FILED 047
SID J. WHITE
JUL 14 1997 8/5
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant-Appellant,

Supreme Court No: 88,526

Florida Bar No: 96-51,422 (171)

VS.

TIMOTHY J. HMIELEWSKI,

Cross-Appellant/Appellee

CROSS-APPELLANT/APPELLEE'S INITIAL BRIEF AND ANSWER BRIEF

J. DAVID BOGENSCHUTZ
BOGENSCHUTZ and DUTKO, P.A
Colonial Bank Building
Suite #500
600 south Andrews Avenue
Fort Lauderdale, FL 33301
Phone : (954) 764-2500
Bar No: 131174

Counsel for Cross-Appellant/Appellee

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

PRELIMINARY STATEMENT

Respondent accepts the preliminary statement made by the appellant.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as offered by Petitioner with the following record additions:

Respondent denies that he lied throughout the entire course of this litigation. In fact, his (and his associate's) advice to Mr. Shubot was to tell the truth on the deposition which uncovered the misconduct. The client although first claiming attorney client privilege on his own, acceded to Respondent and his associate in this direction, (TT-61), and the matter unraveled.

Respondent appeared before the United States Magistrate Judge (for the first time) and took full responsibility for his actions.

He advised that at the time that Scott Shubot initially brought the concededly stolen records to Respondent's office, that Respondent told him that it would be considered a theft by them (Mayo Clinic). (TT-59). The client disagreed. (TT-59) He did not decline to represent Shubot because he believed that Mr. Shubot had a "case that had merit" (TT-60) separate and apart from the purloined records.

After his appearance before the United States District Court, because he felt that he was not strong enough in his advice to his client (who in turn became one of the debtors of $105,000.00 as a sanction from the United States District Court in Minnesota), the Respondent agreed to absorb all of the $105,000.00, holing him (the client) harmless for any of the award.

In addition, (see Bar's Exhibit 3) the Defendant made a full and complete, and uncommonly candid, admission before the Honorable

Ann Montgomery, United States Magistrate Judge (TT-62). The Defendant believed there existed Fifth Amendment implications in the original theft and presentation to him of the records based on his State Attorney's Office experience, and some private criminal defense work afterwards (TT-62,63). He admitted, both in the hearing before United States Magistrate Judge Montgomery, and in the Bar proceedings themselves, candidly and forthrightly, that although he had difficulty formulating how to deal with this situation, he views it now, and even during the period of time that it was going on, as improper and was willing at that point to take all consequences in a total expression of remorse for his actions.

As a contributor to the difficulties that Respondent had or was experiencing with respect to this unique set of circumstances, he recounted a difficulty which another attorney, one Charles Hartz, had encountered several years prior. (TT-68,88-90) This particular "Hartz matter" was regarding an attorney who had a Bar complaint filed against him for using falsified records. Mr. Hartz, the attorney, defended himself before the Bar by stating that he had used the falsified, re-written medical reports, which he knew to be untrue, to cross-examine the plaintiff in a personal injury action where he (Hartz) represented one of the doctors/defendants. When the plaintiff learned that Hartz had utilized such falsified statements and records, the plaintiff filed a Florida Bar Complaint against Hartz. (TT-69) Mr. Hartz's position was that even on records that were re-written and falsified he felt that he had an attorney-client privilege and a

Fifth Amendment privilege and his position was he had to use the re-written version as best he could to lock in the plaintiff for fear that if he revealed the truth of the case (the records being re-written) the plaintiff would merely run rough shod over the doctors because of this intense anger over his son's death. (TT-74) This matter was dismissed by the Bar and it formed some basis for the Respondent's view, previously cited, that he had either , or both, a Fifth Amendment privilege that he must advise his client of (which was, actually, true) or attorney-client privilege with respect to delivery of the records by the defendant (which was, in fact, partially true). The attorney-client privilege, as differentiated from the Fifth Amendment privilege, would have precluded Mr. Hmielewski from going any further than advising his client to return the records in some fashion so as not to implicate the client in a crime. In the mere production of these documents and discussions with Respondent the attorney-client privilege would preclude disclosure. Anything that the Respondent did thereafter in continuation of what appears to be a fraud, would not be privileged under the attorney-client privilege. It could, however, for both the attorney and the client, come within the ambit of the Fifth Amendment. However, rather than do that, when the client was subpoenaed to testify, the Respondent advised him that he must tell the truth, the Respondent's associate advised him that he must tell the truth, and eventually this matter came to light as a result of those advises and of the plaintiff's testimony in deposition. (Ironically, had the Plaintiff maintained his Fifth Amendment

privilege on that singular issue, or testified **falsely** on that issue, this matter would never have come to light because no inquiry by the United States District Court and the **Magistrate** Judge thereof would have been energized). By stepping forward and accepting responsibility for, and admitting complicity in, such a charade, Respondent and his client (who was first hesitant to do so) actually furthered the administration of justice in ferreting out this matter and in accepting financial responsibility for the cost of defense that were uniquely attenuated to the falsehoods submitted.

In further explanation of why he continued attempting to deal with this case in his client's best interests, he viewed from a distance the **"Hartz matter".** The Respondent made **a** determination that the **case** itself as a personal injury matter or wrongful death was a valid, meritorious **case (TT-82)** and had significant conversations with his client over a period of time **about the** validity and legality of the client's seizure of those records in the Mayo Clinic. Although Respondent told the client that the information in the records and a copy thereof actually did belong to the client, the original records did not; the client responded by saying that he believed that the records belonged to him . **(TT-**83). In order to maintain integrity over these records, the Respondent made a copy of them but he could not change his client's mind in this matter. (TT-84)

After all this had taken place, the client had asked Respondent to attempt to settle the case before he was deposed.

(TT-88) This was the same set of circumstances that occurred in "the Hartz matter" previously discussed. (TT-88)

When asked by his own counsel at the hearing before the Referee as to why he had not returned the records himself, the Respondent responded: "I guess because of my underlying philosophy that the case is always the client's case first. It is not my case. I advise . . ..and he was advised that there was a Fifth Amendment situation and there was a crime whether he liked it or not." (TT-97)

When further asked what he would have done differently today than at the time that the client came into his office with the allegedly stolen records the Respondent replied: "Instead of saying at some point you've got to return these records, I would have said if you want me to represent you, having looked at these records, I will tell you that they do not hurt your case. They help your case in terms of the failure to monitor the IV line...unless you are willing to return them and face the music regarding the potential repercussions of the crime, be it State or Federal, I will not represent you. That is what I would have done differently." (TT-100) And, finally, when the Respondent was asked by his counsel as to what or how he felt about this entire matter, he responded: "Terrible... if nothing else comes out of this I hope there will be something definitive in medical negligence arena where this problem is rampant... and if you become aware, as you should, from your client or any other source that those records are anything other than complete and accurate, by God, ethically and otherwise, you

have the duty to immediately rectify that situation, Fifth Amendment and attorney client privilege not withstanding..." (TT-102-104)

Further, in the record, the Defendant placed into evidence the testimony of several other individuals as character witnesses and references for mitigation:

1. Testimony was taken from the Honorable Harry Hinckley, Circuit Judge Seventeenth Judicial Circuit of Florida. (TT-105) He found the defendant to be a "great trial lawyer and very helpful including to his opposition and to the Court-a real gentleman".

2. Richard Alcorn, an attorney in Phoenix, Arizona, who had worked with Mr. Hmielewski during a law suit which came up during the proceedings but was later dismissed by the Bar pre-trial; Mr. Alcorn was "Very impressed with Mr. Hmielewski's talent and believed him to be an exceptional legal talent." He further believed him to be a very credible, honest individual and was trustworthy. (TT-183)

3. Peter Mineo, an attorney who practices in medical malpractice in Broward County, Florida. Mr. Mineo had known Mr. Hmielewski for at least ten (10) years, had litigated with and against him and when asked an opinion about him as a person and a lawyer, said that he was an individual who would cut his fees in the face of the needs of a client and was a loyal and dedicated attorney to the special needs of his clients. (TT-195)

4. Linda Hart, who is a forensic scientist since the early 1970's, is a handwriting specialist and has worked with Mr.

Hmielewski in the past to determine whether or not medical records had been falsified, re-written or in some way perpetrated as a fraud. Ms. Hart testified that Mr. Hmielewski prepared his cases well, that he spends late evenings and weekends to find evidence in a case using his own personal. time and does "incredible service" for his clients. (TT-202)

5. The Honorable Robert Makemson, Circuit Judge Nineteenth Judicial Circuit of Florida. Judge Makemson indicated that ten (10) years prior to his elevation to the bench in 1989 he was in private practice. He testified that Mr. Hmielewski appeared to be very competent was thoroughly prepared and had no doubt of his integrity, honesty or forthrightness, based upon a case in which Mr. Hmielewski represented the plaintiff in his courtroom. (TT-210)

6. Mr. Dennis Maglios, a former client of Mr. Hmielewski and the Plaintiff filing the Bar Complaint against Charles Hartz, previously described. He described the Respondent and said that Mr. Hmielewski took his son's case even when every other lawyer that he had spoken to said it was a "hopeless matter". He further described Respondent as "a guy that would take a case that nobody else would take", would take from his own resources, work day and night on the case, operated further as a counselor to help him and his family through an extremely difficult time. (TT-215)

7. Jonathan Royal, a retired dentist who works for Respondent now part time while he is going to law school. He had retired from being a dentist after a car accident. He filed a law

suit, Mr. Hmielewski took over the case and dealt with him to the extent that he wound up recommending that he attend law school. He describes Respondent as a very "giving person" and that he further reduced his fees for people that he knew needed the money more than he did. (TT-220)

8. Rosemary Cooney, a health law defense attorney. She practices law in Palm Beach County and has litigated against Respondent. She testified that he is very knowledgeable, and formidable, plans his cases well and understands medicine very well. Specifically, she said "I think he (Respondent) has elevated the standard of personal injury practice in the whole State of Florida." (TT-224)

9. Lawrence Ruvin, an attorney in Fort Lauderdale licensed for 38 years, has "great respect" for the Respondent, he mentions that he and Respondent were opponents in a case. He feels that Respondent was honest, forthright, and direct in his operations with him.

10. Edward Dinna, an attorney licensed in 1988, he met Respondent after a motorcycle accident where his cousin was represented by Respondent. He was himself also involved in a car accident at age 17. His spine was injured and he became a quadriplegic, Mr. Dinna's testimony was, in all respects, the most compelling testimony during the hearing. He commented on several instances, and he became too emotional to speak. He is confined to a wheelchair and has no use of his arms and legs. Nevertheless, Mr. Hmielewski influenced him to go to law school and helped him

become an attorney. (TT-241) Mr. Dinna, after telling the Court he had broken his neck in a car accident, opined that "Tim has had the most influence in me in my entire life, save from my mom. And if it wasn't for him I know that I would be dead and my mom as well. I wouldn't be a lawyer and life for me would be very difficult if I wasn't. (TT-241) In representing me, Tim took my burden, put it on his shoulders and carried it and made it easy for me. And for that I am forever grateful". (TT-242)

SUMMARY OF ARGUMENT

The "distillation" as set forth by Petitioner in this matter overlooks several important factors that later should be considered by the Court in extreme mitigation of this unusual and unfortunate set of circumstances: except for a minor discipline several years prior, Respondent's entire legal career has been discipline free (in excess of twenty (20) years). When Scott Shubot confronted him with the records that he had advised he had stolen from the Mayo Clinic, the Respondent was placed on the horns of a constitutional, and ethical dilemma. He recognized that Mr. Shubot had a legitimate Fifth Amendment privilege and legitimate attorney client privilege, both melding into the actual production of these records in Respondent's office. Respondent, not a seasoned criminal practioner, and in view of his direct participation in the "Hartz matter" and knowing that the case, as he was hearing it, had substantial merit, urged his client to return the records. The client refused to do so. The Respondent was thus in a position of having information given to me that showed that his client was potentially a thief, either federally, or under the laws of the State of Minnesota. However, because his history had been to place his client's interest first, with the ability and determination to do justice for them in any way that he could see was appropriate, he struggled intrinsically to resolve this compound issue so that Mr. Shubot, who, in Respondent's estimation, had a meritorious case against the Mayo Clinic for what he considered to be the wrongful

death of Mr. **Shubot's** father, would not be forced to abandon or otherwise lose what was rightfully his based upon the negligence of the Clinic. Throughout the pre-trial discovery process, Respondent never appeared before a United States Magistrate Judge. However, in an effort to keep the negotiations going, he did, unfortunately, make direct or indirect false statements in order to settle the matter for an amount of money that, despite the alleged purloined records, would be fair to compensate the victim. The difficulty that Respondent faced was that he took the wrong tack in protecting that client's interest. In doing so, he now recognizes that he stepped over the line, and now faces a one year suspension as a result thereof. The aggravating factors set forth by Rule, and the overwhelming mitigating factors similarly set forth compel a finding that, with all of the Respondents background and the evidence presented at the hearing before the referee, a one year suspension from the practice of law is the severest sanction that this Respondent should receive. Based upon the defalcation herein, and based upon the Respondent's mitigation presented, it is fair that such a suspension be less than one year.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF ONE (1) YEAR SUSPENSION WAS EXCESSIVE IN THE UNIQUE FACTS AND CIRCUMSTANCES OF THIS CASE.

Unequivocally, the actions of the Respondent in this cause were worthy of discipline, however anomalous to his prior two decades of practice before the Florida Bar. The legal and ethical struggle that he experienced during Scott Shubot's attorney-client relationship with him is well documented by his testimony and the tenor of it, at the March 13th hearing in this cause. In an unusual action, the referee asked several probing and, for most instances, reflective questions of the Respondent when he testified he even permitted Respondent to make a final plea to the Court-also a highly unusual, but well intentioned, attempt by the referee to fully acquaint himself with the intricacies and nuances of this cause and with the person before him. It should be noted, and noted well, that the referee in this cause had a singular ability to watch the Respondent testify, to gauge the sincerity of his answers, and to further observe the credibility and sincerity of the witnesses who testified before him in ostensible mitigation.

Neither counsel, nor Respondent, contest the fact that discipline is warranted, as indicated before. However, the imposition of one (1) year suspension or certainly the Bar's preference for disbarment, under these **facts and circumstances** are excessive and do not comport with fairness in this cause.

Rule 6.11 of the Florida Standards For Imposing Laywer Sanctions wherein petitioner suggests that disbarment is

"appropriate" says, in clear form, that penalty (disbarment) may be appropriate "absent aggravating or mitigating circumstances" in 6.1 of those same standards. Clearly, if in fact there **are aggravating or** mitigating circumstances that a referee might take into consideration to determine that "disbarment" is **not** appropriate, the Standards provide that leeway. Consequently, if the referee finds that there exists mitigating circumstances that make disbarment **inappropriate**, he should find them, recite them, and his discretion in so doing is reviewable only as a palpable abuse. It should be remembered that the referee's recommendation comes to the Court clothed with a presumption of correctness, and is given great weight. (Florida Bar v. Orta) 85,124 and 85,426(S Ct. 3/16/97)

The humanity, and the frailty of the human condition, is not dissolved by admission to the Florida Bar. Respondent became extremely concerned when he learned about Scott Shubot's activities. He was, on the other hand, a lawyer for his entire career and profession and had been an "underdog lawyer"-that is, as stated by one of his witnesses, he took the cases "no one else would". Scott Shubot and his family had a meritorious, valid law suit. The records that were stolen from the Mayo Clinic did nothing to dilute or increase that law suit's worth. The Respondent erred several times in his attempts to keep the law suit "alive" and to, ideally, resolve the case in a manner consistent with what it was worth before any appearances before the Court where he would have to admit the records' problem. When it came time to approaching the Court in deposition, he would not stand for

his client to hide behind a lie, and when called before the Court himself he not only accepted full responsibility therefor, and candidly admitted his involvement, but also, because he felt that he had not been successful in stopping this to begin with, held the client totally harmless for the dollars spent by Mayo Clinic to defend this one particular issue: lost records. He was wrong. He has admitted he was wrong.

As the petitioner suggests, there were several alternative routes to have been taken by Respondent in order to either rectify, or avoid the disciplinary problem he now faces. The visual acuity of hindsight being what it is, and the issue of a highly contested law suit on a major preeminent institution being overlooked, there may have been, and should have been, other action taken by Respondent than that which is complained of here. However, it is instructive, and certainly appropriate and relevant, to review the **mitigating** factors that, in the Respondent's view, are more than significant enough to not only avoid the penalty of disbarment under Rule 6.11, but also to reduce the current one (1) year suspension imposed by the referee: As to the issue of aggravation and mitigation under Rule 9.0 et seq. of the Florida Standards For Imposing Lawyer Sanctions, the trial court found the existence of aggravating factors in the following respects:

A. The Respondent's 1993, report of minor misconduct and admonishment. Although that matter is, or seems to be, permitted by 9.22(a), it should be noted that aggravation issue although technically within the time period, must be read or must be

considered in terms of his entire career of two decades of exemplary practice with but that one minor besmirchment of his record. The fact that it occurred, technically again, within seven (7) or more years prior to the hearing, is misleading as to the real impact of that minor misconduct.

B. Substantial experience in the practice of law. Respondent does not contest that this aggravating factor exists.

C. Dishonest or selfish motive. Although the referee was convinced that the motive of Respondent was not based on selfishness, (although the settlement offer was based upon dishonesty), this particular aggravating fact was found to exist because Respondent "allowed what he perceived as his duty to his client to completely overshadow his duty to the Court and opposing counsel". In citing Dodd v. The Florida Bar, 118 So.2d 17(Fla. 1960) the referee relies upon language which decries an attorney who "allows false testimony to be cast into the crucible". There simply was not false testimony in this case. In fact, when it became necessary for testimony to be taken, both counsel and his associate directed that the client testify truthfully despite the fact that both knew that if he did so, it would adversely affect the law suit, and result in potential problems for Respondent. The client did. The Respondent conceded to the United States Magistrate Judge that it was true. The rest is history.

As to the issue that is raised by the petitioner as to "additional aggravating factors" the Bar suggests that "a pattern of misconduct" as well as "multiple offenses" should support such

an aggravation. On the contrary, this entire scenario revolved around one sinsle law suit, That law suit, and the underlying claim therein, were determined to be meritorious, and, standing alone, recoverable from a hospital which apparently was negligent in the care of Scott Shubot's father. At best, it is one assravatins factor and was taken into consideration by the referee as an aggravating factor under C, Dishonest or Selfish Motive.

More weighted by far, however, are the mitigating factors which the referee was clear to delineate and to suggest guided his eventual decision in this matter.

Whereas the prior minor misconduct was considered as an aggravating factor, as counsel has indicated herein, it was also found to be a mitisatinq factor, as a "sole blemish on the Respondent's record of almost twenty one (21) years of practice". Clearly, the referee considered the mitigation, thereof to be primary in his assessment.

Furthermore the referee found that there was an absence of selfish motive. When matching that against the finding and aggravation of a "dishonest or selfish motive" the referee exercised discretion in assigning the "absence of selfish motive" a mitigating role, and clearly, elucidated the reasoning for that (page 12, Referee's Report and Recommendation). Finding "timely good faith efforts to rectify consequences of misconduct," the referee observed the defendant testify and concluded that his actions in stopping this charade prior to the time that any Court severely impacted by testimony, constituted such a "rectifying"

activity.

"Cooperative attitude toward proceedings in full and free disclosure to disciplinary Board". The referee, in asking his own questions to Respondent at the conclusion of the hearing, and in listening to the other individuals who testified about his honor and integrity, was clearly impressed with his candor and forthrightness and cooperation with this proceeding. Such actions support a mitigator on this issue.

Remorse. It should be noted that the referee was able to question the Respondent himself, observe direct and cross examination of the Respondent, and listen to Respondent's final words in summation all of which place the referee in an entirely, and completely, superior position to assess those issues. In all respects, the referee found that the Respondent was remorseful, and believed, to a great extent, on credibility issues alone, the explanations he gave and the reasons he propounded for his actions. It should be noted that the referee did not agree with them nor did he think they were appropriate. However, in terms of clarity, the report and recommendation show that the referee was impressed with the way that the Respondent reacted to this matter, acted to rectify, and his reputation in the community.

Character or reputation. The referee, very candidly, advised that it is this factor in mitigation that "saves the Respondent from a recommendation of disbarment". In dealing with the litany of witnesses and testimony, it is apparent and, it cannot be overlooked, that the people who came before the referee and put

their own reputation and integrity "on the line" to speak up about the Respondent, were monumentally impressive. As a result, discipline was significantly reduced by the referee in attempting to review the Respondent's every day life from a perspective that did not require the Respondent's own statements.

It is, further, offered to this Court, that the Respondent had imposed upon him other penalties and restrictions which would quality as a mitigating factor under 9.32(k); that is, that the Respondent assumed full responsibility for $105,000.00 in costs regardless whether they had been currently paid or not, and was chastised and castigated by a court to which he was admitted to practice, suffered a Bar complaint, and went through a wrenching Bar hearing which resulted in a recommendation of suspension. The humiliation, and embarrassment as well as the suspension that has been recommended, are unable to be fathomed by an attorney who has not lived through them. Nevertheless, they certainly through no fault of anyone but his own, create such sanctions and penalties upon him so as to qualify for this mitigating factor.

None of the cases cited by the Appellant, are closer to the Respondent's position then the sole case that Respondent would rely upon: The Florida Bar v. Rood, 569 So.2d 750(Fla. 1990). In Rood, the Supreme Court found that concealment of experts and causing clients to sign false answers under oath warranted a one (1) year suspension rather than disbarment. It should be noted that at no time did this Respondent cause anyone to file false answers under

oath in any preceding. In fact, Respondent thwarted any opportunity for his client, or himself, to maintain the falsehood, especially in light of the upcoming sworn deposition to be taken from Mr. Shubot. The factual differentials in the cases that are cited requiring disbarment are as follows:

The Bar cites the Florida Bar v. Calvo, 630 So.2d 548(1994), to support disbarment, In Calvo, unlike in the particular case before the Court, the Respondent attorney actually participated in a loan scandal wherein individuals who were purchasing shares of a Federally regulated security were lied to, and suffered significant financial loss as a result of his affirmative and negligent actions. In Calvo, the Respondent refused to keep current the closings of the loans, and inappropriately conducted such closing without proper filings of notice or permission of the governing authorities. In short, Mr. Calvo was involved with his cohorts who were trying to sell twelve million shares of federally regulated securities within a hundred and fifty days of the affective date of the prospectus, in what appears to be a major fraud in the arrangement of short term "flash" loans or in participating and obtaining those loans. Such a wide spread criminal involvement from the face of the Calvo decision, is a significant reason for disbarment. The instant case has no such sires of criminal "warts".

In the Florida Bar v. Orta, (supra.) the Respondent produced false evidence, false statement and other deceptive practices during disciplinary process was convicted of prior felony charges

and during the suspension that resulted from the felony convictions, continued the pattern of falsity in order to seek, or achieve reinstatement. Orta, is wholly distinguishable from the case at Bar.

In Florida Bar v. Merwin, 636 So.2d 717 (Fla. 1994), the attorney's failure to attend scheduled hearings, failure to respond to telephone calls from the Judge and opposing counsel, lying under oath and failing to properly represent a client warranted disbarment. Even without any other discipline the sanction of disbarment may have been appropriate here. However, Merwin actually had two prior public reprimands. The instant case is far dissimilar that.

In Dodd v. Florida Bar, 118 So.2d 17 (Fla. 1960), Dodd actually suborned, or incited perjury and was charged by the State Attorney with that in two personal injury cases. In holding that "our Supreme Court has held that disbarment should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly and consistent with approved professional standards" 118 So.2d at 18, the Court clearly suggests between actively suborning or inciting activities in the financial interests of the lawyer or attempting to promote false testimony on behalf of his clients, with no appreciable mitigating factors, should, and will result in disbarment. In the instant case, it is precisely what Mr. Hmielewski did not do, that is, when the time came for his client to be not only examined but to produce himself before the defendants' attorney's for deposition, he compelled the

client to testify truthfully, and then later, in a visit to the judicial woodshed in Minnesota, candidly exposed himself to what may be considered rightful retribution by accepting responsibility for his actions therein.

Finally, and in general recapitulation, the Respondent's actions in continuing a law suit while permitting and in some cases assisting, counsel on the other side in believing that records were not in his possession, is a matter that the Bar should deal with, and under the limitations as set forth in the Florida Standards For Imposing Lawyer Sanctions, and deal with appropriately. However, under the unique circumstances of this case, with the mitigating factors so far outweighing the aggravating factors, with the referee making express observations and rulings as to credibility, as to remorse, as to all of the mitigating factors cited in the report and denuding the report of at least one aggravating factor, it is uncontroverted that the referee's findings in this disciplinary proceeding are supported by competent, substantial evidence which precludes the Supreme Court from reweighing the evidence and substituting its judgment for that of the referee (see Florida Bar v. Orta, suara.) except as urged herein. It is further, respectfully suggested that a one (1) year suspension may be excessive under the circumstances and would point to the same suspension that was given in Florida Bar v. Rood, (supra.) and the Florida Bar v. Morrison, 669 So.2d 1040 (Fla. 1996).

CONCLUBION

Wherefore, the Respondent respectfully requests this Honorable Court to **vacate** and reject the report and recommendation of the referee as to discipline only, and impose a ninety (90) day suspension from the practice of law with all of the attendant special conditions set forth in the referee's report.

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing was Cross-Appellant/Appellee's Initial Brief and Answer Brief was furnished via regular U.S. mail to Adria E. Quintela, Bar Counsel at the Florida Bar, 5900 North Andrews Avenue, Suite #835, Fort Lauderdale, FL 33309; John Berry, Staff Counsel at the Florida Bar, John F. Harkness, Jr. Executive Director at the Florida Bar and John A. Boggs, Director of Lawyer Regulation at the Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300 on this 11th day of July , 1997.

J. DAVID BOGENSCHUTZ
BOGENSCHUTZ AND DUTKO, P.A.
Colonial Bank Building
Suite #500
600 South Andrews Avenue
Fort Lauderdale, FL 33301
Phone: (954) 764-2500
Bar No: 131174