IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 29 1997
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

THE FLORIDA BAR,
COMPLAINANT,

CASE NO. 89,069
TFB CASE NO. 96-3 1,4 14(19A)

v s

MICHAEL BARRY RUBIN,
RESPONDENT

RESPONDENT'S INITIAL BRIEF

Michael B. Rubin
Respondent
908 East Stypmann Boulevard
Stuart, Florida 34994
56 1-286-6746
Florida Bar No. 0826080

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PREFACE

The following abbreviations will be used throughout the brief

ROR= Report of Referee

A_ = Appendix page ___.

CTF= Court File

STATEMENT OF THE CASE

The grievance committee, committee 19A, voted to find probable cause, that respondent participated with Robert Udell in a referral fee without a signed referral agreement, by a vote of three to zero, in June 1996, in violation of Rule Regulating The Florida Bar 4-1.5 (f)(2). The attorney who failed to reduce the referral fee to writing, Robert G. Udell, though admitting to having affirmatively misled Respondent, and who admitted that Respondent tried on numerous occasions to have the agreement reduced to writing was wholly cleared by the Grievance Committee (Al), as was the attorney who committed legal malpractice by advising and counseling Respondent to file the lawsuit that led to the instant Bar case (A23). Respondent never received a dated report, so respondent does not know on what date said vote occurred, as respondent was not provided with Notice of the meeting, as required by Rule Regulating The Florida Bar 3-7.4(h). The first referee, Judge Johnston, was appointed on October 24, 1996, but later recused himself in December 1996.

Respondent was treated differently then other attorneys similarly within this case, and the prosecution was a selective, malicious one from the standpoint of The Bar, and Grievance Committee, as the attorney who refused to reduce the referral fee agreement to writing, which led to the instant case, Robert Udell, was cleared by the grievance committee (Al), who found his conduct "distressing," and the attorney who advised and counseled (i.e., assisted) respondent to take action allegedly violating Rules Regulating The Florida Bar (Joseph Negron) was not only

found wholly faultless (A23), but his conduct in wilfully ignoring a subpoena for the Final hearing was ultimately excused as well, by the referee.

The reason for this dis-similar treatment of similarly situated individuals arose as a result of Bar Prosecutor James Wilson Keeter's dislike for the Respondent, which arose as a result of the aforementioned Keeter being forced to admit, in an unrelated case wherein respondent was wholly cleared, that Bar Counsel Keeter neglected a legal matter. (A24, A25).

Final Hearing was held on May 2, 1997, before Judge William T. McCluan, but, based upon the referee's bias against the respondent, and for The Bar, as a result of respondent filing a complaint against the referee with the Judicial Qualifications Commission, the outcome was predictable. The Final Hearing was originally scheduled to be held April 1, 1997, but witness Robert Udell decided to ignore his subpoena, and leave the country (the referee had no problem with Udell's behavior in ignoring the subpoena, and denied respondent's Show Cause Motion).

On March 30, 1997, at the Hearing wherein the case was continued, the referee orally agreed to sign an order continuing the subpoenas from April 1, 1997, to May 2, 1997.

However, despite repeated attempts by the respondent to have those orders signed, including but not limited to several phone calls, and two letters, the court refused to do so until 4: 12 p.m., on May 1, 1997, the day before the Hearing. (A3, AS)

As a result, one of respondents' witnesses, Joseph Negron, chose to ignore the subpoena, and respondent's right to call witnesses was impeded by the court's action in failing to sign the Order until 4: 12 p.m. the day before the Hearing, and, when notified of the problem and the need for a continuance based upon the witness not being served timely, the referee denied respondents' Motion to Continue, and respondents' Motion to Disqualify the Referee was denied as well(A3, A4 A5, A6, A7).

After witness Negron failed to appear, Negron apparently engaged in *ex-parte* communications with the referee, or the referees' staff, as mentioned in Negron's response to respondents' motion to issue a rule to show cause, when Negron states in that Motion that he was excused by the court, at noon after the Hearing was concluded, without respondents' knowledge or consent. (A19).

Because the court refused to sign the Orders continuing the subpoenas, something it orally agreed to sign a month earlier, respondent moved to continue the case and disqualify the referee on May 1, 1997, but both Motions were denied, again, without Hearings, as, when respondent called the referee at four p.m. on May 1, 1997, to find out the status, he was merely told to "be there" the next day by the referee's assistant.

Even The Florida Bar, in its' response to Respondent's Motion to Disqualify, agreed that a continuance would have been appropriate as result of respondents' inability to compel the attendance of witnesses as result of the referee refusing to sign the Order continuing the

subpoenas from the previously scheduled Final Hearing.

As a result of the referee' s conduct resulting in a violation of respondents' rights to call witnesses, and his refusal to hold hearings, respondent filed a complaint against the referee with the Judicial Qualifications Commission, and made the referee aware of that via a Motion to Disqualify filed before the Final Hearing. (A7, AS, A9).

The referee denied the motion to disqualify, though not finding it legally insufficient, and the rest is predictable, as it was a foregone conclusion that respondent would be found guilty by a referee who had, by way of respondent's filing of the Judicial Qualifications complaint, acquired an extreme dislike for respondent, and the referee should have disqualified himself before the Final Hearing.

At The Final Hearing, each and every decision was rendered in favor of The Florida Bar, the referee absolutely refused to consider that respondent was the victim of Robert Udell's deceitful conduct (deceitful conduct which The Bar has no problem with), The Florida Bar was allowed to use leading questions, but respondent wasn't, and the entire proceeding was little more then a mockery of justice, with each and every decision being decided in favor of The Florida Bar.

As a direct and proximate result of the referee taking an extreme dislike for respondent based upon respondent filing said complaint against the referee, the referee blindly sided with The Bar at each and every phase of the hearing, on each and every issue and, further, the Referee, at the

hearing, unilaterally reversed another decision he had earlier made, when the referee decided, when respondent tried to call witness Michael Lewis, that said witness could not be called, despite the earlier ruling that, as investigating committee member, Respondent could question him as to his investigation in the respondent's case, and, later, after being notified by respondent in writing on more then one occasion, the referee would not allow respondent to see the Final Hearing Report Order prepared by the Bar which was apparently blindly signed by the referee, nor would the referee allow the respondent to present mitigating evidence before signing the report prepared by The Florida Bar.

Actually, at the Final hearing, the referee stated that, in the event respondent was found guilty, a separate, telephonic hearing as to penalty would be held. This never happened, and it was perfectly clear to respondent that the referee only held hearings when the referee chose to, and the referee chose not to allow respondent to produce mitigating evidence prior to filing his Final Report of Referee.

In fact, the referee had earlier agreed to allow this witness, and another John Davis Lewis III, to testify telephonically, but, for no apparent reason, would not allow respondent to offer, or even proffer, Michael Lewis as a witness at the Final Hearing when respondent attempted to do so.

After the Hearing, on May 2, 1997, when respondent was not allowed to call two witnesses he planned on calling as result of the court's actions (Negron and Lewis), Respondent attempted vainly, until August 1997, to have the court issue a rule to show cause for Negron ignoring the

subpoena, (A12, A13, A14, A15, A16, A17, A18).

However, the court found that Negron's *ex-parte* communication with the referee's office at noon May 1, after the hearing was over, was good enough, and no action was taken against Negron, despite the fact the case was not continued, and respondent lost the ability to call the witness,

Without respondents' knowledge, or consent, the referee unilaterally excused Negron from the subpoena, at 12:00 p.m. the day of the Hearing, after he had failed to appear.(A19).

As to the Report of Referee, the referee decided, "in secret", to find the respondent guilty, as respondent, in July, received a copy of a letter the referee sent to the Bar, merely stating that the respondent is being found guilty, and asking the Bar to submit a record of a respondent's prior disciplinary actions, Respondent was asked to submit nothing, nor was he given an opportunity to.

Respondent was never asked to, or given the opportunity to present mitigating evidence, as the court held no hearing on the matter, nor did it ask for, or accept, any information from respondent on mitigating circumstances.

Based upon the facts of the case, and respondent's victimization at the hands of Robert Udell, a Public Reprimand is wholly inconsistent with existing case-law for the offense alleged, and diversion to the enhancement program would have been proper here.

As a result of the referee's dislike for respondent, based upon respondents' well-founded Motion to Disqualify, and respondents' complaint to the Judicial Qualifications Commission, the Final Hearing was a foregone conclusion, as respondent was not able to compel the attendance of witnesses, despite the fact they were under subpoena from the earlier, canceled hearing.

Had the referee not been prejudiced against respondent, he would have held a fair and impartial hearing, he would have continued the hearing when it became obvious a witness was not going to appear because the referee had failed to sign the appropriate Order, he would have asked for mitigating factors, and he would have allowed respondent to present witnesses, as is respondents' constitutional right.

The referee's bias and prejudice are evidenced by his rulings about witnesses, refusing to continue the case after he refused to sign the necessary Order to compel their attendance, and changing his mind as to allowing the respondent to call witness Michael Lewis, two things that the referee had agreed to do a month earlier, and by allowing witness Negron to ignore the subpoena served upon him with total impunity.

Before the referee filing his report, the respondent filed a second Motion to Disqualify, on June 5, 1997, and a second complaint with the Judicial Qualifications Commission, as after the Hearing, as the referee again wholly refused to hold hearings in the case, and respondent had learned, via Negron's reply to the Motion to Issue Show Cause Order, that the referee had excused Negron from the subpoena, without respondents' knowledge or consent.(A15-A19).

Predictably, that Motion was denied as well, when the referee finally decided to hold a hearing to deny all of a respondent's pending Motions.

Well after the six-month deadline as contained in the original appointment, and well after expiration of thirty days following the Final Hearing, the referee finally got around to blindly signing the Final Report that The Florida Bar sent him, on August 26, 1997, despite a respondent's repeated attempts to see a copy of the Bar's proposed Order, as the Bar failed to send respondent a copy. The referee also denied respondents' well-founded Motion to Dismiss based upon the expiration of the six months, and the thirty-day deadline pursuant to the Rules Regulating The Florida Bar was also violated.

The referee's obvious dislike for respondent is well evidenced by the referee's actions in this case, as enumerated above, as it permeated the entire Final Hearing, and by the ultimate recommendation for sanctions, which is not reasonably supported by case-law, but is an attempt to punish the respondent based upon the referee's refusal to allow respondent to compel the attendance of witnesses, If the referee didn't want to hear this case, or didn't have time, he should have disqualified himself, but he should not have refused to allow respondent to call witnesses, he shouldn't have changed his mind about witnesses in the middle of the Final Hearing, and he should have disqualified himself upon both of respondents' motions to disqualify.

The result was an unfair Final Hearing, as the court heard evidence how Robert Udell, in-effect, stole $16,000, and lied about it, and admitted to having affirmatively misled respondent upon

respondent's numerous inquiries to Udell both to reduce the agreement to writing, and as to the status of the case, but was cleared by a grievance committee who nonetheless found his conduct "distressing," and respondents' attorney, Joseph Negron was cleared of assisting in the violation of a Bar rule, despite his obvious assistance, and his malpractice by advising respondent to sue Udell .

To the referee and grievance committee, everybody's conduct in this case was fine, except respondents', who was a victim of theft, then legal malpractice, and, now, the victim of the referee who just refused to allow respondent to be heard effectively, both at the Final Hearing, and prior to recommending a sanction.

Through no fault of the respondent, respondent was denied the opportunity to defend himself, and to be heard, at each and every stage of the proceedings in this case thus far.

At the grievance committee level, respondent was denied his right to be made aware of when the grievance committee was meeting, and he was denied his right to make a statement, sworn or unsworn, refuting, denying, or admitting the alleged conduct.

At the referee level, respondent was denied the right to present two witnesses: One, because the referee refused to sign the Order continuing the subpoenas that the referee had agreed to do a month earlier, and because that witness chose to conveniently ignore the subpoena until after the Hearing was over, and, secondly, as the referee, for no apparent reason, unilaterally reversed an

earlier decision and disallowed the testimony of, or proffer of the testimony of, Michael Lewis,

Then, after respondent was denied the right to present witnesses, the referee refused to listen to mitigating factors prior to deciding punishment.

Therefore, respondent was denied due process, and the right to present his defense, at each and every stage of this proceeding, to date, and this fundamental unfairness mandates reversal, and dismissal.

STATEMENT OF THE FACTS

In August 1995, respondent sued Robert G. Udell for sixteen thousand dollars, based upon the referral to Udell from respondent of a personal injury client named Dale Calkins. Despite respondents repeated attempts to get Udell to reduce the agreement to writing, Udell blatantly refused to do so, and, when the case settled, and Udell willfully ignored respondent, respondent sought the legal advice and counsel of Joseph Negron, Attorney at law.

Attorney Joseph Negron advised respondent to sue Udell, assuring respondent that respondent was well within his rights, and said lawsuit was initiated. Both Negron and Udell were held wholly faultless in their conduct by the Grievance Committee but, based upon Bar Counsel James Wilson Keeter's dislike for respondent, a probable cause finding was pushed through the committee without any notice to the Respondent.

Less then one month after the case was initiated, and right before Udell was scheduled to give a sworn deposition, Udell settled the case for $12,000.00.

The Florida Bar presented this case to a grievance committee without giving respondent Notice and a right to be heard at said Hearing, pursuant to Rule Regulating The Florida Bar 3-7.4(h).

According to the Bar's theory of the case, and the referee's report, respondent should have allowed himself to be the victim of Udell's theft, and respondent should not have exercised his legal right to sue for what respondent was rightfully entitled to.

It defies logic and common sense to believe that Udell would settle for $12,000.00 to "avoid the distraction of a civil suit," but, apparently, that explanation was good enough for the selective, malicious, and political grievance committee, and the referee.

For being a victim, of Udell's theft, and Negron's malpractice, the referee has recommended a public reprimand, wholly disproportional to the "offense" committed, and not reasonably supported by case law. Of course, this is a Referee who should have disqualified himself, as his own actions led to respondent being forced to file a complaint against the referee with the Judicial Qualifications Commission, and this is a referee who just did not want to perform the function he was appointed to perform.

However, at the "Final Hearing," respondent was not allowed to present the testimony of the alleged investigating member of the grievance committee, despite an earlier court ruling to the contrary, and respondent's attorney in the case against Udell, Joe Negron, was allowed to ignore his subpoena, so respondent was deprived of his *right* to call two witnesses on his behalf.

Then , prior to issuing his Final Report, three months after the Hearing, the referee did not allow the respondent to present mitigating factors.

SUMMARY OF THE ARGUMENT

1 . The Referee erred by Denying Respondent's Motion to Dismiss based upon The Florida Bar having violated Respondent's Due Process rights pursuant to Rule Regulating the Florida Bar 3-7.4(h), and by refusing to give reasons for the Denial of the Motion in the Order, which respondent timely objected to.

2. The Referee erred by Denying Respondent's two Motions to Disqualify after Respondent filed two Complaints against the Referee with the Judicial Qualifications Commission (A7-A9,A1 5-A18).

3. The Referee erred by refusing to sign subpoenas Respondent needed for the Final Hearing on the matter until 4: 12 the day before the Final Hearing (A10, Al 1), resulting in a witness failing to appear, and the referee refused to continue the case based upon the failure to appear, after respondent filed a motion to Continue (A6) based upon those grounds, and by unilaterally changing his mind during the Final Hearing, and deciding that respondent could not call Michael Lewis as a witness, when the referee had previously ruled Michael Lewis could be called as a witness for respondent,

4. The Referee erred by failing to allow respondent a chance to present mitigating evidence before the Final Report of Referee, by failing to hold any type of Hearing on the matter, and by deciding the issue of punishment "in camera," and based only upon respondents' previous disciplinary

record (A22)

5. The referee erred by refusing to allow respondent the right to present two witnesses respondent wanted to present, one who failed to appear, and with the other, Michael Lewis, the referee had previously ruled that his testimony was admissible as to his investigation, but when respondent attempted to call him at trial, the referee decided not to allow the testimony.

6. The Referee erred by not filing his Final Report timely, within six months of the time of the initial Order appointing said Referee, or within thirty days after the Final Hearing (A22).

7. The referee erred in denying respondents' Motion to Dismiss based upon selective prosecution, as respondent was selectively prosecuted, while other attorneys similarly situated have not received similar treatment.

ARGUMENT NUMBER ONE

The Referee erred by Denying Respondent's Motion to Dismiss based upon The Florida Bar having violated Respondent's Due Process rights pursuant to Rule Regulating the Florida Bar 3-7.4(h), and by refusing to give reasons for the Denial of the Motion in the Order, which respondent timely objected to.

Rule Regulating The Florida Bar 3-7.4 (h) says, in pertinent part, that

> "The respondent shall be provided with all materials considered By the committee and shall be given an opportunity to make a written statement, sworn or unsworn, explaining, refuting or admitting the alleged conduct"

This Rule creates a *due process* right, as it provides the opportunity for Notice, and to be heard. In a Motion for a Protective Order, Bar Counsel James Wilson Keeter affirmatively represented to the referee that respondent was served with such notice, but, when confronted with this misrepresentation, he changed his position to one which essentially said it was up to him to decide who to Notice, and when to do so, and he had discretion in giving respondent's Notice under Rule 3-7.4(h).

Respondent does not see where the rule allows a malicious, vengeful employee of The Florida Bar to decide who gets, and who doesn't get Notice of a Grievance Committee meeting, and it's not up to James Wilson Keeter to decide who has a right to be heard via sworn or unsworn statement, and who does not get such an opportunity, as Rule 3-7.4 (h) does not allow James Wilson Keeter

of The Florida Bar to decide who gets notice, and when, as the Rules says '"shall."

There is no case law as of yet on this issue.

Since respondent was not allowed to make a presentation to the committee, nor was respondent ever notified of when the committee was meeting, dismissal is required, as *a violation of one's* due process rights is never *de minimis*.

Evidence of how the result might have been different is this: Attorney Robert Udell apparently received notice of the meeting, and his conduct, though found to be "distressing," was cleared by the committee. Respondent's requests for discovery vis-a-vis the Grievance Committee and Robert Udell were disallowed by the referee (CTF).

Further, the referee refused to give reasons for denying the motion in his Order, despite respondents' specific request that he do so, so that this Court could review his decision properly (CTF).

Given the mandatory nature of the rule, and the violation of a respondent's due process rights which resulted therefrom, this case should be reversed, and dismissed.

ARGUMENT NUMBER TWO

The Referee erred by Denying Respondent's two Motions to Disqualify after Respondent tiled two Complaints against the Referee with the Judicial Qualifications Commission.

Originally, this case was set for Final Hearing on April 1, 1997. However, because witness Robert Udell decided to ignore his subpoena, and leave the country on a vacation, a telephonic status conference was held March 3 1, 1997, and the case was rescheduled until May 2, 1997.

At that time, the referee orally agreed to sign an Order continuing the subpoenas previously served upon respondents' witnesses to the May 2, 1997 hearing (A3, AS, Al I).

The referee, for reasons unknown to respondent, refused to sign the Order until 4: 12 p.m. (A10) the day before the Final Hearing (May 1, 1997) and, as a result, witness Joseph Negron failed to appear, and the court refused to continue the case (A6) based upon its own conduct in refusing to sign the necessary Order it had agreed to sign a month earlier.

As a result of respondent being unable to get the necessary Orders signed, and the resulting miscarriage of justice, a complaint was filed against the referee with the Judicial Qualifications Commission, as was a Motion to Disqualify filed with the referee (A7-A9), pursuant to Florida Statute 38.10, and Rule of Judicial Administration 2.160.

The referee denied the Motion to Disqualify, though it is undisputable that, as a result of respondent filing such a complaint, the referee would be unable to be fair and impartial toward respondent, unless, of course, the referee is not subject to human nature, and, certainly, based upon the referee's conduct in refusing to sign an Order continuing subpoenas that the referee had orally agreed to do, on the record, one month earlier, respondent had a well-founded fear that the referee was biased against him, or biased in favor of The Florida Bar.

After denying said Motion, and after denying the respondent's Motion to Continue, so that respondent could compel the attendance of Joseph Negron, the Final Hearing was held, with predictable results,

Based upon the respondent's filing the complaint against the judge, each and every ruling in the case was decided blindly in favor of the Bar, and against Respondent, and the Final Hearing was little more then a one-sided mockery of justice.

Subsequently, after the Final Hearing, the referee ignored three requests by respondent to hold a hearing on respondents' Motion to Issue Rule to Show Cause (A13, A14,), and a second complaint with the Judicial Qualifications Commission, and a second Motion to Disqualify were filed **(Al** 5-A18), prior to the Final Report of Referee, based upon the referee's obvious dislike of the respondent, and for his absolute refusal to hold hearings on a case.

Again, the Court denied the Motion to Disqualify, though never finding it legally insufficient.

Clearly, based upon the referee's own conduct in refusing to allow respondent to compel the attendance of witnesses, respondent had a well-founded fear that he would not receive a fair hearing, and said fear was proven true, as respondent did not receive a fair Hearing without being able to compel, and present, witnesses in his own behalf, and from a referee who was wholly biased against him, and biased in favor of The Florida Bar.

Having filed two complaints with the Judicial Qualifications Commission, respondent certainly had a well founded fear that the referee was biased against him, or for the opposing party, The Florida Bar, See *Levine v State*, 650 So.2d 666 (Fla. App. 4 Dist. 1995), *Powell v State*, 650 So.2d 702 (Fla.App. 4 Dist. 1995), and *Feurman* v *Overby*, 638 So.2d 179 (Fla.App 3 Dist. 1994), wherein the Third and Fourth District Court of Appeals have held that the filing of a Judicial Qualifications complaint is sufficient to demonstrate a well founded fear that an individual will not receive a fair disposition, and the respondent's allegations, as contained in both Motions To Disqualify, were legally sufficient, as they supported a claim of bias or prejudice,

ARGUMENT NUMBER THREE

The Referee erred by refusing to sign subpoenas Respondent needed for the Final Hearing on the matter until 4:12 the day before the Final Hearing, resulting in a witness failing to appear, and the referee refused to continue the case based upon the failure to appear, after respondent filed a motion to Continue based upon those grounds, and by unilaterally changing his mind during the Final hearing, and deciding that respondent could not call Michael Lewis as a witness.

On March 31, 1997, the Final hearing was continued until May 2, 1997 because witness Robert Udell chose to ignore the subpoena served upon him, and he left the country on vacation (CTF).

At that Hearing, the referee agreed to sign an Order continuing the subpoenas until the May 2, 1997 hearing, and to allow the telephonic testimony of witnesses John Davis Lewis III, and Michael Lewis, the investigating committee member.

Previously, the referee held that respondent could question the investigating grievance committee member as to his investigation, but not as to the confidential vote of the committee.

During the month long delay, respondent attempted on two occasions to have the referee sign the Order (A3, A4, AS), but the referee would not even respond to the inquiries until the day before

the Final Hearing, when respondent filed a Motion to Continue (A6) based upon the referee's failure to sign the necessary order, and respondent was unable to compel the attendance of witness Joseph Negron, and a Motion to Disqualify (A7) the referee based upon similar grounds, and the fact that a complaint was filed against the referee with the Judicial Qualifications Commission,

Finally, the day before the Hearing, after apparently deciding there would be no continuance, and no disqualification, the referee's office faxed to ***The Bar,*** with respondent receiving the courtesy of a copy, to the respondent, at 4: 12 p.m., the Order continuing the subpoena until the next day (A10). That is further evidence of the referee's bias against the respondent, and for The Bar, as the referee refused to even fax the original Order Continuing Subpoenas to respondent, but did so to The Florida Bar.

Respondent was given exactly forty eight minutes to serve witness Negron, and the other witnesses, and that simply was not enough time, as demonstrated by Negron's failure to appear.

Witness Joseph Negron ignored the copy of the Order faxed to him, and failed to appear at the Hearing.

The referee refused to continue the Hearing based upon Negron's failure to appear, and, as a result, respondent was denied a fair trial in this case.

Further, in the middle of the hearing, respondent attempted to call witness Michael Lewis, but the referee, for no apparent reason, decided to disallow the testimony, despite the earlier ruling that respondent could call Michael Lewis as a witness.

The referee's actions in failing to continue the case after Joe Negron failed to appear, and his action in unilaterally changing his mind about the testimony of Michael Lewis prevented respondent from getting a fair and impartial hearing in this case, and the referee's actions mandate reversal.

Respondent has an absolute, constitutional right to compel the attendance of witnesses, and that right was violated by the referee's deliberate action in this case, requiring reversal.

ARGUMENT NUMBER FOUR

The Referee erred by failing to allow respondent a chance to present mitigating evidence prior to the Final Report of Referee, by failing to hold any type of Hearing on the matter, and by deciding the issue of punishment "in camera," and based only upon respondents' previous disciplinary record,

In August 1997, respondent received a copy of a letter the referee wrote to The Florida Bar, advising that respondent was being found guilty, and that The Florida Bar should send the referee a copy of respondents' previous disciplinary history.

Respondent was fortunate to receive even that minimal courtesy from the referee, who was wholly biased against respondent, said bias demonstrated at the Final hearing, and by imposing sanctions without a Hearing,

Respondent was never given a chance to present mitigating evidence, such as character evidence, and, had he been given that opportunity, a different result would have been reached, as respondent has some forty witnesses waiting to testify as to respondent's character..

The referee did not allow respondent a chance to present evidence in mitigation as a result of the referee disliking the respondent because respondent filed two complaints against the referee with the Judicial Qualifications Commission based upon the referee's laziness , and refusal to hold

Hearings, and sign Orders the referee agreed to sign a month earlier.

At the Final Hearing, the referee had stated that, in the event respondent was found guilty, a separate Hearing would take place for the purpose of sanctions, but, that never occurred.

If the referee was unable to be fair and impartial, he should have granted respondents' Motions to Disqualify, but his actions in deciding the case without hearing any mitigating evidence requires reversal, as the decision is improper.

Further, the recommendation of a public reprimand is not reasonable supported by existing case-law, as respondent was the victim of Robert Udell's deceitful conduct, and Joseph Negron's legal malpractice, but the referee completely ignored that.

Further, no client was injured, and an admonishment, or referral to the diversion program, would have been the appropriate sanction, if any, for this case.

The prejudice caused by the referee's refusal to allow respondent to present mitigating evidence cannot be considered harmless, and mandates reversal, and dismissal

ARGUMENT NUMBER FIVE

The referee erred by refusing to allow respondent the right to present two witnesses respondent wanted to present, one who failed to appear, and with the other, Michael Lewis, the referee had previously ruled that his testimony was admissible as to his investigation, but when respondent attempted to call him at trial, the referee decided not to allow the testimony.

On March 3 1, 1997, the Final hearing was continued until May 2, 1997 because witness Robert Udell chose to ignore the subpoena served upon him, and he left the country on vacation.

At that Hearing, the referee agreed to sign an Order continuing the subpoenas until the May 2, 1997 hearing, and to allow the telephonic testimony of witnesses John Davis Lewis III, and Michael Lewis, the investigating committee member.

Previously, the referee held that respondent could question the investigating grievance committee member as to his investigation, but not as to the confidential vote of the committee.

During the month long delay, respondent attempted on two occasions to have the referee sign the Order, but the referee would not even respond to the inquiries until the day before the Final hearing, when respondent filed a Motion to Continue (A6) based upon the referee's failure to sign

the necessary order, and respondent was unable to compel the attendance of witness Joseph Negron, and a Motion to Disqualify(A7, A8, A9) the referee based upon similar grounds, and the fact that a complaint was filed against the referee with the Judicial Qualifications Commission.

Finally, the day before the Hearing, after apparently deciding there would be no continuance, and no disqualification, the referee's office faxed to the respondent, at 4: 12 p.m., the Order continuing the subpoena until the next day (A10). Respondent was given forty eight minutes to serve witness Negron, and the other witnesses, and that simply was not enough time, as demonstrated by Negron's failure to appear,

Witness Joseph Negron ignored the copy of the Order faxed to him, and failed to appear at the Hearing.

The referee refused to continue the Hearing based upon Negron's failure to appear, and, as a result, respondent was denied a fair trial in this case.

Unbelievable, and despite the fact the referee knew respondent wanted Negron's testimony, the referee unilaterally excused Negron from the subpoena at 12:00 p.m. May 2, 1997, after the Hearing was concluded, and then, most predictably, denied respondents' motion for a show cause Order.

It is respondent's *right* to compel the attendance of witnesses, and the referee's conduct, both by

excusing Negron without the consent or knowledge of respondent, and the manner in which it was done, via *ex-parte* communication, was wholly improper.

It sure seems strange that Mr. Negron knew enough to call the referee after the Hearing, but chose to ignore the requirement of his personal attendance.

Further, in the middle of the hearing, respondent attempted to call witness Michael Lewis, but the referee, for no apparent reason, decided to disallow the testimony, despite the earlier ruling that respondent could call Michael Lewis as a witness.

The referee's actions in failing to continue the case after Joe Negron failed to appear, and his action in unilaterally changing his mind about the testimony of Michael Lewis prevented respondent from getting a fair and impartial hearing in this case, and the referee's actions mandate reversal.

So, as far as this referee was concerned, based upon his dislike for respondent, witnesses were free to ignore subpoenas, with complete impunity from the "referee."

ARGUMENT NUMBER SIX

The Referee erred by not filing his Final Report timely, within six months of the time of the initial Order appointing said Referee, or within thirty days after the Final Hearing.

The Order appointing the referee dated October 24, 1996, allowed for six months wherein a Final Report of Referee should have been filed.

Respondent filed a Motion to Dismiss based upon the violation of the Order, but it was denied (CTF).

Further, Rule Regulating The Florida Bar 3-7.6(k), calls for the filing of the Report of Referee within thirty days after the Final hearing, or within ten days after the referee receives the transcripts of all hearings.

Neither the six-month mandate, nor the thirty-day rule, were adhered to in this case, and fundamental fairness requires a reversal.

ARGUMENT NUMBER SEVEN

The referee erred in denying respondents' Motion to Dismiss based upon selective prosecution, as respondent was selectively prosecuted, while other attorneys similarly situated have not received similar treatment.

Respondent is similarly situated to Robert Udell, and Joseph Negron, but, in this case, Robert Udell was cleared by the grievance committee(though his conduct was "distressing" to the committee, and Joseph Negron, who assisted in respondents" alleged violation of the Rules Regulating The Florida Bar, was similarly held wholly faultless(A23). See *State* v *A. R.S.*, 684 So.2d 1383 (Fla. St.. DCA 1996), and *State v Parrish*, 567 So.2d 461 (Fla.1 St. DCA 1991).

Respondent was treated differently because, in an unrelated case wherein respondent was found not guilty by a referee(A25), Bar Counsel James Keeter was forced to admit, in a letter dated March 7, 1996, that he had neglected a legal matter(A24).

As a result, Keeter pushed this case through the grievance committee without notice to respondent, and Keeter counseled the committee to make a selective and malicious finding in respondents' case.

The committee "findings' vis-a-vis the other two similarly situated attorneys, as compared to the finding in respondent's case, is ludicrous. Either all three attorneys should have been disciplined,

or none should, but the selective, malicious nature of the finding in respondent's case is fundamentally unfair.

CONCLUSION

Through no fault of the respondent, respondent was denied the opportunity to defend himself at each and every stage of the proceedings in this case thus far.

At the grievance committee level, respondent was denied his right to be made aware of when the grievance committee was meeting, and he was denied his right to make a statement, sworn or unsworn, refuting, denying, or admitting the alleged conduct.

At the referee level, respondent was denied the right to present two witnesses.

One, because the referee refused to sign the Order continuing the subpoenas that the referee had agreed to do a month earlier, and because that witness chose to conveniently ignore the subpoena until after the Hearing was over, and, secondly, as the referee, for no apparent reason, unilaterally reversed an earlier decision and disallowed the testimony of, or proffer of the testimony of, Michael Lewis,

The referee should have disqualified as soon as respondent made him aware that a complaint had been filed against him, by respondent, with the Judicial Qualifications Commission, and, without doubt, should have disqualified himself upon the Second Motion to Disqualify.

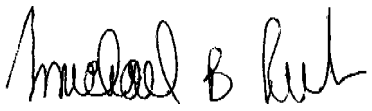
Then, after respondent was denied the right to present witnesses, the referee refused to listen to

mitigating factors prior to deciding punishment,

Therefore, respondent was denied due process, and the right to present his defense, at each and every stage of this proceeding, to date, and this fundamental unfairness mandates reversal, and dismissal.

WHEREFORE, Respondent prays that this Honorable Court will review the referee's findings of fact, and law, and reverse the finding of guilt, and dismiss this case, as it came at the expense of respondents' due process rights, as respondent was not allowed to call witnesses on his own behalf, the referee should have disqualified himself when it became apparent that he would be unable to fairly and impartially judge the respondent's case, and the respondent's rights were violated when the referee refused to allow respondent to present mitigating evidence prior to sentencing.

Respectfully Submitted:



Michael B. Rubin, Florida Bar No. 0826080
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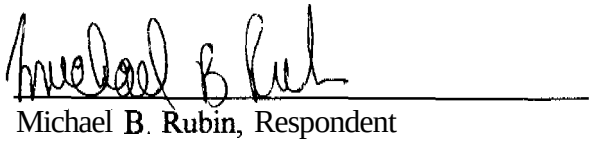
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original, and a copy of Respondent's Initial Brief and Appendix have been sent by regular U.S. Mail to Sid. J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-2300, and a copy furnished to The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085, and to The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 28th day of October 1997.



Michael B. Rubin, Respondent
Florida Bar No. 0826080

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, CASE NO. 89,069

COMPLAINANT, TFB CASE NO. 96-3 1,4 14(19A)

v s

MICHAEL BARRY RUBIN,

RESPONDENT

APPENDIX TO RESPONDENT'S INITIAL BRIEF

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APPENDIX INDEX

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