IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Appellant/Cross-Appellee,

CASE NO.: 89, 551
The Florida Bar Case No.: 96-51,025(15B)

vs.

FRANK G. CIBULA, JR.,

Appellee/Cross-Appellant.
_____/

**ANSWER BRIEF AND INITIAL BRIEF OF CROSS-APPELLANT, FRANK G. CIBULA, JR.**

ROBERT H. SPRINGER, ESQUIRE
Counsel for Appellee/Cross-Appellant
Springer & Springer
3003 S. Congress Avenue, Suite 1A
Palm Springs, FL 33461
561-433-9500
Florida Bar No.: 158594

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES** **PAGE**

| CASES | PAGE |
|---|---|

**CASES** **PAGE**



**RULES REGULATING THE FLORIDA BAR**



**FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS**

## PREFACE

The following terms of reference will be used by the Appellee/Cross-Appellant, Frank G. Cibula, Jr.: The Florida Bar will be referred to by its full name or "The Bar" and Frank G. Cibula Jr. will be referred to by his full name, as "respondent", and as "former husband". References to the September 2, 1997 hearing transcript will be designated as (T Vol. 1). References to the September 12, 1997 hearing transcript will be designated as (T Vol. 2). References to the Report of Referee will be designated as (RR)

## STATEMENT OF THE CASE AND FACTS

Appellee and Cross-Appellant, FRANK G. CIBULA, JR., sets forth his Statement of the Case and Facts for completeness in response to the Appellant's Initial Brief and this timely cross-appeal.

The subject complaint of The Florida Bar arose out of a post-judgment hearing on a dissolution of marriage between Frank G. Cibula, Jr. and June C. Cibula, now known as June S. Clarke. The former wife filed three petitions for dissolution of marriage against the former husband. Ultimately, her petition for dissolution was granted on July 7, 1988. Prior to that time, the previous petitions were dismissed, although, Frank G. Cibula, Jr. was granted custody of his two children. As a result of the last petition for dissolution, the former wife stipulated that the former husband would have custody of the parties' then minor child. The older child had reached his majority at the time of the last petition for dissolution of marriage.

The former wife, although, having a Bachelor's Degree in Education, was granted $2,000.00 per month in permanent alimony, plus a majority of the assets of the parties. The husband received one-half interest in the marital home. The wife received one-half interest in the marital home and 100% interest in the parties' former marital home where she resides. The Final Judgment of Dissolution of Marriage awarded no child support to the husband on behalf of the one minor child. During the years that the wife filed her three petitions for dissolution of marriage, she hired a number of attorneys who took advantage of the rules of discovery and secured documents from the former

husband. The husband was maintaining the marital home and going through the dissolution proceedings, running a law office with six lawyers, and being the residential custodial parent of two children. At the time of the wife's last Petition for Dissolution of Marriage (the husband never filed a Petition for Dissolution of Marriage), the husband's six man law partnership dissolved due to the former wife's disruption of the former husband's law practice and personal life. The former husband learned of the break up of his law partnership during the dissolution trial proceedings in 1987.

As a result of the dissolution, the husband was left paying permanent alimony, maintained the children in their private schooling, was obligated to the mortgage on the marital home and had other financial responsibilities. The wife at the time had a Bachelor's Degree in Education and now has a Ph.D. in Education.

The former husband immediately went from a six man partnership to that of a sole practitioner requiring the dissolution of the partnership and all the attendant circumstances that surround a dissolution of a business professional partnership. This, in addition to the emotional aspects of a dissolution of marriage.

The former husband was held in contempt on four separate occasions, some based upon the underpayment of his alimony obligation while still trying to attend to the minor child's financial needs. The former husband through an agreed settlement was disciplined by a public reprimand by The Florida Bar due to the former wife's filing of a complaint for being held in contempt. The Florida Bar's complaint of December, 1996, is based upon two questions and two answers in an August, 1991, hearing and a

November, 1991, hearing at which The Bar contends the testimony was false. The position of the Appellee and Cross-Appellant, Frank G. Cibula, Jr., was that there was no falsity in his answers. His total income for the year was not known until approximately mid-year in 1992, his Income Tax Return for 1991 was not filed until April 14, 1994. (T 19 & 126 and Exhibit #1) At neither of the hearings was the former husband requested to bring any financial records. (T - 40) Those records would have been kept by his Certified Public Accountant, Donald Pagan.

The referee found in favor of The Florida Bar and ordered a 60 day suspension. The Florida Bar timely filed a Petition for Review seeking a greater suspension and the Appellee/Cross-Appellant filed his timely Cross Petition for Review of the referee's report finding guilt in favor of The Bar.

The questions posed at the two hearings were:

> Q: How much money do you have available today to make that mortgage payment tomorrow?
>
> A: I'm hoping that I'll be able to continue what I've been squeezing out of my practice, which would be about $3,000.
>
> Q: And earlier, you mentioned a $3,000 figure for yourself. Is that a draw, a salary, or what?
>
> A: That's a draw. And that may not be accurate. It may actually be less than that. I recall that, sometimes I take in, like, $2,200 or $2,300, so I could at least made the mortgage payment, and that's it. And sometimes I take in $2,500. But I'm just saying, I haven't looked at the records but I can tell you it's probably – it might average $3,000 a month. Probably averages, actually, a little bit less.

Q: How much are you saying you made this year?

A: I think I'm making like I said before probably a little less now. I think I have been taking about $3,000.00 a month so that I could make the mortgage payments on the house.

Q: You are saying about $36,000 a year?

A: If that's what it amounts to, hopefully I'll do better, but I may not.

The 1991 draws were neither regular in time or amount. No records were ever requested to be brought to the hearings. The Certified Public Accountant, Donald Pagan, would have the numbers and the Appellee/Cross-Appellant would only be guessing. (T - 130)

The draw schedule as per Appellee/Cross-Appellant's Exhibit #2 is as follows:

Per your request I am furnishing the following information on your 1991 draw account of $84,700 as shown on my year end "Annual General Ledger" run.

a. $30,000 was sent directly to the IRS for your estimated tax payments.

b. The following is a list by dates of checks written to you

| | |
|---|---|
| 01-10 | $2,500 |
| 01-30 | 2,500 |
| 02-20 | 500 |
| 03-01 | 5,000 |
| 03-07 | 3,000 |
| 03-28 | 1,500 |
| 04-10 | 2,500 |
| 04-12 | 4,500 |
| 04-25 | 600 |

| | |
|---|---|
| 05-07 | 3,000 |
| 05-24 | 1,000 |
| 06-10 | 3,600 |
| 07-03 | 5,000 |
| 08-13 | 2,500 |
| 08-28 | 3,500 |
| 08-30 | 1,000 |
| 10-09 | 1,000 |
| 11-01 | 1,000 |
| 11-26 | 1,000 |
| 12-11 | 1,500 |
| 12-23 | 3,000 |
| 12-24 | 5,000 |
| Total | $54,700 |

Draws were explained as what Appellee/Cross-Appellant takes home, not money paid to the IRS for estimated taxes or money left in the accounts to run the office. Actually between the two dates of the hearings (August 9 and November 25, 1991) the following draws were taken:

| | |
|---|---|
| August 13, 1991 | $ 2,500 |
| August 28, 1991 | 3,500 |
| August 30, 1991 | 1,000 |
| September, 1991 | 0 |
| October 9, 1991 | 1,000 |
| November 1, 1991 | 1,000 |
| TOTAL | $ 9,000 |

This draw schedule would support a recollection of approximately $3,000.00 per month in draws at the November 25, 1991 hearing.

The Florida Bar complained that the Appellee/Cross-Appellant knew prior to the end of 1991 how much he would earn from his practice and therefore testified

intentionally falsely. The Appellee/Cross-Appellant denies any such intent in his testimony. (T - 40).

From a finding of misconduct The Bar appealed for a greater measure of discipline and the Appellee/Cross-Appellant, on the finding of misconduct, contests there was no violation of the Rules regulating the Florida Bar.

## SUMMARY OF ARGUMENT
(Bar Appeal)

The Appellee, Frank G. Cibula, Jr., denies that he is guilty of any misconduct that would impose discipline on him. His position is based upon the facts and law as set forth in his Cross Appeal.

Should this Honorable Court find that he is guilty of misconduct, it is suggested that the misconduct does not arise to the level of a suspension, but to a lesser degree such as a private reprimand or no more than a public reprimand. The Appellee has been current with his alimony obligation for years. The Appellee was the primary residential custodial parent of his minor child.

A suspension as advanced by The Bar does not serve the purpose of attorney discipline, nor is it in accordance with The Florida Standards imposing lawyer sanctions.

## ARGUMENT
(Bar Appeal)

**THIS COURT SHOULD NOT SUSPEND, AND IF SO, FOR A PERIOD LESS THAN 60 DAYS, OR ALTERNATIVELY, NO MORE THAN A PUBLIC REPRIMAND.**

The Appellee/Cross-Appellant, Frank G. Cibula, Jr., files this his Answer Brief to The Florida Bar's Initial Brief, but in no way concedes misconduct. The Appellee/Cross-Appellant suggests that his Cross-Appeal disposes of the Florida Bar's complaint and these proceedings should be dismissed.

The Appellee/Cross-Appellant, Frank G. Cibula, Jr., will not respond to the Black Letter Law as cited in The Florida Bar's Initial Brief. The Appellee/Cross-Appellant will respond to individual cases before setting forth his own argument.

In the case of The Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995), the court imposed a thirty day suspension based upon the "unique facts" in that case. The respondent, Burkick-Burrell, was representing her husband in a lawsuit to recover injuries he sustained in an automobile accident. Burkich-Burrell was a plaintiff in the second action and also represented her husband. Interrogatories were propounded to the husband requesting information as to any prior accidents and any medical treatment. The Interrogatory answers failed to disclose that her husband was treated for a neck injury in the prior accident or the names of the three medical doctors who treated him for those injuries. She also sat in on his deposition, but made no correction to his testimony. The referee found that Burkich-Burrell had personal knowledge of the

accident and injuries and had notarized the Answers to Interrogatories which were not complete, as well as attended his deposition. When the information was known Burkich-Burrell never amended the Answers to Interrogatories. In addition, the referee found that the Answers to Interrogatories were evasive and at the hearing she refused to acknowledge the wrongful nature of her conduct or accept responsibility, had selective recall, and lacked credibility. The referee recommended a thirty day suspension for failing to disclose material facts to opposing counsel and failing to insure that the information provided to opposing counsel was correct and consistent with her personal knowledge.

In The Florida Bar v. Johnson, 648 So.2d 680 (Fla. 1994), Johnson executed a notarized tenant affidavit which indicated there was a valid lease which he knew was invalid. The tenant affidavit was given to a third person, a bank, which relied upon the affidavit for the purpose of issuing a loan. In this instance, Johnson knowingly provided an affidavit containing false and misleading statements. He knew there was no lease, nor was he paying any money for the space and that a third person would rely upon his affidavit. Johnson was suspended for 60 days.

The Bar cites The Florida Bar v. Morse, 587 So.2d 1120 (Fla. 1991) wherein a 90 day suspension was based upon the fact that Morse attempted to hide from the client his partner's malpractice for letting the Statute of Limitations run, but provided a firm Trust Account check for recovery of his claim which ultimately led to the use of other client's trust fund money to pay for the partner's malpractice. Morse further never

advised the client that there was a conflict of interest after the running of the Statute of Limitations.

In The Florida Bar v. Oxner, 431 So.2nd 983 (Fla. 1983) Oxner lied to the trial judge in order to obtain a continuance. Oxner lied to the judge both by telephone and in court. Oxner presented the appearance to the referee that this was a minor mistake and that The Bar was making too big a matter out of it. He did not secure counsel to represent him in the proceeding. He filed no Answer and he denied the truth of all of The Bar's Request for Admissions, except that he was a member of The Bar subject to discipline. The referee found that the seriousness of the conduct in making bold faced lies to the judge did not appear to be recognized by Oxner. This court gave him a sixty day suspension, although the dissent by acting Chief Justice Adkins suggested a public reprimand.

In The Florida Bar v. Bratton, 389 So.2d 637 (Fla. 1980) this court approved the referee's findings and publicly reprimanded Melvin Bratton for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation including knowingly making false statements of fact in representing a client. Attorney Bratton received a $500.00 retainer, agreed to refund it, and issued a check which was returned for insufficient funds. The client ultimately sued and received a Judgment which Bratton paid. Bratton seemed to be unaware of the Judgment and forwarded a check for the costs. In another complaint against him, Bratton gave a receipt in a real estate transaction acknowledging the receipt of $1,000.00 in cash. Bratton knew the transaction was not

between the buyers and the sellers as represented by the deposit receipt, but was a three way transaction. There were a multitude of intentional misrepresentations.

In The Florida Bar v. Kaufman, 684 So.2d 806 (Fla. 1996) the referee after numerous discovery violations entered a Default Judgment against Kaufman. Kaufman previously had a Judgment against him, lied to the court as to where the assets were, and transferred and dissipated his assets to avoid payment of the Judgment. In addition, Kaufman failed to attend the final hearing. It would appear from the opinion that the false testimony about his assets, concealing transferring and dissipation of assets and failing to attend the final hearing warranted discipline.

In the case of The Florida Bar v. Merwin, 636 So.2d 717 (Fla. 1994) the Supreme Court found a number of violations such as non-attendance at hearings, unreturned phone calls to the trial judge, and failure to respond to phone calls from opposing counsel. The referee found no mitigating factors, found aggravating factors, prior breaches of moral conduct, illegal conduct involving moral turpitude, engaging in conduct adversely affecting the fitness of the practice of law, and conduct involving dishonesty, fraud and deceit. Similar acts which warranted more discipline.

The case of The Florida Bar v. Thomas P. Colclough, 561 So.2d 1147 (Fla. 1990) is more than an over-reaching situation (fraud upon the court) wherein counsel represented to the court that a Cost Judgment had already been entered and that there was damage to a third party resulting in an increased Judgment and an increased Supersedeas Bond.

The Florida Bar v. Agar, 394 So.2nd 405 (Fla. 1980) was another instance where the attorney suggested that a witness give false testimony. The referee found that Agar did either arrange actively or passively for a witness to testify falsely before a court of competent jurisdiction, presented a witness when he had good reason to know that the witness would falsely testify before the court, and he failed to notify the judge of the false testimony. Criminal charges were brought against Agar and he subsequently entered a plea of Nolo Contendere to a lesser misdemeanor offense of solicitation to commit perjury. The court states at page 406,

> It is clear from the record that Agar knew the testimony in question on behalf of his client was false and that he did nothing to reveal the fraud to the court * * * What is relevant is that respondent by his own admission allowed his client to perpetrate a fraud upon the court and according to the testimony of his client and the false witness, was the one who suggested the fraud in the first instance.

In The Florida Bar v. Dodd, 118 So.2d 17 (Fla. 1960) Dodd filed claims in personal injury cases for items of expense amounting to hundreds of dollars that were never incurred. He knew at the time that they were not incurred and, in addition, he attempted to get his clients to assert such claims as part of their expense in the litigation. The State Attorney filed criminal charges against Dodd in two cases. There was no question that Dodd was attempting to further perpetrate a fraud upon the court.

In The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992) not only did Poplack lie to a police officer, but he was charged with a criminal offence, a third degree felony of grand theft for attempting to steal an automobile.

The Florida Bar v. Rightmyer, 616 So.2d 953 (Fla. 1993) is a case wherein Rightmyer plead Nolo Contendere to three counts of perjury. The Bar audited Rightmyer's Trust Account records and found vast technical violations. The court disbarred Rightmyer due to his perjury convictions.

The Florida Bar v. Feige, 196 So.2d 433 (Fla. 1992) again is an instance where the attorney assisted his client in conduct known to be fraudulent, failed to reveal the fraud to an affected person, accepted employment where his professional judgment would be affected by his own personal interests, and accepted employment when he was a witness in a pending litigation. The referee stated at page 435:

> We agree that Feige's misconduct was egregious. He defrauded Gale of more than $4,000.00 over the course of nearly two years. He used the money to pay himself for fees incurred by Whalen. Feige refused to acknowledge the wrongful nature of his conduct. In addition, he exhibited indifference to making restitution and he returned the money only after Gale initiated a lawsuit against him.

In The Florida Bar v. Rood, 622 So.2d 974 (Fla. 1993) Rood required the client to sign false annual guardianship returns which he had prepared. He then informed the subject of the guardianship that she had to sign forms acknowledging receipt of property or that her mother would go to jail. Rood later after being confronted by an associate that the documents were false, went before the probate judge and secured an order of discharge even though Rood knew the documents in support of the order were false. When another lawyer in the firm advised Rood that he intended to submit an affidavit to the court outlining the fact that the documents were false, Rood returned to

the probate judge, informed him of the mistake, and the judge voided the order of discharge. Rood was charged by The Florida Bar with several different violations of the rules regulating The Florida Bar. In addition, Rood executed a worthless check complaint on four different checks and testified that the statements regarding his initials were forged.

In The Florida Bar v. Norvell, 685 So.2d 1296 (Fla. 1996), Norvell was convicted in Federal Court of a felony drug offense for which he received a five year prison sentence. Norvell was involved in several business ventures and filed an application and affidavit with the bankruptcy court which was false indicating that he had no connection with the debtor and did not hold a represented interest that would be adverse to the interest of the debtor's estate in a Chapter 11 case. He was charged with seven different violations of the Rules Regulating The Florida Bar. Because of a prior suspension nearly ten years prior and other conduct, the court provided a 91 day suspension.

The common thread that runs through all these cases is actual intent, i.e. false pleadings, fraud upon the court, criminal actions, false motions, forged signatures, and false affidavits, and a multitude of disciplinary violations.

**APPROPRIATE DISCIPLINE OTHER THAN LENGTHY SUSPENSION**

This court in The Florida Bar v. Batman, 511 So.2d 558 (Fla. 1987) upheld a referee's finding of a public reprimand when the attorney had testified falsely concerning his practice of law in representing clients during his time of suspension for

non-payment of Bar dues. This court in The Florida Bar v. Wright, 520 So.2d 269 (Fla. 1988) upheld a referee's recommendation of a public reprimand in a dissolution case when the attorney failed to divulge in response to discovery requests real property and sales contracts of which he had an interest. He was charged among other things with dishonesty. In The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986), the attorney was charged with dishonesty finding that he abused his status as an attorney to secure loans from his relatives and was guilty of overreaching in his dealings with them and engaging in conduct contrary to honesty, justice, and morals or engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and other misconduct. The court accepted the referee's finding and gave a public reprimand. In The Florida Bar v. Story, 529 So.2d 1114 (Fla. 1988), this court upheld a 30 day suspension of an attorney who was charged with four violations of the Rules of Professional Conduct. One violation was a commitment of a criminal act. In The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1988), this court upheld a public reprimand for an attorney who submitted a notarized pleading to the court when he knew or should have known it contained a factual averment which was not true and, in addition, was signed by the attorney outside the presence of a notary after the jurat clause was affixed. In The Florida Bar v. McLawhorn, 535 So.2d 602 (Fla. 1988) this court approved a public reprimand even though there was a prior public reprimand in the case of The Florida Bar v. McLawhorn, 505 So.2d 1338 (Fla. 1987). The referee had recommended a 30 day suspension, but this court refused and substituted a public reprimand. In The Florida Bar v. Glick, 693 So.2d 550 (Fla. 1997) this court found a

number of rule violations, including dishonesty which warranted a 10 day suspension.

**PURPOSE OF DISCIPLINE**

This court has held that Bar discipline or actions must serve three purposes:

1. The judgment must be fair to society;

2. The judgment must be fair to the attorney;

3. The judgment must be severe enough to deter other attorney's from similar misconduct. See The Florida Bar v. Lawless, 640 So.2d 1098 (Fla. 1994).

The Appellee/Cross-Appellant, Frank G. Cibula, Jr., has received one prior reprimand which arose out of the dissolution proceedings with his former wife. She was the complainant. It is suggested as in the case of The Florida Bar v. Taylor, 648 So.2d 709 Fla. 1995) that if that same complaint were brought today under the same factual scenario, there would be no discipline.

The Appellee is a father who was designated as the residential custodial parent by stipulation of the former wife in the third and final divorce proceeding she filed. The Appellee is still responsible for his now adult son who is in law school and has medical problems for which the Appellee is financially responsible. There has been no other private, public, or other blemish on the Appellee's record. To punish the Appellee by a suspension would financially hurt his son, his new family, and himself, as well as the former wife who receives alimony and his office staff and their families who depend on him. The Appellee has been current in his alimony obligation. A suspension would not be fair to society or to the attorney. A suspension would not deter other attorneys. A

suspension would affect approximately 19 people in Appellee's law office, in addition to his immediate family.

Attesting to his good character, was the testimony given before the referee by three sitting Circuit Court judges in Palm Beach County, Florida. (T Vol. 2, 13-16, 21-22 & 34-36) Numerous letters were submitted from lawyers, a retired judge, and a former sitting judge.

In imposing lawyer sanctions, The Florida Standards were adopted which require a referee to consider each of the following questions before recommending or imposing appropriate discipline:

1. Duties violated;
2. The lawyer's mental state;
3. The potential or actual injury caused by the lawyer's misconduct;
4. The existence of aggravating or mitigating circumstances.

The referee did not seem to consider these questions before recommending or imposing discipline. It is suggested that the Standards which would apply to these proceedings are 6.14, or the gravest 6.13.

> 6.14 Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or not actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

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

Further, in support of an admonishment or public reprimand, the referee did not find some of the egregious conduct found in the cases cited by The Bar, such as:

1. Evasiveness;
2. Selective recall;
3. Filing only pleadings to attest one is a member of The Bar, subject to its discipline;
4. Taking a cavalier attitude;
5. Lack of credibility.

The most it is suggested is that these may have been negligence, but the evidence clearly shows there was no actual or potential injury to a party and caused little or not adverse effect on the legal proceedings.

The Bar's suggestion that the Appellee's certificate in trial practice should be lifted is without foundation. It is suggested if the court finds misconduct, at the most a private or public reprimand should be the severest punishment.

## CONCLUSION ON APPEAL
(Bar Appeal)

It is submitted that the case law cited by The Bar involves much more grievous and egregious actions, multiple violations of the Rules Regulating The Florida Bar, as well as criminal activity, including defrauding clients and removing trust fund monies. Even the discipline in the cases cited by The Bar were individualized to the conduct or misconduct found by the referee and/or upheld or changed by this court. There is no indication in the referee's report that the attorney acted anything but professional throughout the proceedings, did not take a cavalier attitude about the proceedings, and was very serious concerning the issues raised. No finding was made of

lack of credibility. The only other disciplinary matter was a public reprimand arising out of the dissolution proceedings filed by the former wife. Under the recent case law cited in the brief, the earlier public reprimand would not have been a bar disciplinary proceeding. Should this court find that there was misconduct and a violation of the rules by the attorney, then at most a public reprimand or a short suspension should be the punishment pursuant to the Florida Standards Imposing Lawyer Sanctions.

## ON CROSS APPEAL

## SUMMARY OF THE ARGUMENT ON CROSS-APPEAL

The Cross-Appellant, Frank G. Cibula, Jr., cross appeals the findings of guilt in the disciplinary proceedings before the referee. The findings of fact in the referee's report are erroneous, unlawful, unjustified, and not based upon competent substantial evidence in the record. The four questions and four answers as referenced in the briefs do not arise to the level of dishonesty, deceit, misrepresentation, or fraud as set forth in the Rules Regulating The Florida Bar.

The Bar is acting as a "Monday morning quarterback". The Bar and its expert rely upon information that was not known until well after the close of the 1991 calendar business year. Certainly only someone with a crystal ball could determine what the total business income would be in August, 1991, some five months before the close of the business year or even in November, 1991, two months before the close of the business year.

It is submitted that the actual estimates or guesstimates were just that. He testified, "That may not be accurate". His guesstimates are somewhat lower than the actual average at the close of year end and were certainly accurate for the three month period in mid-August through mid-November, 1991, based upon the draw schedule before the court. The attorney's estimates/guesstimates of draws were not such that they were out of line to such an extent which would indicate misconduct.

For the reasons set forth in the Cross-Appellant's brief and the arguments set forth therein, the disciplinary proceeding and findings should be dismissed.

## ARGUMENT

### THE REFEREE'S FINDINGS OF FACT ARE ERRONEOUS, UNLAWFUL, UNJUSTIFIED AND NOT BASED UPON COMPETENT EVIDENCE

**STANDARDS OF PROOF**

In Bar disciplinary proceedings, a referee must find that the conduct or misconduct of the attorney be proved by clear and convincing evidence.

The Standards of Proof is found in such cases as The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973), at page 8 and 9:

> It is necessary to bear in mind, however, that disciplinary actions while not fully criminal in character, are penal proceedings the results of which may permanently cripple an attorney's reputation and standing in the community. Thus, we adhere to the view we took in *The Florida Bar v. Rayman*, supra, that the quantum of proof necessary to sustain a referee's finding of guilt is something more than the mere "preponderance of the evidence" sufficient for a civil action. We have defined that quantum as "clear and convincing evidence", not as stringent a standard as that required in criminal cases, but most certainly more than the contradictory and inconclusive testimony adduced in the instant case.

See also The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) and The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994)

**WHAT IS NOT CLEAR AND CONVINCING EVIDENCE**

This court has held that contradicting facts, supported only by the two statements of a check and the testimony of other interested parties does not establish clear and convincing evidence. The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973).

The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) was a proceeding to disbar two lawyers accused of attempting to bribe a judge to influence a decision in a will contest. The referee found the pair guilty. This court reversed and said at page 598:

> While we cannot say that there was no evidence to support the referee's findings, we are constrained to the view that much of the supportive testimony is itself evasive and inconclusive so that when it is considered together with the above recited inconsistencies, the evidence does not establish the charges with that degree of certainty as should be present in order to justify a finding of guilt on charges as serious as those made against these respondents.

**INTENT**

The burden is on the Florida Bar to provide proof of the specific rule violations. In this case, the crucial point is the element of intent. This court in The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992), affirmed a referee's finding that Neu did not act with any intent to be dishonest, misrepresent, deceive or fraud.

The court held The Bar must show the necessary element of intent. At page 298 the court states:

> In the instant case, The Florida Bar is seeking to overturn the referee's findings that Neu did not act with dishonesty, misrepresentation, deceit, or fraud. In order to find that an attorney has acted with dishonesty, fraud, deceit, or

> misrepresentation, The Florida Bar must show the necessary element of intent. *The Fla. Bar v. Burke*, 578 So.2d 1099, 1102 (Fla. 1991). Further, in *The Florida Bar v. Dougherty*, 541 So.2d 610 (Fla. 1989), and *The Florida Bar v. Lumley*, 517 So.2d 13 (Fla. 1987), we have found that an attorney's lack of intent to deprive, defraud or misappropriate a client's funds supported a finding that the attorney's conduct did not constitute dishonesty, misrepresentation, deceit or fraud. Thus, The Florida Bar has the burden of showing that the referee's findings are clearly erroneous or not supported by the record. The Florida Bar must establish that Neu intended to convert his clients' funds, and consequently that he acted with dishonesty, misrepresentation, deceit or fraud.

In Neu, supra, the complaint by The Florida Bar was for improperly using guardianship funds for his own personal expenses and the relesion of his trust accounts earned interest.

Neu invested guardianship funds without authority into a music venture, and paid personal income taxes from guardianship funds. The referee found no violation finding that Neu did engage in conduct that involved dishonesty, fraud, deceit, or misrepresentation, or evidence that reflects adversely on his fitness to practice law.

The referee found that even though Neu commingled personal funds with trust funds, he did not intend to convert his client's funds and was upheld by this court.

This court again in The Florida Bar v. Lanford, 691 So.2d 480 (Fla. 1997) held that The Bar must show the necessary element of intent to discipline an attorney for conduct involving dishonesty, fraud, deceit, or misrepresentation. [Rule 4-8.4(c)]

The Florida Bar's complaint against the attorney is set forth in four questions and four answers on two separate hearing dates. The referee's report is not

supported by competent evidence, but by conjecture and speculation. The questions are as follows:

> Q: How much money do you have available today to make that mortgage payment tomorrow?
>
> A: I'm hoping that I'll be able to continue what I've been squeezing out of my practice, which would be about $3,000.
>
> Q: And earlier, you mentioned a $3,000 figure for yourself. Is that a draw, a salary, or what?
>
> A: That's a draw. And that may not be accurate. It may actually be less than that. I recall that, sometimes I take in, like, $2,200 or $2,300, so I could at least made the mortgage payment, and that' sit. And sometimes I take in $2,500. But I'm just saying, I haven't looked at the records but I can tell you it's probably – it might average $3,000 a month. Probably averages, actually, a little bit less.
>
> Q: How much are you saying you made this year?
>
> A: I think I'm making like I said before probably a little less now. I think I have been taking about $3,000.00 a month so that I could make the mortgage payments on the house.
>
> Q: You are saying about $36,000 a year?
>
> A: If that's what it amounts to, hopefully I'll do better, but I may not.

The Florida Bar asserts to this court that the respondent knew his gross business income in August or November, 1991, prior to the year end and all bookkeeping entries made. Those figures were determined in mid year 1992 and as set forth in his 1991 Income Tax Return filed in April, 1994, that the total gross income of the business was $118,290.00. (T- 20, 126, 130, & 143 and Florida Bar Exhibit #1) It would be more

than shear speculation for someone to know in either month what the total business income would have been in 1991 after the payment of salaries and all attendant expenses. The Bar again wants this court to uphold the referee's finding that their expert witness knew that the attorney knew in August and November, 1991, that his 1991 Income Tax Return would show that he would have available to him $118,290.00 in total income. In fact, this is a total fallacy. The expert did not know these figures without reviewing the 1991 tax return. Besides not being known until the final year end computations and the filing of the 1994 tax return, The Bar's expert wants this court to believe that the quarterly tax payments totaling $30,000.00 and the $30,000.00 used for operating capital was available for income. [RR p. 6(e)] The Bar's Certified Public Accountant, Whiddon, guessed at what amount may have been available to take out (draw) out of total income. Donald Pagan, C.P.A. testified he sent directly to the IRS $30,000.00. (T 131). Taxes are charged to draws, but he (Frank G. Cibula, Jr.) doesn't get it. (T 131) Donald Pagan testified out of the total business income of $118,000.00, he paid directly to the IRS $30,000.00; $30,000.00 is left in the business to pay rent, etc. (T - 132 & 160) He can't milk the business dry. (T - 132) The difference $56,000.00, actually $54,700.00 was paid as draws to Frank G. Cibula, Jr. (T 132) No reasonable person would suggest that taxes paid (in this case paid by the attorney's accountant) was disposable and drawable income nor operating capital of the business was disposable income kept for running the business that generates income. It is known that at the end of the year out of the total draws of $54,700.00 which was established at the end of 1991 and not in August or

November, 1991, that the attorney had paid $23,800.00 in alimony which is more than 50% of his gross. (Florida Bar Exhibit #1, T - 58)

A reading of the questions and the answers posed in the two hearings do not suggest any dishonesty, misrepresentation, deceit, or fraud. The Bar attempts to bolster its case by less than circumstantial evidence of intent. The Bar simply cannot prove intent. The Bar's expert could not testify and the referee could not have found that the respondent had available to him $118,290.00 in total income for 1991 without the tax return which was filed in 1994 when the figures were known unless no taxes were paid and the office closed. The Bar further attempts to set up the fact that there was no backup documentation from six years ago. Even The Bar's expert admitted that documents according to the Internal Revenue Code Regulations are not required to be kept more than three years. (T - 80 & 81) To suggest that the documents should have been kept longer does not conform with any requirement, rule, or law. In addition there is absolutely no evidence in the record that any overpayment of taxes was made in 1991 and that the only payment of taxes was the quarterly payments which totaled $30,000.00 and which approximately the actual tax due of $28,005.00. (T - 18, 77 and 126)

Again, the finding of the referee that the overpayment was a method of hiding income from creditors or an ex-spouse was totally unsupported by the record due to the fact that a persons greatest creditor is the Internal Revenue Service. (T - 24, 149 & 151) Whiddon's opinion on the overpayment of taxes is just his opinion. It does not even arise to the level of circumstantial evidence, which requires it to be inconsistent with any

reasonable hypothesis of innocence. The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994). This court has even gone farther as to requiring unrefuted evidence. The Florida Bar v. Burke, 57 So.2d 1099 (Fla. 1991)

The explanation of Donald Pagan, C.P.A., is competent & substantial that some of the numbers would not go through. He had numerical numbers, but there is not a credit there. (T - 134) The accountant was not comfortable with the number that he really owed to us. (T -149) The former wife put the former husband through three different divorces, had a number of lawyers and all kinds of documents were produced and scattered around, including daily diaries. (T - 41 & 42)

There was further no evidence before the referee that any creditor existed. The ex-spouse was paid $23,800.00 in alimony for 1991. It is further suggested that the testimony of James Rich, counsel for the ex-spouse, is somewhat tainted and is more than self-serving. His income figures were handwritten by him. (T - 99) No representation was made by Appellee. (T - 31) He failed to file a motion to compel discovery with the court to produce financial information and sent self-serving letters. In fact, his client by letter dated December 11, 1991, specifically wanted no representation - "no representation of salary". (T - 112; Respondent's Exhibit #2) The Stipulation and Order of Modification drawn by James Rich did not reflect any financial representations by either party. (T - 44) Had James Rich wanted any discovery that was not provided, he certainly should know the rules of procedure to secure that information pursuant to a court order. The reasons are evident now why no discovery was pursued. The former

wife had a Master's Degree, had no debts, had been saving money over the years - she had money and her house was paid for. (T - 119 & 120) His only recollection of filing any financial information on the part of the former wife was he believed she filed a financial affidavit - not necessarily accurate. (T - 111) The Bar further suggests that there was no overpayment of estimated tax in any financial affidavit provided to Mr. Rich, but they overlook the fact that Mr. Rich's testimony was that no financial affidavit was requested. (T - 105)

Again, as a red hearing The Bar indicates that Mr. Rich was advised that there would be an accountant's charge for 1991 documentation since the 1991 year had not come to a close and that he would have to stop other work in order to provide the documentation. The Bar wants this court to believe that because there would have been an accountant's charge which could or might be taxable against them, the attorney and the ex wife refused to go forward with discovery which according to her own letter she didn't want anyway.

The Bar must be candid in it dealings with the referee and this court. The Bar suggests again to the court that the order entered by Judge Rapp on May 31, 1996, denying modification of alimony for the former husband and also denying an increase in alimony to the former wife contained the following quote:

> The former husband misrepresented his income in 1991 in order to induce the former wife to agree to modify the alimony. **The true facts would have justified modification in 1991.** (T - 113)

The Bar fails to candidly indicate the next sentence in Judge Rapp's Order.

Again, Judge Rapp may have been misled by the same type of analysis that The Bar is making in this case. The Bar somehow would have this court believe that because a day after a contempt hearing, the Appellee took a $1,000.00 draw that that fact is significant. In fact, the reasonable explanation is that fees came in at that time and were available for a draw distribution.

The Bar's case is built on supposition and conjecture. Since the burden is on The Bar to prove intent and if The Bar is attempting to use circumstantial evidence to prove intent, then this court has held that in order to be legally sufficient evidence of guilt, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence. See The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).

The reasonable and logical conclusion is that the answers to the questions posed at the two hearings were not dishonest. It is accurate that the draws taken as an average exceed $3,000.00 per month, but there were months when draws were $500.00, $1,000.00 and 0.00.

If as James Rich suggests that he believed that between August and November, 1991, he recalled a $3,000.00 figure, the draw schedule for August 13 through November 25, 1991 would support that figure:

| | |
|---|---|
| August 13, 1991 | $ 2,500 |
| August 28, 1991 | 3,500 |
| August 30, 1991 | 1,000 |
| September, 1991 | 0 |

| | |
|---|---|
| October 9, 1991 | 1,000 |
| November 1, 1991 | 1,000 |
| TOTAL | $ 9,000 |

Lastly, The Bar in paragraph 6(e) at page 6 of the referee's report indicates that the respondent has been held in contempt which would show a pattern of avoiding his responsibility to his ex-wife. The testimony and the income tax return for 1991 shows that the Appellee's alimony obligation was paid to the extent that it was more than 50% of his draws for the year which were known at the close of 1991. This was not an incident where the former husband failed to pay child support due to the fact that the former husband had custody of the minor child.

This court held in The Florida Bar v. Taylor, 648 So.2d 709 (Fla. 1995) that an attorney was not subject to disciplinary action when he was held in contempt for failure to pay child support. The contempt was civil, not criminal and there was no finding made of fraudulent or dishonest conduct. No such finding was ever made in the case before this court. Had the Taylor case been in existence before the former wife filed her grievance with The Bar concerning the husband's contempt charges, there would be no disciplinary action consistent with Taylor. Supra.

**COSTS**

The referee awarded substantial costs against the Appellee/Cross-Appellant. The attorney was not given an opportunity to object to some of the costs which according to the document submitted after the hearing as to the account's costs, included activities

which were far afield of the singular issue of the 1991 income tax return. Although the record does not indicate, the bills do show there were charges for rent, analysis and the like. At the very least, the attorney should be granted due process so that a hearing could be held on the costs.

## CONCLUSION ON CROSS-APPEAL

The referee's findings of fact are erroneous, unlawful, unjustified and not based upon competent, substantial evidence. The four questions for which the referee finds the Cross-Appellant guilty of misconduct are errors in testimony, not intended to be dishonest, deceitful, misrepresentative, or fraudulent when discussing numbers without documentation. Looking back now as The Bar is looking back as a "Monday morning quarterback", it might have been better for the Cross Appellant's accountant to be present at the hearings as the accountant would have had an accurate accounting of the draws taken on any particular date. Even if the accountant were present and testified as to the draws taken in 1991, those records would not suggest to this court that either in August or November, 1991, that it could be determine that the total net business income was approximately $118,000.00. Under no circumstances could it have been determined that all of the income was working capital and the payment of taxes could be considered income that was drawable by the Cross Appellant. The questions and answers in two hearings do not arise to the level of attorney misconduct.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed this 25th day of March 25th day of March, 1998, to: Ronna Friedman Young, Esq., The Florida Bar, 5900 N. Andrews Avenue, Suite 835, Fort Lauderdale, FL 33309.

SPRINGER & SPRINGER
Counsel for Appellee/Cross-Appellant
3003 S. Congress Avenue, Suite 1A
Palm Springs, FL 33461
561-433-9500

BY _____
ROBERT H. SPRINGER, ESQ.
Florida Bar No.: 158594