IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,

v.

MARK EVAN FREDERICK,

Respondent/Appellant.
_____/

Case Nos. 90,007 and 90,387

TFB File Nos. 96-00987-01B
97-00094-01B

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Complainant/Appellee, THE FLORIDA BAR, will be referred to as "The Florida Bar" throughout this Answer Brief. Respondent/Appellant, Mark Evan Frederick, will be referred to as "Respondent".

References to The Rules Governing The Florida Bar shall be designated as “Rule” with the appropriate number, i.e., “Rule 3-7.1,” or as "Rules."

References to the Report of Referee shall be designated as "ROR" followed by the appropriate page number, i.e., "ROR-12."

References to the Transcript of the Final Hearing before the Referee on March 17, 1998, shall be designated by "TFH" followed by the appropriate volume, page, and line number, i.e., "TFH II, 14/22."

References to the Transcript of the Penalty Phase of the Final Hearing before the Referee on March 17, 1998, shall be designated by "TPP" followed by the appropriate page and line number, i.e., "TPP-8/12."

References to The Florida Bar's Exhibits shall be designated as "TFB-Exhibit" with the appropriate number, i.e., "TFB-Exhibit 4."

References to Respondent's Exhibits shall be designated as "Resp.-Exhibit" with the appropriate number, i.e., "Resp.-Exhibit 3."

References to specific pleadings will be made by identification of their location in the Supreme Court pleadings file and index.

References to reported decisions and opinions of the courts will be made by citation to the appropriate reporter.

STATEMENT OF THE CASE

This appeal consists of a challenge by Respondent to the Referee's Report issued on May 18, 1998, that consisted of two separate and unrelated complaints filed with The Florida Bar against Respondent. In the first case, Simp McCorvey filed a complaint with The Florida Bar on July 24,1996 (hereinafter "McCorvey"). Subsequent to a Notice of Finding of Probable Cause issued to Respondent on March 26, 1997, a Complaint was filed in the Supreme Court of Florida on April 22, 1997. In the second case, Sammy D. Barnes, Ray C. Dunklin, and James Cox (hereinafter "Barnes") filed a complaint with The Florida Bar on April 30, 1996. Subsequent to a Notice of Finding of Probable Cause issued on November 1, 1996, a Complaint was filed in the Supreme Court of Florida on February 28, 1997.

On May 6, 1997, The Honorable Allen L. Register was appointed as Referee. The McCorvey and Barnes cases were consolidated by motion on May 2, 1997. A Final Hearing was held in this cause on March 17-19, 1998. On May 11, 1998, a subsequent hearing was held to determine appropriate disciplinary sanctions based on Respondent's violation of the Rules of Discipline and the Rules of Professional Conduct of The Florida Bar.

The Referee issued his Report of Referee on May 28, 1998, recommending

Respondent be found guilty of violations of the Rules Regulating The Florida Bar, to wit: Rules 3-6.1, 4-5.3(a) and 4-5.3(b) in the McCorvey case, and Rules 4-1.15(a), 4-8.4(d), 5-1.1(a) in the Barnes case.

The Referee further recommended the following disciplinary sanctions:

A. that Respondent be suspended from the practice of law in Florida for a period of ninety-one days and thereafter until he proves rehabilitation pursuant to R. Reg. Fla. Bar. 3-5.1(e);

B. attendance at least at one law office management course, including instruction on the keeping of time records, trust accounts, and payment of costs;

C. following reinstatement, probation for three years under the supervision of a member of The Florida Bar, a requirement to provide periodic reports of Respondent's caseload as well as to provide proof that he has established an acceptable method of keeping time records by entering into a contractual arrangement with Law Partners or a similar type organization;

D. to pay into the Clients' Security Fund $5,500.00, the amount that he should have retained in his trust account for costs from the representation of the class action that resulted in the majority of The Florida Bar's allegations against him.

The Referee also considered Respondent's Personal History, Past Disciplinary Record as well as aggravating and mitigating factors pursuant to Florida Standards for Imposing Lawyer Sanctions.

The Board of Governors of The Florida Bar considered the Report of Referee during its August 14, 1998, meeting and voted not to seek review of the recommended discipline.

Respondent filed a Petition for Review on August 27, 1998, and submitted its Second Amended Initial Brief on November 23, 1998. The Florida Bar's Answer Brief was submitted on December 31, 1998, in response to the Respondent's Second Amended Initial Brief.

STATEMENT OF FACTS

Respondent's Second Amended Initial Brief (hereinafter "Initial Brief") does not reflect the Referee's findings of fact, but rather Respondent's position on the case that was rejected by the Referee. Respondent's Initial Brief is laced with inaccuracies and misrepresentations of the factual record below, and has citations referenced to Respondent's Appendix. The Florida Bar therefore adopts and incorporates the findings of fact as reflected in the ROR with the Referee's citations to the evidentiary record to show that the findings were supported by competent substantial evidence.

Referee's Findings of Fact

Case No. 90, 387
(McCorvey)

1. In late March 1996, Respondent employed William D. Barrow, a disciplinarily resigned attorney to work in his office.

2. Despite knowing Mr. Barrow's status with The Florida Bar, Respondent made no efforts to determine the permitted parameters of Mr. Barrow's services. TFH I, 41-44.

3. Respondent relied exclusively upon Mr. Barrow's representations to him of his conversations with The Florida Bar representatives concerning what law office activities he was allowed to conduct.

4. Respondent allowed, and in fact directed, William D. Barrow, a disciplinarily resigned attorney, to have direct contact with a client, Mr. Simp McCorvey. TFB-Exhibit 1.

5. The Florida Bar's Exhibit 1 which consists of a number of memoranda to the file of the client in question, documents in excess of ten times that Mr. Barrow had contact with the client without Respondent being present. For the most part, these were the telephone conversations, several being noted as having been taken at Respondent's request.

6. William D. Barrow considered these conversations to be direct contact, as set forth in a memorandum dated April 30, 1996, wherein Mr. Barrow noted to Respondent that he "would prefer, if at all possible, not to have any more person to person dealings with the man."

7. Respondent has contended from the beginning of this Complaint being filed that direct contact means face to face meetings with clients and does not encompass telephone conversations such as Mr. Barrow had with the client. The Referee agrees with the position of The Florida Bar that direct contact encompasses any unsupervised client contact whether such contact is in person or by telephone.

Case No. 90,007
(Barnes)

1. Respondent met with a group of men who were anticipating bringing a class action suit against the U.S. Navy. At this meeting in Panama City, Respondent discussed with the group their claims against the Navy and also discussed with them his fees and costs. Initially, it was believed that fourteen people would be named as plaintiffs. The financial arrangements were that each person would pay $2,000 and that $5,000 of this would go as a cost retainer. TFB- Exhibit A.

2. Respondent memorialized this meeting and agreement by letter dated August 18, 1994. TFB-Exhibit A.

3. On August 31, 1994, Respondent had two of the group, Robert Jones and Sammy Barnes, acting on behalf of the entire group, execute a written agreement for representation. TFB-Exhibit B.

4. The written agreement, which was a standard form for a contingency fee arrangement, was modified by Respondent who wrote the following terms on the form: "$20,000 nonrefundable retainer; $8,000 cost deposit; $13,100 received today; balance of $14,900 due by September 22, 1994." It was still assumed at this time that the plaintiffs would equal fourteen in number when their suit was filed.

5. At this meeting, Respondent told Robert Jones, one of the two signers for the group that this contract provided the terms they had discussed at their Panama City Meeting. TFH II, 11/21-25.

6. Ultimately, nine people, instead of the anticipated fourteen, participated in the litigation. Respondent was paid $18,000, in keeping with the $2,000 per person. None of this money was deposited into Respondent's trust account to cover costs.

7. In a later meeting with the group at the Bay County Courthouse, Respondent agreed to proceed with the case as set forth in paragraph numbered six above, in spite of his earlier desire to have at least ten plaintiffs.

8. According to the testimony of the members of the group, which the Referee finds convincing, Respondent never told them of his intentions to use the entire $18,000 as his attorney's fees. They still had the understanding that some of this money was to pay costs and expenses, and that this amount would be placed in, as they termed it, an escrow account.

9. On January 25, 1995, Respondent sent his paralegal, Tammy Tikell to a meeting with the nine group members, again in Panama City. At this meeting, Ms. Tikell had each of the group's members sign a straight contingency fee contract to meet what she understood to be a requirement for individual contracts in federal class action law suits. TFH III, 21/ 13-22.

10. At the time the clients signed the contract, no handwritten language was contained thereon.

11. Ms. Tikell later added language that indicated that the members acknowledged that their individual $2,000 payments made on September 24, 1994, were nonrefundable retainers. All of the members of the group who testified at the hearing in this matter vehemently denied the presence of the handwritten notation when they signed the contract. The referee finds their testimony to be more credible than Ms. Tikell's.

12, It was always represented to the group by Respondent that a certain sum of their money would go to pay costs. This was clearly represented in Complainant's Exhibits numbered A and B, as well as in his conversations with the clients. At no time was their fee arrangement renegotiated.

13. Respondent failed to maintain any records by which he could establish specific costs incurred in this litigation.

14. In spite of testimony by Tammy Tikell that she mailed letters to the clients concerning their delinquent standing on the issue of cost money, TFH III, 20/9-14, Respondent is unable to produce any documentation showing that the clients were billed for any outstanding fees. TFH I, 120/9, this in spite of an order to produce.

15. Due to health concerns, Respondent was preparing to withdraw from representation of certain federal litigation matters. In doing so, Respondent prepared letters to be sent to certain clients informing them of this decision.

16. Tammy Tikell, who at the time was in a salary dispute with Respondent, discovered a draft of a withdrawal from representation letter Respondent had prepared for this group of clients.

17. Tammy Tikell informed the group of Respondent's intentions to withdraw from representing them. She eventually showed them a copy of the draft.

18. As a result of seeing the draft, the group sent Respondent a letter, TFB-Exhibit F, demanding $15,000 of their money back or they would "file a Florida bar complaint and sue...for legal malpractice."

19. Upon receiving the group's letter, Respondent replied by mail offering to refund $7,500.

20. After other negotiations, it was agreed that Respondent would refund the group $12,500.

21. Sammy Barnes, one of the spokespersons for the group was informed by Respondent's secretary that before she could give them the $12,500 check, they would each have to sign a release.

22. The release prepared by Respondent stated the financial terms of their agreement and then provided that "...we agree to not write The Florida Bar and if we have already, we agree to voluntarily withdraw it." TFB- Exhibit H.

23. The clients thought that they had to sign the release as it was prepared in order to get their money back.

24. The wording of the release and the accompanying wording on the check eventually picked up by the clients, TFB- Exhibit I, clearly show that the provision that the clients not contact The Florida Bar was a condition precedent to the money being refunded to the clients.

25. The clients had at this time made arrangements to retain another attorney to represent them in this matter, and the fee they were to pay her was to come from the money they received from Respondent.

Based on the foregoing findings of fact, the Referee found Respondent guilty of violations of the Rules, specifically, 4-1.15(a), 4-8.4(d), 5-1.1(a), 3-6.1(c), 4-5.3(a) and 4-5.3(b). Further, the Referee recommended appropriate and reasonable discipline for violation of these Rules.

SUMMARY OF ARGUMENT

In answer to Respondent's arguments set forth in his Initial Brief, The Florida Bar would contend that:

(1) The Referee's Report should be affirmed because the findings of fact contained therein are based on competent substantial evidence in the record. Respondent has put forth no evidence to show that the findings of fact are erroneous, that the findings are contradicted in the record, or that there is no evidence to support the Referee's findings.

(2) The parol evidence rule is not applicable to the Barnes case because a disciplinary action is a quasi-judicial factfinding inquiry. Rule 3-7.6 that governs procedures before a Referee does not require adherence to any rules of evidence including the parol evidence rule.

Further, even if the parol evidence rule would come into play in the Barnes case, the Referee did not commit any fundamental error by considering testimony relating to events that were prior, and subsequent, to the August 31, 1994 Agreement for Representation. TFB-Exhibit B. The parol evidence rule as a substantive principle of law does not prohibit the admission of extrinsic evidence to explain the terms of an agreement, oral modifications of an agreement, and additional fee

agreements, all of which were present in the Barnes case, or to determine the parties intent under a written contract when there are disputed terms.

Respondent claims that the Agreement for Representation permitted him to allocate the total amount of money paid by the nine clients to the $20,000.00 recited as a "nonrefundable retainer" for attorney's fees in the Agreement for Representation. On the face of the Agreement, however, the clear language indicates an allocation between attorneys fees and costs. In order to determine the parties intent when the total payment was reduced to $18,000.00 in a subsequent oral modification by the parties, it was necessary for the Referee to hear additional evidence to explain the parties' terms and to glean the intent of the parties prior, and subsequent, to the Agreement for Representation. Through the testimony of the witnesses, the Referee was also aware of written contingency fee agreements that had been "doctored" after the clients had signed the individual contingency fee agreements in January 1995.

Contradictory testimony and written documentation created a sound foundation for the factfinder to inquire into all aspects of the fee arrangement between the clients and Respondent both prior, and subsequent, to the August 31, 1994, Agreement for Representation. Thus, having generated the confusion surrounding the fee arrangements between himself and his clients, Respondent cannot now be heard to

complain that there is an evidentiary bar of the parol evidence rule to the Referee inquiring into the truth of the matter.

(3) The discipline recommended by the Referee is reasonable under the prevailing case law and should be adopted by the Court under the facts and circumstances of the McCorvey and Barnes cases.

A. McCorvey

The issue in this case is whether a disciplinarily resigned attorney, William D. Barrow, had "direct contact" with McCorvey in violation of Rule 3- 6.1(c). The Florida Bar maintains that (a) Mr. Barrow had "direct contact" with Respondent's client, McCorvey, via telephone and letter at times when Respondent was not present, (b) Respondent specifically directed Mr. Barrow to have direct contact with his client, McCorvey, (c) Respondent wrongfully relied upon Mr. Barrow's representations as to what the permissible scope of his duties could be under The Florida Bar Rules, (d) Respondent failed to make any reasonable efforts to familiarize himself with Mr. Barrow's permissible scope of responsibility as a disciplinarily resigned attorney working as an employee in a law firm under Respondent's direct supervision, and (e) Respondent failed to take any timely action to remove Mr. Barrow until after the issuance of the Referee's Report.

In support of its position, The Florida Bar presented evidence of numerous telephone contacts, and correspondence between Mr. Barrow and Respondent's client, when Respondent was not present. Further, The Florida Bar showed memoranda where Respondent instructed Mr. Barrow to directly contact McCorvey by telephone. Respondent not only directly supervised Mr. Barrow, but also ratified and acquiesced in Mr. Barrow's direct contact via telephone and letter with the client McCorvey.

Respondent admits that he was unaware of Rule 3-6.1, and did not make any efforts to ascertain what Mr. Barrow's proper scope of responsibility could be as one of the law firm's employees. Initial Brief at pp. 36, 39. Respondent also admits that he did not properly research or read Rule 3- 6.1, but nevertheless maintains in his Initial Brief that Rule 3-6.1 is overly broad and vague. Initial Brief at pp. 40, 41. Further, Respondent claims that Rule 3-6.1 was adopted on September 24, 1998, and should allow the type of direct contacts that were the subject of this disciplinary action.

The September 1998 provisions were not in effect when Respondent violated Rule 3-6.1. Even if they were applicable to this case, the revised Rule does not allow any direct contact between disciplinarily resigned attorneys and an attorney's clients. The revised rule merely states what type of activity will *not* be considered direct contact, i.e., when the resigned, suspended or disciplined attorney is present merely as an *observer* at a meeting, hearing or interaction between an attorney and a client.

Thus, the revised Rule is inapplicable to absolve Respondent from a violation of Rule 3-6.1 under the facts of this case.

The Florida Bar contends that Rule 3-6.1(c) that prohibits "direct contact" by any "suspended, resigned, or attorney" is not vague or overly broad. A review of the prevailing case law for the past twenty years affirms that prohibited "direct contact" consists of contact in person, via telephone or correspondence by a resigned attorney. The Court has constitutional authority over the members of The Florida Bar and the authority to establish Rules, and is the final arbiter of the meaning of "direct contact." In prior opinions and pronouncements, the Court has elucidated its position that the type of contact by Mr. Barrow in Respondent's law firm is prohibited by Rule 3-6.1(c). The Florida Bar therefore maintains that under the facts of the McCorvey case and the prevailing case law, Respondent has clearly violated Rule 3-6.1(c).

B. <u>Barnes</u>

In the Barnes case, The Florida Bar's position is that Respondent violated Rules 4.1.15(a), 4-8.4(d), and 5-1.1(a), for the following reasons:

1. Respondent failed to keep any portion of the $18,000 in a trust account separate and apart from the attorney's own funds;

2. Respondent failed to keep complete records of the disposition of any of the $18,000 for costs and expenses;

3. Respondent failed to hold any portion of the $18,000 in trust and apply that portion solely to the specific purpose for which it was intended, i.e., costs, and not attorneys' fees;

4. Respondent's actions were prejudicial to the administration of justice in that he required the clients, as a condition precedent to obtaining a refund of monies under a signed Release form, to agree not to file a Florida Bar complaint or, if one had already been filed, to withdraw it.

On the faulty premise that all of the $18,000.00 was applicable to fees, Respondent's mistakenly argues that there has been no violation of any Rules Governing The Florida Bar because the entire amount collected from the nine clients in the Barnes case was a nonrefundable retainer fee, and as such, there was no duty to set aside any of the monies in a separate escrow/trust account or maintain complete cost accounting records for such an account.

On appeal, Respondent claims that the Referee's findings of fact were based on evidentiary testimony and documentation that was inadmissible under the parol evidence rule, and therefore should have been excluded at the hearing level. Respondent also claims that the only valid, written agreement that should have been considered by the Referee was the August 31, 1994, Agreement for Representation that was notated by Respondent to provide $20,000 of the total advance payment for a

nonrefundable retainer fee and $8,000 for costs and expenses in an escrow account. Respondent maintains that, since the Barnes group eventually paid only $18,000, all of the monies should be attributable to the nonrefundable attorney's retainer fee in the Agreement and none of the money is applicable to costs or expenses. Respondent alleges that the four corners of the Agreement for Representation should govern any findings of fact by the Referee.

Respondent's argument, however, disregards Respondent's prior August 18, 1994 letter and the oral modification that occurred subsequent to the signing of the written Agreement for Representation. The witnesses' testimony supports The Florida Bar's position that Respondent agreed to take $2,000.00 per person from nine individuals for a total of $18,000.00 subsequent to the execution of the Agreement for Representation. It was always the intent of the parties, both before and after the Agreement was signed, that the total amount paid to Respondent would include attorney's fees and whatever costs were necessary to pursue the litigation.

More significantly, Respondent signed a sworn affidavit and filed it on April 9, 1997, in the United States District Court, Northern District of Florida, attesting to the fact that $12,500 was for attorney's fees and containing the inference that the remainder, $5,500, was for costs of suit. Respondent thus acknowledged previously that the witnesses' testimony was accurate. Upon entering into this disciplinary action,

however, Respondent has now changed his tune, and argues that, despite the sworn affidavit, prior correspondence, a subsequent oral modification, as well as a later straight contingency fee agreement signed by the nine remaining clients, the Referee should have relied solely on the original Agreement for Representation that recited attorney's fees of $20,000.00 of which the $18,000.00 was only a portion. In this way, Respondent hopes to justify the retention of the $5,500.00 by reclassifying this amount as part of permissible attorney's fees, rather than as costs subject to an accounting and which should have been placed in a separate trust/escrow account as originally agreed. By this means, Respondent hopes to relieve himself of any liability for violation of the Rules cited above.

The Florida Bar respectfully maintains that the Referee's Report should be adopted in full both as to findings of fact and recommended discipline because Respondent has failed to meet its burden of proof by challenging the Referee's findings of fact and the competent substantial evidence in the record.

LEGAL ARGUMENT

I.

THE REFEREE'S REPORT SHOULD BE AFFIRMED BECAUSE THE FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE.

It is a well established principle of Florida law that a Referee's findings of fact enjoy a presumption of correctness that will be upheld unless the challenging party can show that the facts are unsupported by the evidence in the record, or are clearly erroneous. The Florida Bar v. Cox, 718 So. 2d 788, 792 (Fla. 1998); The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983). Moreover, the Court will not reweigh the evidence and substitute its judgment for that of the referee if there is competent substantial evidence to support the referee's findings. The Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992), as cited in The Florida Bar v. Lecznar, 690 So. 2d 1284, 1287 (Fla. 1997). Further, "[t]he party contending that the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings, or that the record evidence clearly contradicts the conclusions." The Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996).

In the Barnes and McCorvey cases herein, the findings of fact were based on competent substantial evidence as reflected by the oral testimony in the trial transcript

and the Exhibits presented at the final hearing in this matter. Moreover, Respondent is not entitled to a trial *de novo* before this Court on the disputed issues of fact that were disposed of before the Referee. The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994); The Florida Bar v. Hooper, 509 So. 2d 289 (Fla. 1987). More significantly, Respondent has failed to show that there is no evidence in the record to support the Referee's findings of fact. Having failed to meet its burden of proof on appeal, the ROR should be affirmed in toto by this Court.

A. Barnes

Respondent's Initial Brief is replete with misleading, misrepresented, and contradictory statements of alleged facts. Respondent has persistently attempted throughout the Initial Brief to reformulate the findings of fact to make them appear so the facts will be contoured to Respondent's version of the "story", rather than to challenge the Referee's actual findings of fact based on the competent substantial evidence in the record.

For example, Respondent mistakenly states that the Barnes case involved solely a fee dispute. In Barnes, prior to filing The Florida Bar complaint, the clients were refunded $12,500 of their fee payment by Respondent, and the Referee recommended that the remaining $5,500 should be allocated to the Client Security

Fund. Thus, the fee portion of the clients' payment was no longer in dispute at the final hearing; only the portion attributable to costs.

On appeal, Respondent objects to the Referee's allocation to the Clients' Security Fund on the grounds that it results in an unjust and unlawful loss for Respondent, and therefore constitutes a forfeiture and unjust enrichment. Respondent conveniently neglects to mention why a payment to the Clients' Security Fund is a forfeiture or unjust enrichment, except for the inference that Respondent will be required to disgorge funds that were costs. The remaining $5,500.00 was admittedly attributable to costs that should have been deposited into a trust account, and the retention of these funds by Respondent was a violation of Rules 5-1.1 (a) and 4-1.15(a). When Respondent terminated his representation, these unexpensed costs should have been returned to the clients. Despite numerous requests at the outset by the clients and later by an Order to Compel Production by the Referee to produce a cost accounting, Respondent failed to provide any cost records to The Florida Bar or the Referee at any time during the referee level proceedings.

Respondent's continual reference to the $20,000 and/or the $18,000 actually paid as a "retainer fee" or "nonrefundable retainer" is contrary to the Referee's findings of fact, and the clear testimony in the record. See TFH-II, 71/8-13, 94/7-8, 97/1-3, 178/21-22, 179/23- 25, 196/12-20. The Referee found that, from the outset of

Respondent's representation, the clear understanding of the parties was that at least a portion of the money would go into an escrow account for costs and expenses. Respondent, however, never informed any members of the Barnes group at their last meeting in the Bay County Courthouse, that he was unilaterally allocating the entire $18,000 to be used solely as his attorney's fees. See ROR-Paragraph 8 under Case No. 90,007.

The witnesses' trial testimony clearly reflects their understanding that all of the costs and expenses were to be taken out of the $18,000 originally remitted to Respondent. TFH-II, 71/8-13, 94/7-8, 97/1-3, 178/21-22, 179/23-25, 196/12-20. Significantly, in a sworn affidavit submitted to the United States District Court after the Barnes Florida Bar Complaint had been filed, Respondent testified under oath that he had refunded all the *fees, $12,500*, to the clients, leaving the remaining $5,500 as expenses. TFH I, 131/7- 25, 132/1-13; TFB-Exhibit E. The sole amount of money in dispute is therefore the balance of $5,500.00 that Respondent claims was part of his attorney’s fees under the original written Agreement for Representation. This $5,500 was considered costs by the clients and were properly treated as such by the Referee according to the competent substantial evidence in the record.

Respondent further claims that "At the client's suggestion", Barnes and Jones signed the Agreement for Representation on August 31, 1994. This statement is

contrary to the Referee's finding that "*Respondent* had two of the group, Robert Jones and Sammy Barnes, acting on behalf of the entire group, execute a written agreement for representation." See ROR- Paragraph 5 under Case No. 90,007.

Respondent also makes the bare assertion that there was no violation of the Rules Regulating the Florida Bar because "no offense was committed in either case." Initial Brief at p. 3. Respondent's contention that the language in the "Release" signed by the Barnes group not to pursue a grievance complaint with The Florida Bar was "ill-advised" but not " unethical" because it was unenforceable is specious at best. See The Florida Bar v. Fitzgerald, 541 So. 2d 602, 605 (Fla. 1989). The Referee found that Respondent's conduct violated R. Reg. Fla. Bar 4-8.4(d) in that his actions were prejudicial to the administration of justice by requiring a condition precedent to the release of client funds that Respondent had agreed to refund to the Barnes group. Knowing that the clients needed the funds to pursue their litigation, nevertheless, Respondent extorted a written promise from them to absolve himself from any liability with The Florida Bar before releasing the monies that he agreed should be refunded to the clients.

Respondent has failed to meet his burden of proof on appeal, i.e., to clearly demonstrate that the findings of fact are erroneous or that there is no competent substantial evidence in the record to support the Referee's findings of fact. The

Florida Bar would therefore respectfully submit that the Referee's Report should be affirmed in full because it is soundly supported by clear and convincing evidence in the form of oral testimony and written documentation presented at the final disciplinary hearing.

B. McCorvey

As in the case above, Respondent's Initial Brief is replete with misleading statements and misrepresented facts. Respondent admits that he failed to properly read or research Rule 3-6.1. It was not until January 1998, upon inquiry by The Florida Bar's counsel, that Respondent contacted The Florida Bar to inquire regarding the permissible scope of responsibility for his employee, William D. Barrow, who had been working at Respondent's law office from March 1996. The record testimony and written evidence clearly and convincingly demonstrates that Respondent allowed a disciplinarily resigned attorney to have direct contact with Respondent's client, McCorvey.

Rule 3-6.1 states: "No suspended, resigned, or disbarred attorney shall have direct contact with any client ...." Nevertheless, while admitting to these facts, without any substantiation in its Initial Brief, Respondent refers to Rule 3-6.1 and erroneously states: "It was agreed that the rule was overly broad and vague." Initial Brief at p. 39**.** The Rule plainly states that "direct contact with any client" is

prohibited to resigned attorneys. The Referee properly found that Respondent allowed and directed Mr. Barrow to have direct contact with McCorvey. The Referee based this finding on The Florida Bar's Exhibits that clearly and convincingly showed Mr. Barrow had numerous direct contacts by telephone, several of which were carried out at Respondent's request. Further, the Referee found that, although knowing of Mr. Barrow's disciplinary problems with The Florida Bar, Respondent failed to make any "efforts to determine the permitted parameters of Mr. Barrow's services." ROR-1.

Although Respondent alleges that he operates a solo practice, he had another attorney, Lisa Ann Troell, whom he hired as an in-house counsel to handle personal injury and worker's compensation cases. In her deposition, Ms. Troell testified that Mr. Barrow had direct contact in person and via telephone at Respondent's direction with many clients on a daily basis. TFB-Exhibit M, Deposition of Lisa A. Troell, pp. 7-9. Mr. Barrow when deposed by The Florida Bar counsel also admitted that he had direct contact in person and via telephone with Respondent's clients when Respondent was not present. TFB-Exhibit L, Deposition of William D. Barrow, pp. 29-30.

The scope of permissible responsibility by a resigned, suspended or disbarred attorney has been treated by the Court in prior decisions. The case law unambiguously supports The Florida Bar's position that Mr. Barrow's conduct was in violation of Rule

3-6.1(c). In The Florida Bar v. Thomson, 354 So. 2d 872 (Fla. 1978), the Court held that direct client contact was prohibited. ("...direct client contact with clients is strictly forbidden, Employers of suspended attorneys are on such notice as well." Id. at 874, fn.). Correspondence with clients constitutes direct client contact. The Florida Bar v. Hunt, 429 So. 2d 1202 (Fla. 1983). More recently, the Court suspended an attorney for ninety-one days where a suspended attorney had in person meetings and telephone contact with clients of the law firm. The Florida Bar v. Corydon E. Nourse, 709 So. 2d 537 (Fla. 1998).

On appeal, Respondent has not challenged many of the findings of fact, but has admitted that he did not properly supervise and direct Mr. Barrow's activities. Nevertheless, Respondent disputes the meaning of "direct contact" in Rule 3-6.1(c) claiming that it is overly broad and vague. If there ever was any doubt, the prevailing case law for the past twenty years has dispelled any ambiguity in the interpretation of this Rule. No direct contact with clients either in person, by telephone, or via correspondence is permissible by a suspended, disbarred or resigned attorney.

The Florida Bar would respectfully submit that the findings of fact in the McCorvey case are amply supported by Respondent's own testimony, as well as the other oral testimony and written evidence entered on the record. The findings of fact

in the Referee's Report are thus clearly rooted in competent substantial evidence presented at hearing in this case and should be affirmed by the Court.

II.

THE PAROL EVIDENCE RULE IS NOT APPLICABLE TO THE BARNES CASE.

The parol evidence rule does not apply to the Barnes case because a disciplinary action is in the nature of a "quasi-judicial administrative procedure" not in the nature of a civil or criminal action in circuit court. See Rule 3-7.6(e)(1). The Florida Bar Rules specifically state that the Florida Rules of Procedure apply to discovery during referee hearings, but there is no requirement that the referee conduct the final hearing subject to any particular rules of evidence. The Referee properly admitted all oral and written evidence showing prior negotiations and the parties' understanding of the fee agreement both before and after the August 31, 1994 written Agreement for Representation.

Further, the parol evidence rule is inapplicable to this case because The Florida Bar never challenged the August 31, 1994, Agreement for Representation. To the contrary, The Florida Bar's position was that the written agreement showed that the parties' understanding was at all times based on the premise that at least a portion of the total fees to be collected would be applied to costs of suit. The reduction in the

number of clients from 14 to 9 never changed the consistent understanding of the parties as evidenced by the negotiations and discussions between Respondent and his clients both prior, and subsequent, to the Agreement for Representation being executed on August 31, 1994. Thus, the terms of the written fee agreement supports The Florida Bar's position.

Even if, *arguendo,* the parol evidence rule were applicable to these proceedings, the Referee did not commit fundamental error, but properly admitted evidence to show the intent of the parties in signing the fee agreement. The parol evidence rule is a rule of substantive law. It prohibits the introduction of evidence that will contradict, vary or alter the terms of a fully integrated written agreement. Nevertheless, where the terms of the written agreement are in dispute, parol evidence is admissible to explain the real intent of the parties. In the interpretation and construction of an integrated written agreement, all relevant evidence referring to the meaning of the agreement is admissible. Pertinent parol evidence can be offered at trial as an aid in the search for the true intention of the parties.

In this case, the evidentiary record plainly supports the Referee's overruling of Respondent's objection to the introduction of extrinsic oral testimony to show the intent of the parties' agreement for fees and costs. F.M.W. Properties Inc. and Fred Webb v. Peoples First Financial Savings and Loan Association, 606 So. 2d 372 (Fla.

1st DCA 1992)("Evidence of a subsequent oral modification is admissible even where the writing contains a merger clause." Id. at 375.) Accord, The Race, Inc. v. Lake & River Recreational Properties, Inc., 573 So. 2d 409,410-411 (Fla. 1st DCA 1991). The witnesses' testimony reveals that, in preliminary discussions, the parties discussed equal payments of $2,000.00 per person, and attorney's fees that would be based on a contingency fee arrangement. The August 18, 1994 letter from Respondent to his fourteen (14) clients confirms these discussions in that $23,000.00 would be applied to attorney's fees and $5,000.00 to costs. Respondent's own Agreement for Representation dated August 31, 1994, where Respondent inserted his own language, shows that $20,000.00 was to be used as a nonrefundable retainer, and $8,000 for costs. The plain intent was always that a portion of the monies was to be applied to costs.

Subsequently, when only nine (9) individuals joined in the suit, an oral modification of this written Agreement for Representation again called for a $2,000.00 payment per person for a total of $18,000.00 with the implicit understanding that the total amount would cover all attorney's fees and costs, plus a contingency amount upon settlement or a favorable decision. The oral modification was to include only nine clients, and for Respondent to accept a total of $18,000.00 in place of the original amount, $28,000.00. This oral modification, however, was never reduced to writing.

Respondent's self-serving bare assertion that the oral modification eliminated all cost advances and that the $18,000.00 was to be applied solely to attorney's fees is without merit. There is no substantiation in the record for Respondent's position. All the other witnesses' testimony supports The Florida Bar's position that the $18,000.00 also included a portion for costs. Respondent's own prior affidavit to the United States District Court provides written evidence on the record that Respondent contemporaneously believed that a portion of the $18,000.00, namely $12,500, was to be allocated to fees, with the inference that the balance of $5,500 was allocated to costs. TFB-Exhibit E, par. 5.

If there was any confusion concerning the actual allocation of the clients' funds, then any written or oral fee arrangement should be construed against Respondent. The clients' understanding of the use of their money was generated by Respondent's statements in discussions, via letter, and in the Agreement for Representation. All of these representations to the clients solidified their mutual understanding that a portion of their $2,000.00 payment would be placed in a cost escrow account. Respondent's initial letter indicated that the initial monies would be used for cots, and the *balance* would be used as Respondent's fees. When the terms of a contract are ambiguous, it should be construed against the party who drafted the contract. Mayflower Corporation v. Davis, 655 So. 2d 1134, 1137 (Fla 1st DCA 1994).

Despite Respondent's protestations that the $18,000.00 was attorney's fees because the Agreement for Representation cited a $20,000.00 nonrefundable retainer, the oral testimony of the clients at hearing shows that a portion of the $2,000.00 individual payments was to be allotted to costs and expenses. Rule 5-1.1 prohibits Respondent's use of a cost deposit as a setoff against attorney's fees. See, The Florida Bar v. Bratton, 413 So. 2d 754 (Fla. 1982)(client funds given to the attorney for posting a bond could not be subsequently attached as a payment for attorney's fees). Similarly, in the Barnes case, Respondent could not appropriate monies intended for costs as his attorney's fees, and then allege that he was advancing costs to the clients.

Subsequent to the Agreement for Representation that allocated the $28,000.00 to attorney's fees and costs, the parties mutually agreed in a meeting at the Bay County Courthouse that a total of $18,000.00 would be collected from nine (9) clients. The witnesses' testimony reveals that no other discussion took place that changed any allocation of this amount to solely attorney's fees as Respondent has claimed.

Moreover, in January 1995, Respondent sent his paralegal, Tammy Tikell, to meet with the nine clients in Panama City to have them sign individual fee arrangements. At the time the clients signed these individual fee agreements, the contract was a straight contingency fee arrangement that Respondent alleged was necessary for him to submit to the federal court for the class action suit. There were

no other handwritten notations on these fee agreements. Only later on the day of the final hearing did the clients learn that Tammy Tikell had doctored the fee agreements and added language asserting that the $2,000.00 paid by each of the nine (9) clients was solely for a nonrefundable attorney's fee.

The clients vehemently denied at the final hearing that any handwritten language was noted on any of the individual agreements that they had signed for Ms Tikell. At hearing, Ms. Tikell testified that she had made the written notations regarding the fee agreements before the clients signed the contracts. This testimony, however, contradicted her previous testimony before the grievance committee in October 1996 where she confirmed that there was no additional writing, but that the clients had signed only a "straight contingency fee agreement.." TFB- Exhibit E, Grievance Committee Transcript, p. 143.

This disciplinary action is a “quasi-judicial administrative proceeding” that should not be constrained by the parameters of the parol evidence rule which is a principle of substantive law. Disciplinary actions are governed by the Rules Regulating the Florida Bar. There is no section of the Rules that excludes certain types of evidence from consideration by the Referee. As a factfinder appointed by the Florida Supreme Court, the Referee is entitled to hear all written and oral evidence that is relevant to the disciplinary action. When there is conflicting testimony,

however, as in this case, the Referee must decide what credibility and weight the evidence should receive.

Based on the complaint filed by The Florida Bar, the intent of the parties in entering into a fee arrangement with Respondent was relevant. The oral and written testimony both prior to, contemporaneous with, and subsequent to the actual written Agreement for Representation was also relevant, and therefore admissible. Consequently, the Referee properly heard the oral testimony of the witnesses and correctly overruled Respondent's objection at hearing based on the parol evidence rule.

III.

THE DISCIPLINE RECOMMENDED BY THE REFEREE IS REASONABLE IN LIGHT OF RESPONDENT'S PRIOR DISCIPLINARY HISTORY

Respondent's prior disciplinary history warrants the disciplinary action recommended by the Referee. From 1988 to the present, Respondent received the following prior discipline:

A. Private reprimand/admonishment in July 1990 for incompetent client representation in a federal RICO suit.;

B. Private reprimand/admonishment in 1990 for improper disbursement of trust funds;

C. Private reprimand/admonishment in 1993 for failure to have a contingency fee contract with Respondent's client, and to clearly explain the fee rates to the client;

D. Private reprimand in 1996 on two cases, relating to Respondent's failure to adequately communicate with clients, and his failure to clearly explain fee arrangements to the clients; in four other cases that were based on similar grounds, Respondent received diversion. TPP-106-107.

Respondent's actions in the cases herein are not merely an aberration but disclose a continuous pattern of similar misconduct that justifies a more severe penalty. See, The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982)("The Court deals more harshly with cumulative misconduct that it does with isolated misconduct" Id. at 528); The Florida Bar v. Vernell, 374 So. 2d 473, 476 (Fla. 1979)(The Court held suspension appropriate where the misconduct was cumulative). Further, the Court considers the prior disciplinary history and similar ethical violations in determining appropriate discipline in each case. See The Florida Bar v. Vernell, 1998 WL 559003 (Fla.); The Florida Bar v. Adler, 589 so. 2d 899,900 (Fla. 1991).

Under the fee agreement in the Barnes case, when Respondent initially accepted the $13,100.00 from the clients, he failed to allocate the funds between fees and costs, but rather attributed the total amount to his attorney's fees. Later, when the total amount paid by the clients was $18,000.00 that was to include both costs and fees, it was also deposited into Respondent's operating account. No allocation was ever made to a trust or escrow account for costs. Respondent deposited the entire amount into his operating account as fees. Respondent's unilateral assumption of all the monies as an nonrefundable retainer, however, contradicts the express written terms of the fee agreement as well as the parties' implicit understanding from the outset of the representation through the final individual contingency fee arrangements signed by the clients in January 1995. Respondent used the funds for purposes other than those for which the monies had been entrusted to him by the clients.

In considering Respondent's prior disciplinary record, the findings of fact, and the criteria under Florida Standards for Imposing Lawyer Sanctions, the Referee's recommended discipline of a ninety-one day suspension with three years probation is reasonable under the relevant case law. In similar cases, the Court has ordered an 18-month suspension for commingling and misuse of client funds, see Adler, *supra* at 901; a 91-day suspension for gross negligence in handling trust funds and conduct prejudicial to the administration of justice, The Florida Bar v. Burke, 578 So. 2d 1099,

1102 (Fla. 1991); a six-month suspension for requiring a client to sign a release and retaining unearned legal fees, The Florida Bar v. Penn, 421 So. 2d 497, 501 (Fla. 1982).

The Florida Bar v. Neely, 502 So. 2d 1237 (Fla. 1987) is almost directly on point with many of the facts in the Barnes case. Neely failed to keep funds in an escrow or trust account and forward them to a third party for satisfaction of his client's judgment. In addition, after a Florida Bar complaint was filed, Neely insisted that the client sign a letter releasing him from any ethical violations and withdrawing the complaint. The referee found that the attorney had not properly accounted for the client's funds, failed to use the funds for the specific purpose for which they were entrusted to him, and had inadequate recordkeeping for trust accounts. For these reasons, the Court adopted the referee's recommended discipline of a three-month suspension with two years probation.

In the Barnes case, Respondent failed to hold in a separate trust or escrow account, separate from his own property, funds paid to him by clients for both costs and expenses. Respondent also extorted an agreement from his clients to sign a release and withdraw their Florida Bar complaint before remitting a refund of the monies previously paid. Respondent commingled the monies for costs and expenses into his own operating account and used the funds for his own attorney's fees contrary

to the parties' fee agreement. In addition, although requested, Respondent failed to provide his clients with a cost accounting.

In the McCorvey case, Respondent allowed and directed william Barrow, a disciplinarily resigned attorney to have direct contact with a client. Further, Respondent failed to make any good faith, reasonable efforts to determine Mr. Barrow's scope of responsibility, and relied solely on Mr. Barrow's representations of what duties he could perform in Respondent's law office.

For the aforementioned reasons, the Court should affirm the Referee's recommended discipline as reasonable under the facts and circumstances in the McCorvey and Barnes cases.

CONCLUSION

For the reasons set forth above, The Florida Bar respectfully requests that the Court adopt the Referee's findings of fact and impose the recommended discipline in the McCorvey and Barnes cases for Respondent's violation of the Rules Regulating the Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Answer Brief, regarding TFB File No. 96-00987-01B and 97-00094-01B have been forwarded by regular U.S. Mail to Mark Evans Frederick, c/o W.H.F. Wiltshire, Respondent's counsel, at his record Bar address of 201 East Government Street, Pensacola, FL 32598-1832, this _____ day of December, 1998.

_____
OLIVIA PAIVA KLEIN
Bar Counsel