation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Respondent was forwarded by AirBorne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927 and that a true and correct copy was mailed to John T. Berry, Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to Lorraine C. Hoffmann, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, Florida 33309 this 24th day of June, 1997.

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