IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL BARRY RUBIN,

Respondent.

Case No. 89,069
[TFB Case No. 96-31,414(19A)]

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on May 2, 1997, shall be referred to as "T" followed by the cited page number. Citations to transcripts of motion hearings shall be referred to as "T" followed by the date of the hearing and the cited page number(s).

The Report of Referee dated August 26, 1997, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached, (RoR-A-___).

Other items contained in the appendix shall be referred to by the appendix page (A p. ___).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

The bar takes exception to the respondent's statement of the case in his initial brief as it contains argument and statements not supported by the record. Robert G. Udell never admitted to having misled the respondent and the respondent makes no citation to the record to support his contention that Mr. Udell misled him about anything (T p. 76). Further, there is nothing in the record to support the respondent's claim that Joseph Negron, the attorney who represented him in his civil suit against Mr. Udell, committed malpractice. The referee did not decide his report 'in secret." There was **a** full evidentiary hearing and both parties submitted to him, for his review, proposed referee reports. After the referee made his determination **as** to guilt, he wrote to bar counsel, with a copy to the respondent, on August 8, 1997, requesting that the bar provide a statement of the respondent's prior disciplinary history. The bar provided the referee with a statement of the respondent's disciplinary history and copied the respondent. At no time did the respondent make **a** written argument **as** to the appropriate level of discipline to be imposed, other than to state in his letter of July 7, 1997, to the referee that the prior bar counsel handling this case had believed "diversion

was appropriate," nor did the respondent seek a hearing on the issue.

This case was handled with procedural correctness by the bar, the grievance committee and the referee. After the respondent was given an opportunity to respond to the allegations, the Nineteenth Judicial Circuit Grievance Committee 'A" voted to find minor misconduct on May 22, 1996 (see Response to Respondent's Amended Third Motion to Dismiss and Motion to Disqualify the Orlando Office of The Florida Bar dated March 10, 1997). After being served with the report, the respondent exercised his right under rule 3-7.4(n) to reject said report and the bar proceeded to file a formal complaint of minor misconduct with this court on October 2, 1996. On October 14, 1996, this court issued an order to the Chief Judge of the Eighteenth Judicial Circuit to appoint a referee to hear this matter. The referee was appointed on October 23, 1996. The final hearing was initially set for December 23, 1996, but on December 20, 1996, the respondent moved to disqualify the referee. On December 20, 1996, the referee entered his order granting the respondent's motion. A new referee was appointed on or about February 6, 1997.

The final hearing was rescheduled for April 1, 1997. On March 25, 1997, one of the witnesses, Robert G. Udell, served a motion for protective order in which he stated he had not been served with the respondent's witness subpoena until March 21, 1997, and could not appear at the final hearing due to prearranged, noncancellable travel plans. The referee rescheduled the final hearing for May 2, 1997. On April 30, 1997, the respondent filed a motion to recuse the referee. This was denied at the final hearing on May 2, 1997. On June 5, 1997, after the final hearing but prior to the referee entering his report, the respondent filed another motion to recuse the referee. This motion was denied on July 29, 1997. The referee entered his report on August 26, 1997, recommending the respondent be found guilty of violating rule 4-1.5(f)(2) for participating in a referral fee without the written consent of the client. The referee recommended the respondent receive a public reprimand to be administered by an appearance before the Board of Governors of The Florida Bar. The referee considered in aggravation the respondent's prior disciplinary history (ROR-A p. 7) and his unprofessional conduct during these bar proceedings (ROR-A p.p. 5-6). Further, the referee found there was a selfish or dishonest

motive in participating in the fee agreement, and the respondent failed to acknowledge the wrongful nature of his misconduct (ROR-Ap. 6).

The respondent served his petition for review on October 1, 1997. After considering the referee's report at its September, 1997, meeting, the board voted not to seek an appeal. The respondent served his initial brief on October 28, 1997.

STATEMENT OF THE FACTS

In September, 1995, the respondent filed a sworn grievance with the bar concerning a fee dispute with attorney Robert Udell (ROR-A p. 2). The respondent admitted, in his civil suit against Mr. Udell, that they had entered into an oral referral fee agreement in the Dale Calkins case and that he had never signed any written referral agreement with either Mr. Udell or Mr. Calkins with respect to the sharing of an attorney's fee for the respondent's referral of Mr. Calkins to Mr. Udell (ROR-A p. 2). The respondent's civil suit against Mr. Udell sought recovery for the breach of the alleged verbal agreement under which Mr. Udell agreed to pay the respondent 25% of any contingent fee recovered in Mr. Calkins' case, as provided in rule 4-1.5(f) of the Rules Regulating The Florida Bar (ROR-A p. 2). The respondent also stated a claim for recovery under ***quantum*** *meruit* and sought a mandatory injunction (ROR-A p. 2). Mr. Udell eventually settled the suit by paying the respondent $12,000.00 (ROR-A p. 2).

The respondent's services rendered to Mr. Calkins consisted of nothing more than an initial interview, preparation of a few

standard documents, and occasionally speaking to Mr. Calkins about Mr. Calkins' increasing dissatisfaction with the first lawyer to whom the respondent had referred Mr. Calkins (ROR-A p. 3). Despite the respondent's argument that the $16,000.00 he sought from Mr. Udell constituted quantum *meruit,* the referee found that in order to have earned a $12,000.00 fee, the respondent would have had to perform 60 hours of legal services billed at $200.00 per hour (ROR-A p. 3). The referee determined the nature of the services the respondent testified he provided to Mr. Calkins would not have required the expenditure of so much time (ROR-A p. 3) . The referee determined from the testimony and evidence that it was clear the respondent participated in a referral fee agreement that was not reduced to writing signed by the client and the other participating lawyer as required by rule 4-1.5(f)(2) (ROR-A p. 4). The referee found the respondent could have ensured compliance with the rule's requirements by preparing the fee agreement himself rather than relying on Mr. Udell to prepare one and send it to him (ROR-A p. 4).

SUMMARY OF THE ARGUMENT

A referee has broad discretion with respect to ruling on motions in a bar disciplinary proceeding and, absent a clear showing that the referee has abused his or her discretion, this court will not disturb a referee's rulings. The Florida Bar v. Roth, 693 So. 2d 969, 972 (Fla. 1997); The Florida Bar v. Vernell, 520 So. 2d 564, 565 (Fla. 1988). The bar submits the respondent has failed to show the referee abused his discretion in ruling against the respondent on his motion to dismiss based on selective prosecution and failure of the bar to follow the procedural rules nor has he shown the referee erred in denying the respondent's two motions to recuse, which were the second and third filed by him in these proceedings. The transcript of the March 12, 1997, hearing on the motion to dismiss shows the referee entertained considerable argument by the respondent and explained to the respondent, on the record, the reasons for his denial of the motion. There is no requirement under either the bar's rules or the rules of civil procedure that a judge or referee explain the basis for his or her rulings. Further, because the respondent had already filed and been granted one

motion to recuse, Judge McCluan did not abuse his discretion in considering the factual sufficiency of the respondent's two subsequent motions. The filing of a Judicial Qualifications Commission grievance does not mandate a judge's recusal from hearing a case. To hold otherwise would result in the judicial grievance system being used to circumvent the Rules of Judicial Administration that prevent parties from abusing the recusal provisions to seek a judge more to their liking.

The referee's error in failing to issue the order continuing the witness subpoenas until shortly before the final hearing of May 2, 1997, was a harmless error that the referee provided the respondent with the opportunity to cure. The respondent elected to go forward with the final hearing. The bar submits that neither of the witnesses who failed to appear, Joe Negron and Michael Lewis, could have provided any testimony bearing on the issues framed by the bar in its complaint.

The referee allowed the respondent an opportunity to present mitigating evidence after he notified the parties, in writing, of his decision to find the respondent guilty of the rule charged.

The respondent could have submitted his mitigating evidence in writing or he could have requested that the referee hold another hearing. Apparently, the only evidence the respondent would have presented was character evidence. Such is of little value in excusing or explaining a lawyer's misconduct.

There was no unjustifiable delay in the referee filing his report. Judge McCluan was the second referee appointed to hear the matter. Judge Johnston, the first referee, granted the respondent's motion for disqualification filed only shortly before the final hearing originally scheduled for December, 1996. Likewise, the respondent moved to disqualify Judge McCluan only shortly before the final hearing in May, 1997. After the final hearing, the respondent filed further motions, which had to be ruled upon before the referee could issue his report. The bar submits the referee timely entered his report in August, 1997. Even if the report had been untimely, this is merely a factor to be considered in mitigation and is not grounds for a dismissal or new hearing.

ARGUMENT

POINT I

THE REFEREE EXERCISED APPROPRIATE DISCRETION IN RULING ON RESPONDENT'S MOTIONS

A referee has the discretion to grant or deny motions and this court will not disturb those rulings absent a showing of an abuse of discretion. Roth, supra; Vernell, supra. The referee did not err in denying the respondent's motion to dismiss nor did he err in denying the respondent's two motions to recuse given the fact they were the second and third such motions filed by the respondent in this proceeding.

For clarity, the bar would note the respondent filed a total of six motions to dismiss during the progress of this case - one dated October 7, 1996, titled simply a Motion to Dismiss; one dated October 30, 1997, titled as an Amended Motion to Dismiss, Motion to Exclude Evidence, and Motion to Strike Clauses Three, Four and Six of the Bar's Complaint; one dated October 31, 1996, also titled as an Amended Motion to Dismiss, Motion to Exclude Evidence, and Motion to Strike Clauses Three, Four and Six of the Bar's Complaint; one dated December, 14, 1996, titled as a Motion to Dismiss Based on Newly Discovered Grounds; one dated February

21, 1997, titled simply as a Motion to Dismiss but which essentially restated the same grounds as those contained in the October 30, 1996, and December 14, 1996, motions; **and** one dated July 13, 1997, titled simply as a Motion to Dismiss. Although the respondent's initial brief does not **make** it clear which motions he alleges the referee erred in denying, the content of his arguments number one and seven in his initial brief indicates it is the February 21, 1997, Motion to Dismiss.

The motion to dismiss of February 21, 1997, essentially reargued two earlier motions to dismiss that had been denied by Judge Johnston. The argument concerning selective prosecution **was** contained in the October 31, 1996, Amended Motion to Dismiss, Motion to Exclude Evidence, and Motion to Strike Clauses Three, Four and Six of the Bar's Complaint which Judge Johnston denied December 19, 1996. The argument concerning the bar's alleged failure to comply with rule 3-7.4(h) was contained in the December 14, 1996, Motion to Dismiss Based Upon Newly Discovered Grounds that Judge Johnston denied on December 26, 1996. The bar submits Judge McCluan did not err in denying the respondent's renewed motion to dismiss of February 21, 1997, merely because

his order did not state the reasons for his denial. There is no requirement in either the rules of civil procedure or the Rules Regulating The Florida Bar that a referee state the reasons for denying a motion. The issue is whether the respondent's conduct violated the Rules of Professional Conduct and his argument that the bar is selectively prosecuting him is not a defense nor is it relevant. The fact that another lawyer might have engaged in similar conduct and received either a lesser discipline or none at all is irrelevant to the charges against the accused attorney because each case is decided on its own individual facts and each case has aggravating and mitigating factors unique to it. The Florida Bar v. Levin, 570 so. 2d 917 (Fla. 1990). The facts surrounding the bar cases involving Mr. Udell and Mr. Negron were not the same as those presented in the respondent's case and the outcomes of the other bar disciplinary matters have no effect on whether or not the respondent's conduct violated the rules. In Levin, supra, the accused lawyer argued, without success, that he did not deserve to receive a public reprimand for betting on football games because other lawyers who had engaged in the same conduct, and who had been investigated by the same grievance committee as he, received either a private reprimand or no

discipline at all. This court determined that the aggravating factors particular to Mr. Levin's case warranted the imposition of a harsher sanction.

The respondent is essentially rearguing his motion to dismiss which the bar submits is not appropriate in this appellate proceeding. He has failed to show the referee in any way abused his discretion in denying the motion. At the hearing on March 12, 1997, Judge McCluan considered extensive oral argument by the respondent on each ground raised in his motion to dismiss, including the arguments that he was being subjected to selective and malicious prosecution (T 3/12/97 p.p. 24-26) and that the bar failed to comply with rule 3-7.4(h) and thus violated his constitutional rights (T 3/12/97 p.p. 5-7). Despite the respondent's repeated attempts throughout these proceedings to broaden the scope of this disciplinary action, the issue is very narrowly drawn by the bar's complaint and it is the only issue presented. The bar opened this matter when the respondent filed his grievance against Mr. Udell with the bar because a review of the documentation supplied by the respondent indicated that the respondent had entered into an oral referral fee

agreement. The outcomes of other bar disciplinary cases or investigations have no effect on whether or not the respondent's particular actions violated the Rules Regulating The Florida Bar. Judge McCluan, in denying the respondent's motion to dismiss on this ground, stated to the respondent that even if the respondent was being selectively prosecuted, this was not a proper ground to support a motion to dismiss (T 3/21/97 p. 29). As a member of the bar, the respondent has a duty to abide by the rules regulating his profession. If it should be discovered that he has violated a rule, he cannot urge that other attorneys have committed the same transgressions but have not been caught and prosecuted. For example, in The Florida Bar v. Farinas, 608 so. 2d 22 (Fla. 1992), a lawyer was disciplined for requesting that his nonlawyer employee, who was a notary, perform an illegal notarization of a document. Mr. Farinas' argument that notaries routinely notarize documents without witnessing signatures at the request of lawyers was found to be without merit. An attorney's conduct is not governed by the behavior of other lawyers in the community. It is governed by the Rules Regulating The Florida Bar.

As for the respondent's argument that the bar allegedly

failed to comply with the rules at the grievance committee level, Judge McCluan reviewed the language of rule 3-7.4(h) and could not find that the rule required the bar to advise an accused lawyer of the time and date of the committee hearing (T 3/21/97 p. 10) . Rule 3-7.4(h) states:

> At a reasonable time before any finding of probable cause or minor misconduct is made, the respondent shall be advised of the conduct that is being investigated and the rules that may have been violated. 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 misconduct.

The respondent was provided with adequate notice concerning the conduct the bar was investigating prior to the grievance committee hearing where the committee voted to find minor misconduct. The bar wrote the respondent on March 11, 1996, (A p. 11) advising that it was investigating whether the respondent and Robert Udell had entered into a verbal referral fee agreement in violation of rule 4-1.5(f)(2). Attached to this letter were all the documents the committee considered. All of these were documents the respondent had provided to the bar himself. The bar requested that he respond in writing and advise as to his position on the allegations. Therefore, the respondent was put on

notice of the alleged conduct and rule violation under investigation, and more importantly, he was provided an opportunity to respond. He was provided with copies of **all** the documents being considered some two months before the committee hearing in May, 1996, where the committee voted to find minor misconduct. Judge McCluan explained to the respondent that where the rule did not specifically require notice of time and place for the committee hearing, **a** motion to dismiss the complaint on this basis could not be granted (T 3/12/97 p.p. **11-13).** The referee explained to the respondent his reasons for denying the respondent's motion to dismiss. He found the motion to be legally insufficient to warrant dismissal of the complaint (T 3/12/97 p.p. **11-13, 16, 22, 29, 35).**

The respondent made many of these same arguments earlier to Judge Johnston to support his prior motions to dismiss, all of which Judge Johnston denied. At the March 12, 1997, hearing, the respondent argued to Judge McCluan that Judge Johnston did not hear the respondent's allegation that the bar improperly withheld exculpatory evidence and that Judge Johnston was "only interested in speeding this case through to a final hearing." This

characterization is not born out by the record, At the November 21, 1996, hearing before Judge Johnston on the respondent's motion to dismiss, when Judge Johnston asked the respondent if he had any further argument to add to his motion to dismiss, the respondent replied that he did not (T. 11/21/96 p. 7). Clearly Judge Johnston gave the respondent ample opportunity to raise further arguments at the hearing in support of his motion and the respondent did not do so.

Judge McCluan also did not err in refusing to grant the respondent's two motions to recuse served on April 30, 1997, and June 5, 1997, respectively. It should be noted that like the first motion to recuse Judge Johnston, which was granted, the respondent's second motion to recuse was filed only a few days before the scheduled final hearing of May 2, 1997. Judge McCluan did not receive the motion until May 1, 1997 (T p. 6). When Judge McCluan asked the respondent if he wanted to make any argument in support of his motion, the respondent declined to do so (T p. 7). Pursuant to Fla. R. Jud. Admin. 2.160(g), subsequent motions to recuse a judge must receive stringent review to preserve the integrity of the judicial process and prevent forum shopping.

While a judge facing the first motion to recuse filed in a case may only rule as to the motion's legal sufficiency, subsequent judges who face additional motions to recuse may rule on the truth of the facts alleged in support of the motion. The respondent has not shown that Judge McCluan abused his discretion in ruling on the two motions. If filing a complaint with the Judicial Qualifications Commission (hereinafter referred to **as** the "JQC") was valid grounds for seeking the recusal of a judge, all litigants who wish to "judge shop" would pursue this route. The bar submits the respondent's motions to recuse were factually insufficient because a JQC complaint does not ipso *facto* mean a judge will become biased. The first motion to recuse **was** based on Judge McCluan's failure to sign an order continuing witness subpoenas originally issued for the final hearing scheduled for April **21, 1997.** Because one witness, Mr. Udell, was not able to attend on that date, the final hearing **was** continued to May 2, 1997. The referee apologized to the respondent about the error and advised the hearing could be continued if there was a problem with a witness refusing to attend (T p.p. 5-6). At the end of the bar's case, the respondent stated that Mr. Negron had not appeared but he had **a** copy of Mr. Negron's file (T p. 30). After

the conclusion of Mr. Udell's testimony, the respondent advised that Mr. Negron still had not appeared and that he could just proffer what Mr. Negron's testimony would have been (T P. 92). The referee expressed doubt as to the relevancy of Mr. Negron's testimony but accepted the proffer (T p. 92). The referee offered the respondent an opportunity to continue the final hearing so that Mr. Negron, whose testimony was of dubious value with respect to the issue at hand, could attend (T p.p. 5-6). However, the respondent elected to go forward with the hearing and provided the referee with the testimony Mr. Negron would have provided had he appeared. That the referee should or should not have held Mr. Udell in contempt has no bearing on the respondent, this disciplinary proceeding, or the referee's attitude towards the parties.

The respondent's second motion to recuse Judge McCluan was based on Mr. Negron's alleged ex parte with the referee resulting in his allegedly being excused from the respondent's witness subpoena. Even accepting the respondent's allegations as being true, Mr. Negron was excused only after the respondent had made a proffer of his anticipated testimony during the final hearing. In

fact, the respondent had closed and rested his case (T p.p. 150-154). The final hearing was concluded at approximately 11:50 a.m. (T p. 157) and Judge McCluan did not allegedly excuse Mr. Negron until approximately noon of that same day after the respondent had rested his case. If the respondent felt it necessary to reopen the case so as to present Mr. Negron's testimony, he could have pursued other means rather than filing yet another motion to recuse a referee.

POINT II

THE REFEREE'S TREATMENT OF RESPONDENT'S WITNESS SUBPOENAS WAS A HARMLESS CLERICAL ERROR

At the final hearing on May 2, 1997, the referee noted at the outset that he had erroneously believed the order continuing the witness subpoenas had been sent out to the parties when in fact it had not (T p.p. 5-6). The referee advised the respondent that if there was a problem with a witness refusing to attend the final hearing that day, he would continue the hearing so that the witness's attendance could be compelled (T p.p. 5-6). The respondent advised that he was not aware of any witness refusing to attend and that he was not going to argue his motion to continue the hearing (T p.p. 6-7). At no time did the referee refuse to sign the respondent's witness subpoenas. In fact, he offered the respondent the opportunity to continue the hearing but the respondent chose to go forward with the hearing. After the respondent determined Mr. Negron had not appeared for the hearing, the respondent advised the referee that he was willing to proffer what Mr. Negron's testimony would have been (T P. 92). The referee expressed doubt as to the relevancy of Mr. Negron's testimony but accepted the proffer (T p. 92).

With respect to the testimony of Michael Lewis, the investigating member of the grievance committee, the respondent advised the referee at the final hearing that the purpose of his calling Michael Lewis was to delve into whether or not the bar had provided the grievance committee with the allegedly exculpatory closing statement before the committee voted to find minor misconduct (T p. 95) and the extent of his investigation (T p. 97). The referee determined that such testimony would not be relevant because the purpose of the final hearing was not to determine whether or not there was probable cause (T p. 96). The respondent had already addressed this issue in his motion to dismiss of February 21, 1997 (T p. 96). Mr. Lewis' testimony would have been limited to his investigation of the allegations, which the bar submits would have been irrelevant as to whether or not the respondent entered into an oral referral fee agreement with Mr. Udell. The respondent's only purpose in calling Mr. Lewis as a witness was an attempt to deflect the inquiry into his own conduct by trying to show the bar failed to conduct an investigation at the grievance committee level. The bar submits the fact that the respondent stated in his civil complaint filed against Mr. Udell that they had entered into an oral referral fee

agreement supported a finding of minor misconduct in and of itself. The issue required very little investigation at the grievance committee level. Therefore, the referee correctly determined Michael Lewis' testimony would have been of little, if any, value to resolving the only issue at hand. The respondent waived any objections by closing his case without objection (T p-p* 95-97, 150).

POINT III
THE REFEREE ALLOWED RESPONDENT AN OPPORTUNITY TO PRESENT MITIGATING EVIDENCE

The record does not indicate that the respondent ever attempted to present mitigating evidence to the referee. The referee gave the respondent ample opportunity to present mitigating evidence. Between the conclusion of the final hearing on May 2, 1997, and the referee's order of July 29, 1997, the respondent still had pending motions and certainly could have moved the court for an additional hearing on mitigating evidence or he could have submitted mitigating evidence in writing. He chose not to do so. After giving both parties the opportunity to present proposed referee reports, the referee wrote to the bar, with a copy to the respondent, on August 8, 1997, requesting that the bar provide him with the respondent's prior disciplinary history.

According to the respondent, he wanted to call some forty persons to testify as to his character. Character evidence has little relevance with respect to determining guilt or innocence of an alleged rule violation. The Florida Bar v. Whitney, 237 So. 2d 745, 748 (Fla. 1970). Character evidence may be considered in

mitigation but a referee in a disciplinary proceeding cannot, on his own initiative, transform the hearing into a reinstatement action by entertaining character evidence The Florida Bar v. Scott, 238 So, 2d 634 (Fla. 1970). Such evidence does not abrogate the need for discipline, The Florida Bar v. Solomon, 338 so. 2d 818, 819 (Fla. 1976). As former Justice Ehrlich stated in his opinion in The Florida Bar v. Seldin, 526 So. 2d 41, 46 (Fla. 1988), where he concurred in part and dissented in part, *"All of [a lawyer's] good deeds fade into relative insignificance when he violated the code by which lawyers, as officers of the Court, are bound, because lawyers are held to a higher standard than other participants in our system of free enterprise. The client places his life, his liberty and his property in the hands of the lawyer. No other member of society is entrusted with so much. The public must have confidence that one to whom so much is entrusted will not breach that confidence. The conduct demanded of lawyers by our Code distinguishes the lawyer* from *others."*

POINT IV

THE SHORT DELAY IN THE FILING OF THE REFEREE'S REPORT WAS JUSTIFIABLE GIVEN THE CIRCUMSTANCES OF THE CASE

The referee presented his report to this court approximately six months after being assigned the case. The respondent had sought the recusal of the previous referee only three days before the scheduled final hearing. This caused the reasonable and nonprejudicial delay because the chief judge had to assign another referee who had to reschedule the final hearing. Delay in processing a disciplinary matter is not grounds for dismissal of the action. Instead, unreasonable delay, caused by the bar, is a factor to be considered in mitigation. The Florida Bar v. Micks, 628 So. 2d 1104 (Fla. 1993). An accused lawyer claiming unreasonable delay in a bar disciplinary proceeding must produce evidence of prejudice. The Florida Bar v. Brakefield, 679 So. 2d 766, 770 (Fla. 1996). Delay in rendering a Report of Referee until after the passing of the 180 day time limit recommended by the supreme court is not grounds for dismissal of the proceedings nor does it render the report invalid. The Florida Bar v. Daniel, 626 So. 2d 178, 183-184 (Fla. 1993).

This court entered its order on October 14, 1996, directing

the Chief Judge of the Eighteenth Judicial Circuit to appoint a referee within 14 days. The order also specified that the Report of Referee would be due within 180 days of the order, or April 14, 1997, unless there were substantial reasons requiring delay. The first referee in this matter, The Honorable Lawrence V. Johnston, was appointed on October 23, 1996. Judge Johnston initially set this matter for **a** final hearing on December 23, 1996. On December 20, 1996, the respondent moved to disqualify Judge Johnston only three days before the scheduled final hearing. That same day, after receipt of the respondent's motion, Judge Johnston recused himself from the case. As a result, the final hearing had to be postponed until after a new referee could be appointed to hear the matter. The bar was prepared to go forward with its case and the matter would have proceeded to final hearing on December 23, 1996, had the respondent not moved to recuse Judge Johnston. The present referee **was** assigned during early February, 1997, and the matter was set for final hearing. Due to a witness subpoena situation, the matter was rescheduled to May 2, 1997. On May 8, 1997, the respondent wrote the referee, enclosing a Motion to Issue a Rule to Show Cause against a witness, and requesting that the referee schedule a hearing

time for the motion. The referee's judicial assistant attempted, without success, to contact the respondent to schedule a hearing time. By letter dated July 1, 1997, the referee advised the respondent that the respondent's secretary, Nora, had advised the judicial assistant that the respondent was out of town for the month of June and that the respondent needed to submit a proposed Report of Referee by July 16, 1997, if he wished to have it considered. The respondent advised the referee in a letter dated July 7, 1997, that he had been unavailable for the past several weeks due to his recovery from a medical procedure but had not been out of town. The record clearly shows the respondent never requested an extension of time to submit his proposed referee report.

The bar has never sought any delay or continuance in this matter. The delay in the referee filing his report after the final hearing was due to the respondent's actions in filing more motions that had to be resolved before a final report could be issued. The referee did not consider the motions until July 29, 1997, and filed his report within a reasonable time thereafter on August 26, 1997.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of a public reprimand to be administered by an appearance before the board of governors and tax costs against the respondent currently totaling $2,020.54.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's 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, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Michael Barry Rubin, 908 East Stypmann Boulevard, Stuart, Florida, 34994; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 17th day of November, 1997.

Respectfully submitted,

Jan Wichrowski

Jan Wichrowski
Bar Counsel

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