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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Howard Rosenberg,

Complainant

vs.

LOUIS VERNELL, JR.,

Respondent

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Supreme Court Case No. 90,010

AMENDED/CORRECTED
BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

I. Rule 3-7.3 of the Rules Regulating the Florida Bar as well as this Court's prior admonitions specifically mandate that a grievance "complaint" must be made under oath. The Bar's failure to follow such prescribed procedure warrants a dismissal of the complaint.

II. The testimony of the Bar's "key" witness, i.e. Howard Rosenberg, is barred and otherwise inadmissible as being in violation of Respondent's due process rights, where it affirmatively appears that such witness had a vested and contingent interest to Funds from the Client's Security Fund and that in order for Mr. Rosenberg to recover the same, the Bar erroneously and unlawfully required as a prerequisite thereto, that Respondent be ousted as a member in good standing from the Florida Bar.

III. The Findings and Recommendation of guilt and punishment as to an "uncharged" offense is barred as a matter of law as being violative of Respondent's due process rights.

IV. Where it affirmatively appears that the Bar's "key" witness was totally impeached and his testimony fully discredited, the Referee's findings and/or recommendations of guilt based thereon should be vacated.

V. The record demonstrates a series of ongoing and egregious violations of Resondent's procedural and due process rights to an extent as to warrant and mandate the dismissal of the complaint.

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
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Supreme Court Case
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vs

LOUIS VERNELL, Jr.,

Respondent
_____/

AMENDED/CORRECTED BRIEF OF RESPONDENT
IN SUPPORT OF PETITION FOR REVIEW

INTRODUCTION

The Respondent herein, LOUIS VERNELL, Jr., pursuant to Rule 3-7.7 of the Rules Regulating the Florida Bar herewith seeks review of the "Report of Referee" as rendered in the within cause by the Honorable Eugene J. Fierro, Circuit Court Judge as the designated and presiding referee herein.

Accordingly, and as an incident to the findings and recommendations as made therein, Respondent filed a timely Petition for Review seeking appellate review by this Honorable Court of those certain orders and recommendations as more fully set forth in such Petition.

In furtherance thereof, Respondent submits that the absence of either a docket sheet or an index to the "record" on appeal as required in virtually all other trial and appellate proceedings, serves to materially hinder a more coherent consideration of the arguments and issues raised herein in that, and among other things:

a. As an incident to the duplication of documents constituting the "record" in accordance with Rule 3-7.5 (n), the Bar's designated copying service, i.e., Ikon Nightrider, estimated, and Respondent paid for, the duplication of approximately "40,000 documents" (App.1).

b. Albeit, and notwithstanding the somewhat massive size of the "record" as received, the same did not include any exhibits received or offered in evidence at time of trial as required by Rule 3-7.5(1)(2) of the Rules Regulating the Florida Bar; that, to the contrary, such exhibits are, for the most part, "missing" and presently unaccounted for by reason of the somewhat unprecedented procedures utilized by the referee herein, viz:

Immediately after the conclusion of the August 14, 1997 somewhat "marathon" trial session encompassing approximately 11

½ hours from 8:00 A.M. to 7:30 P.M., Referee Fierro's Deputy Clerk and bailiff did, at the Referee's direction, seize and otherwise confiscate 8 boxes of relevant materials, files and exhibits from Respondent's desk and possession, commingling the contents thereof with countless exhibits offered and/or received as evidence during trial proceedings.

Four days later, at the urging of Respondent and his trial counsel, Barry Roderman, Referee Fierro authorized the "release" of "most" of the boxes: however, no inventory was ever taken as to what was provided to Respondent's courier or what, or how many exhibits were retained by the referee.

Albeit, and inasmuch as some of the boxes released to Respondent contained numerous trial exhibits, the Respondent is much concerned as to what happened to the remaining exhibits, especially since no exhibits whatsoever appeared in Respondent's copy of the record.

Accordingly, and for reference, the Respondent deemed it to be essential to file an appendix and to include therein those exhibits (or copies) which respondent was able to locate and/or to reconstruct.

Ergo, and as an incident to the foregoing, the following symbols will be used herein, to wit:

T - for transcript of trial proceedings

Volumes I and II relating to trial proceedings conducted on August 6, 1997

T - Volumes III, IV and relating to trial proceedings conducted on August 14, 1997.

TR - For transcripts of pre-trial hearings, followed by the date thereof.

A - for Appendix

B - for Appendix

STATEMENT OF THE CASE

Course of Proceedings below:

On August 24. 1995 the "complainant" Howard Rosenberg caused a complaint to be remitted to the Florida Bar by his "then" attorney, Michael Eisler who requested that the Bar "review" the same and "to feel free to contact" him in the matter (A. 2).

As noted, although the Bar accepted such remittance for filing as a "complaint," the same was not sworn to as required by Rule 3-7.3 (c); nor was the "complaint" dated; nor did Mr. Rosenberg sign the narrative portion thereof ("Exhibit A") which was "presumably" attached to the Bar form when it was signed in blank by the complainant.

Moreoever, and although the factual/narrative portions of such complaint were, in fact, prepared by Mr. Eisler and

attached to the Bar's form by Mr. Eisler, there is no indication therein that Mr. Rosenberg ever saw the same before it was submitted by Mr. Eisler for "review" purposes.

Albeit, and inasmuch as the Respondent had, prior to such submission, no notice nor complaint whatsoever as to any grievance on the part of Mr. Rosenberg, the Respondent immediately sought to contact and to discuss the matter with Mr. Rosenberg.

Arrangements were thereupon made with Mr. Eisler for a meeting with Mr. Rosenberg in Mr. Eisler's offices on September 11, 1997, however, and although Respondent appeared thereat, Mr. Rosenberg did not (per Mr. Eisler's Instructions).

In nonetheless proceeding to speak with Mr. Eisler on such occasion, the Respondent sought to enlighten Mr. Eisler as to the 5 years of intense litigation and efforts expended by Respondent in behalf of Mr. Rosenberg for relatively nominal sums.

In "brushing aside" such matters, Mr. Eisler informed Respondent that <u>all</u> of the problems, including the dismissal of the Bar complaint, could be resolved, but that the "bottom line" was money. The meeting concluded with Mr. Eisler advising

Respondent that he would "get back with" Respondent and provide him with an amount necessary to effect such resolution.

The next day Respondent faxed Mr. Eisler a letter memorializing the events of the preceding afternoon (A. 3).

In response, Mr. Eisler faxed Respondent a letter wherein he advised Respondent that "the matter can be remedied by immediate payment of the sum of $49,000.00 (A. 4).

Respondent, however, opted to defend against the false and venomous accusations made by his "friend" of 35 years and to additionally file suit against such "friend" seeking substantially more fees than the nominal sums which had previously been authorized and/or paid to Respondent for services expended by Respondent for a period encompassing five years. (A. 5).

Significantly, on the same day that Mr. Eisler was seeking payment of the non-negotiable sum of $49,000.00 from Respondent, he was <u>also</u> "making claim upon the Clients' Security Fund" for an unspecified amount (A. 6).

Albeit, and notwithstanding the impact of such claim upon the within proceedings, at no time did the Florida Bar ever

disclose to the Respondent that such outrageous and unwarranted claim had even been filed by Mr. Rosenberg.[1]

Thereafter, and as an incident to a somewhat abbreviated grievance committee proceeding, the committee summarily found "probable cause" after denying Respondent the right to call Mr. Eisler as a witness, notwithstanding Mr. Eisler's presence in the room, with Bar counsel arguing:

> MR. VERNELL: Again, I respectfully move to have Mr. Eisler - - that the rule be invoked, because I will probably be calling him as a witness.
>
> MS. EVANS: I'm going to object. He is here solely as Mr. Rosenberg's attorney. He is not going to participate and he is not going to ask any questions. He is here to advise Mr. Rosenberg should desire his legal advice.
>
> (Grievance Committee proceedings, October 23, 1996 transcript, pp.17,18)

Thereupon, and following the filing of a formal complaint and the appointment of Referee Fierro, the Respondent filed a motion to dismiss challenging the jurisdiction of the Court, alleging among other things, the failure to comply with Rule 3-7.3(c) which requires that a complaint be made "under oath."

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[1] The first time Respondent became even aware of such claim was upon, and as an incident to Respondent's examination of the copy of the "record" duplicated and provided to the Respondent by the Florida Bar.

Approximately, one week after the filing of such motion, the Referee remitted a notice scheduling hearing to be had in the cause on August 6, 1997 "for the purposes of DISCIPLINARY PROCEEDINGS" (A. 7).

On July 16, 1997 hearing was had upon Respondent's Motion to Dismiss, with the Referee reserving decision thereon.

One week later, i.e. July 24, 1997, during hearing upon a collateral matter, the Referee specifically advised the parties that he had not, as of such date, entered a decision upon Respondent's Motion to Dismiss, stating:

> "MR. VERNELL: * * * I have not filed an answer in the case, Your Honor, in deference to the fact that the Court has not ruled on the motion.
>
> THE REFEREE: The motion to dismiss, you are saying?
>
> MR. VERNELL: The motion to dismiss, Your Honor. Also, possibly - - well, the motion to dismiss would be primarily it.
>
> THE REFEREE: Right, and I have not ruled on this motion yet."
>
> MR. VERNELL: Correct, your honor.
>
> (July 24, 1997 transcript, pp. 52, 53)

Albeit, and notwithstanding Respondent's reliance upon such statement, a subsequent perusal of the Referee's file on July 31, 1997 revealed the presence of an undated order denying

Respondent's motion to dismiss (A. 8) which had improperly been certified to have been "mailed" to the parties on July 17, 1997 (or exactly one week before the Referee stated that he had not entered such an order (Tr. July 14, pp. 52, 53)

Based upon such erroneous certification, the Referee immediately converted the previously noticed hearing upon "DISCIPLINARY PROCEEDINGS" which had been scheduled for August 6, 1997 into a trial.

On the same day, July 31, 1997, (3 business days prior to the converted "trial,' the Respondent filed an "Emergency Motion for Continuance of Hearing on "Disciplinary Proceedings" scheduled for August 6, 1997" (A. 9) alleging, among other things:

1. The total lack of opportunity to prepare for trial.

2. The total absence of any discovery whatsoever by reason of the Bar's uni-lateral decision not to respond to Respondent's discovery requests (A. 10), i.e. __ Respondent's request for admissions; for responses to interrogatories; or for the taking of Mr. Rosenberg's deposition.

3. The necessity for Respondent's attorney to have the time and opportunity to prepare for trial.

4. The total absence of any prior written notice scheduling trial in the within cause.

The Referee summarily denied such motion for continuance.

Respondent thereafter filed a second "Emergency Motion for Continuance of Trial" (A. 11), alleging as new and additional grounds, the required presence of Respondent as trial attorney in a Federal Court criminal trial which had commenced on August 4, 1997.

Incredibly, as a result of the Referee's "Rush to Justice" type proceedings (no prior continuances having been requested or granted), the Federal Court was required to interrupt its criminal Trial in order to allow Respondent to be present for trial in the within cause, following the Referee's warning that he intended to proceed to trial in the within cause on August 6, 1997, with or without the presence of Respondent.

Moreover, and prior to the commencement of trial on August 6, 1997, Respondent's attorney, Barry Roderman, joined in Respondent's request for a continuance urging the Court that he was required to confer that same day with medical doctors in Atlanta, Ga. as an incident to his son being diagnosed a week earlier with having life threatening cancer.

Although the Referee summarily denied all requests for a continuance, he permitted Mr. Roderman to leave the courtroom in the early afternoon so as to enable him to take a flight to Atlanta, leaving Respondent with the task of representing himself.

After exhausting all available witnesses appearing in behalf of the Bar, the trial was adjourned and was thereafter reset to August 14, 1997 at which time the aforementioned "marathon trial proceedings (11 ½ hours) were conducted.

During the conduct of such trial proceedings, the Referee made unprecedented and totally erroneous rulings reaching the level of "due process violations" in that, and among other things:

1. Although the parties, as well as the Referee stipulated and agreed that the "guilt" phase of proceedings would be separate and apart from the "punishment" phase, notwithstanding, and during closing argument, the Referee abruptly changed his position and directed that both phases would be considered by the Referee at the same time, thereby serving to preclude Respondent from any opportunity whatsoever to present witnesses or to otherwise prepare and argue in mitigation.

2. Additionally, and in further violation of Respondent's due process rights, the Referee entered a finding and recommendation of guilt and disbarment as to an uncharged offense which the Referee described in his report as a "New Count of Misconduct," in purported violation of Rule 4-4.2; the same relating to Resondent's delivery to Mr. Rosenberg of a totally innocuous LETTER inquiring as to what happened in Respondent's relationship with Mr. Rosenberg to abruptly end their 35 years of "friendship". (A. 12).

2. The Facts

Respondent and Mr. Rosenberg had been close friends for over 35 years during which time they and their families shared holidays together; vacationed together; been partners in a pleasure boat; socialized together; frequented each others homes, etc., etc.

During such period, Respondent intermittently represented Rosenberg in various matters beginning with Respondent's representation of Mr. Rosenberg in a labor dispute in 1963.

Over 20 years later (1984), the State Department of Transportation filed eminent domain proceedings in Broward County relating to the construction of State Road I-595;

the same requiring the taking of a minimal portion of an unimproved section of Mr. Rosenberg's property.

Mr. Leo West, who appraised most of the properties involved in the construction of such highway, appraised Mr. Rosenberg's loss and damages at $31,600 (A. 13). A declaration of taking as to such amount was later filed in the eminent domain action (A.14).

Although Mr. Rosenberg testified that other appraisals were later made by the state, none exceeded in amount the damages calculated by Mr. West (T. 367).

Rosenberg retained Robert Byrne, Esq. to represent his interests in the eminent domain case. Mr. Byrne continued as Rosenberg's attorney for 5 years from 1984 through January, 1989 before Rosenberg abruptly requested the Court to discharge him without Mr. Byrne's presence or knowledge (A.15). No fees were ever paid to Mr. Byrne by Rosenberg, despite the 5 years of effort and services expended by him.

Likewise, and prior to such discharge, Rosenberg similarly fired (without payment of any compensation) all of his "expert" witnesses because of their respective refusal to appraise Rosenberg's damages at the unrealistic values which Mr. Rosenberg

attributed to the taking, i.e. Don Felicella; John Figini; James Zook; and Michael Flynn (A. 16).

After Mr. Byrne's discharge, Rosenberg proceeded pro se until approximately October 1989 when trial was scheduled on Mr. Rosenberg's property. Accordingly, and as of the trial date, Rosenberg had absolutely no "expert" witness testimony to offer, nor any appraisals or reports which could possibly reflect a value higher than the DOT's estimate of $31,600.00.

Notwithstanding, and in a "spirit of generosity," the DOT had offered, and Rosenberg had accepted on April 2, 1985 (4 years before Respondent' entry in the cause) the sum of $44,991.04. (A.17).

Thereafter, the DOT made an "Offer of Judgment" to settle Rosenberg's claim for $45,900.00. When questioned about such offer, Mr. Rosenberg denied that the same had ever been made or communicated to him; he further denied any discussions with Mr. Byrne, the Respondent or anybody else regarding such offer of judgement (T. 362-370).

Notwithstanding, and in a consistent pattern of providing false, deceptive, vague and misleading responses to critical issues and matters, the record of trial proceedings demonstrates that Mr. Rosenberg was totally discredited as a witness and that

his testimony was, for the most part, materially impeached not only from the testimony of 2 FAA inspectors; the respondent herein and respondent's wife, but incredibly, most of the impeachment material came from Mr. Rosenberg's own lips and that of his wife who contradicted material portions of his testimony, e.g.___

BY MR. VERNELL:

> Q. Mr. Rosenberg, you indicated that you don't recall any information from Mr. Byrne about the offer of judgment and the fact that no attorneys' fees might be awarded if you didn't get a higher verdict of forty-five nine.
> (Tr. 367)

As noted, such question was repeatedly asked of Mr. Rosenberg, who studiously denied and/or sought to avoid answering the same, e.g._

BY MR. VERNELL:

> Q. Sir, you were aware of the fact, were you not, that if the jury failed to award you more than $45,000.00, there would be no attorney's fees?
>
> Weren't you aware of that before I came into the case?
>
> A. I was told by Mr. Byrne and by you and by other people that if you go to trial, all your fees, all your appraisers, all your expenses are paid by the state.
>
> If you settle, you pay your own fees.

(T. p. 364)

Q. Did you ever discuss the offer of judgment that was made by the D.O.T. of 45 - - I think it was $45,900.

A. I don't understand the question
(T. p. 365)

* * *

Q. Did he (sic, Mr. Byrne) ever discuss with you the State's offer of judgment?

In other words, the State was saying, we'll let a judgment be entered in the eminent domain proceedings in which you will recover $45,900. If you don't take it, there is no fees if there is no additional award.

Did you ever have any discussion? Were you ever so informed by Mr. Byrne that was the case?

A. I'm not following you too clearly. I can only answer—maybe this will help—that I went to the taking.

He said this is just procedural. There's nothing that changed. You have to go to Court if you want more money. If you're not satisfied. Is that what you mean?
(T. 366)

In being totally frustrated by Mr. Rosenberg's continuous and deliberate refusal to provide clear and truthful answers, the Respondent questioned Mr. Rosenberg about his continuous vacillation in answering questions (T. 366).

Moreover, and even when Mr. Rosenberg was confronted with proof positive about a particular fact, he still sought to "wiggle his way out, e.g.__

After being shown a letter written to him by Mr. Byrne informing Mr. Rosenberg about the $49,500 "offer of judgement, he was asked:

BY MR VERNELL:

Q. Well, what does it say about fees, sir?

Doesn't it say if you don't get any higher award than forty-five-nine there are no attorney fees.

A. It says - - May I read the order?

THE REFEREE: Yes.

THE WITNESS: (reading from Mr. Byrne's letter)

Another feature of the offer of judgment is that the D.O.T is not responsible for fees and costs incurred after expiration of said offer in the event that the verdict in the case is less than the 45,900 offered" (T. p. 369).

Incredibly, after reading such clear and concise explanation, Mr. Rosenberg continued to provide false and deceptive answers by interpreting such letter to mean:

"To me, it says if you don't take the offer, it's going to expire. You have to go to Court." (T. p. 370)

Additionally, the record clearly reflects that throughout his testimony Mr. Rosenberg not only provided evasive and deceptive answers, but otherwise and further continuously lied and contradicted his own testimony, e.g.____

In alluding to Respondent's representation of Mr. Rosenberg relating to the various complaints and violations involving the Federal Aviation Administration, it is interesting to note that despite his receipt of an "Emergency Order of Suspension" on November 21, 1991 suspending his pilot's license and all FAA certificates (A.18), Mr. Rosenberg nonetheless still testified at trial that his license was never suspended (T. 254, 258). On another occasion during the trial, Mr. Rosenberg testified that his license was suspended only for "three days" (A. 349).

To the contrary, and to convincingly demonstrate Mr. Rosenberg's NOTORIOUS propensities to LIE and to "cut corners" in order to make a "dishonest buck," not one, but TWO inspectors from the Federal Aviation Administration made a somewhat remarkable and surprising appearance at the trial to testify in the cause (with less than two days subpoena notice and without following prescribed and time consuming procedures), i.e. __ Raul Diaz (T. 386 - 409) and Steven Gordon (T. 409 - 425).

Albeit, and through such totally unbiased FAA inspectors (neither of whom knew the Respondent), it was evidenced that although neither of such inspectors had sufficient time before the trial to retrieve their records, the nature of Mr. Rosenberg's violations and suspension would have required the suspension of his license for not less than a full year before be would be even permitted to reapply (T. 409).

In accordingly reviewing Mr. Rosenberg's flagrant disregard for applicable law and his ongoing and DELIBERATE violations of FAA regulations, the Inspectors alluded to Mr. Rosenberg's illegal and unlicensed operation of an airline charter business, wherein he would fly... without a license to do so, fare paying passengers in and out of the country (T. 399). In lying about the nature of the operation, Mr. Rosenberg had his passengers execute a lease on the aircraft, wherein they pretended to rent the aircraft and to "hire" Mr. Rosenberg as their pilot for the flight (T. 399).

Inspector Diaz went on to describe the safety risks and hazards caused by such lies and attempts by Mr. Rosenberg to circumvent the law, to wit:

THE WITNESS:

A. Well any time you have that, you have the circumventing and the disregarding of the

Federal Aviation Regulations, the Aviation Safety Act.

It puts the public at risk. It puts the pilot at risk. It puts the passengers who are flying that aircraft at risk because number one, the pilot is not trained as an air carrier operator, number two, the aircraft is not licensed and/or inspected as an air carrier aircraft, and there are quite a few training and maintenance requirements that would apply to an air carrier that normally do not apply to a aircraft being operated for pleasure.

(T. 400).

To further his illegal operation, it was necessary for Mr. Rosenberg to intentionally lie to the FAA inspectors, viz:

Q. Were there ever times that you recognized that he (Sic, Mr. Rosenberg) just out and out lied to you?

A. In my opinion, yes.

(T. 398)

The total disregard of Mr. Rosenberg to comply with society's rules and regulations or to otherwise tell the truth is underscored in the following colloquy, to wit:

Q. Would you explain to the court why you developed an impression that Mr. Rosenberg was a <u>smooth liar</u> in those conversations.

A. Well every time I would bring up the fact that, you should really apply for an air carrier certificate. You know, we'll help you all we can for you to get the certificate," he would say, I don't need it and you'll just have to catch me if you can."

(T. 400).

Similarly, the somewhat "abbreviated" testimony of the Bar's only other witness, Mr. Rosenberg's new spouse, Ellen Koga, was likewise replete with evasive and deceptive answers and otherwise reflected a totally contrived and false scenario of events.

In alluding to one of the many contradictions relating to Ms. Koga's trial testimony and her previous testimony at the grievance committee hearing, Mr. Roderman, Respondent's trial counsel, engaged in the following colloquy:

> Q. Was your memory better than it is today, or have you looked at notes to - -
>
> A. It's better now, I think.
>
> (T. 463).

In other portions of her testimony relating to her visit to the courthouse with Mr. Rosenberg to examine court records, she had no recollection as to when she went (T. 466); couldn't describe the building, except that it was concrete (T. 450): and stayed in a lobby which she couldn't describe (T. 449).

Although Ms. Koga stated that she went to the courthouse with Mr. Rosenberg (T. 442), Mr. Rosenberg denied that she ever went with him (T. 697).

Moreover, Ms. Koga was unaware that Respondent had represented and was continuing to represent her husband in four different cases and she specifically denied that Mr. Rosenberg ever mentioned the same to her (T. 448).

Albeit, in contrast to the false, deceptive and contrived testimony of Mr. And Mrs. Rosenberg, the testimony and evidence adduced in behalf of the Respondent affirmatively demonstrated that the Respondent did not at any time engage in any unethical conduct, nor did he otherwise commit any violations of Florida Bar rules.

To the contrary, the evidence demonstrated that Respondent was initially retained to defend Mr. Rosenberg in a foreclosure damage action, wherein Felicella Consulting Engineers brought suit to recover $31,041.35 in fees and costs (A. 19).

Although Mr. Rosenberg denied that Felicella ever performed services for him or that he owed Mr. Felicella any money, the time sheets provided by Mr. Felicella reflect a vast and substantial amount of time and effort expended in behalf of Mr. Rosenberg (A. 20).

Albeit, and despite such false denials and his NON-payment for services rendered by Mr. Felicella, Mr. Rosenberg dismissed

him simply because "he just couldn't support the figures of our meeting" (A. 16).

Although the eminent domain proceedings, including both trial and appellate efforts, as well as the defense of the Felicella claim were vigorously pursued for a period encompassing three years, Mr. Rosenberg admitted that except for the payments of retainer fees in the amount of $5,500.00, he had never paid any additional fees whatsoever to Respondent for the substantial amount of time expended by Respondent throughout the five years of intense litigation.

Likewise, in representing Mr. Rosenberg in an ongoing series of complaints, disciplinary proceedings and suspension orders brought against Mr. Rosenberg by the FAA which encompassed a period in excess of three years, Mr. Rosenberg contended that all fees for ALL services in ALL cases and matters SHOULD BE PAID BY THE STATE, i.e. ____

> MR. RODERMAN: In March of 1993, Mr. Vernell had represented you on at least four different lawsuits and was preparing to file a Federal suit against the excuse me on four different law suits March, 1993, and then in 1994, you and Mr. Vernell met to file the Federal suit against the FAA.
>
> How much money did you think, if any, that you owed him for all these

services, or did you think he was doing it for free?

MR. ROSENBERG: We're going back to the same question. There was no fee arrangement. There was no fee agreement. The state was supposed to pay all the bills."
(T. 720)

Contrary thereto, Respondent and Mr. Rosenberg did, in fact, have a fee agreement wherein Respondent, unfortunately, focused more upon the years of friendship than the extraordinary amount of time and effort expended in Mr. Rosenberg's behalf which resulted in Respondent spending hundreds of hours over a five year period in behalf of Mr. Rosenberg, with litigation being pursued in four different courts and numerous FAA Administrative proceedings.

Accordingly, in furtherance of such agreement, the Respondent requested and received from Mr. Rosenberg a relatively nominal retainer of $5,000.00.

Additionally, Mr. Rosenberg further agreed that Respondent would receive a reasonable fee for all services rendered and/or to be rendered in the ensuing eminent domain proceedings, the Felicella claim and all other matters referred to Respondent by Mr. Rosenberg.

Accordingly, at no time, did Respondent ever agree to look only to the state for payment of fees especially in light of the following :

a. The highest appraisal obtained for Mr. Rosenberg's loss was $31,600.00. Notwithstanding, and five years before Respondent's entry in the case, the state had paid Mr. Rosenberg the sum of $44,999.04 for the taking. (A. 17).

b. Mr. Rosenberg had no "expert" witnesses to testify in the case nor any evidence that his loss exceeded the $31,100.00 value placed by the state for such loss.

c. The state had made an offer of judgment for $49,500 and, accordingly, if the verdict did not exceed such amount, no fees would be payable to Respondent under applicable law.

d. Mr. Rosenberg's former attorney, Robert Byrne, had been discharged by Mr. Rosenberg after 5 years of service without any fees being paid to him (either by the state or by Mr. Rosenberg). The Respondent was accordingly in doubt as to how, and to what extent, such unpaid fees would impact upon any claim for attorney fees which Respondent might make in the cause.

Accordingly, the requirement of both a retainer and the payment of reasonable attorney fees was fully agreed to and was ostensibly based upon the mutual trust in each other as acquired after 35 years of friendship, viz:

Q. He never asked you for any money for the transcript of the court reporter?

A. He asked me if he could get a $5.000.00 advance.

Q. Did you give it to him?

A. Yes, I did.

Q. You didn't know what the money was for.

A. He said he needed money.

Q. You trusted him.

A. Yes, I did.

Q. He trusted you.

A. I hope so.

Accordingly, and after reaching such fee agreement the Respondant entered his appearance in the eminent domain case.

Albeit, and although Mr. Rosenberg, through his accountant, Harvey Schwartz, sought an award in excess of two million dollars, such claim did not "fly" with the jury which returned a verdict of $70,000.00 in favor of Mr. Rosenberg (A. 21)

Accordingly, in deducting therefrom the prior payment made to Mr. Rosenberg from the state in the amount of 44,991.04, the verdict netted Mr. Rosenberg approximately $25,000.00.

Thereafter, and feeling aggrieved, Mr. Rosenberg desired to appeal such verdict, but advised Respondent that he lacked the funds necessary to advance or pay any appellate costs or fees.

In considering Mr. Rosenberg's plight, the Respondent was fully aware of the applicable provisions of Florida Satutes, Section 73.131, which mandated that NO fees would be allowed for appellate services or costs if the appeal court were to affirm the trial court's judgment of $70,000.00.

In discussing such eventuality with each other, the Respondent and Mr. Rosenberg agreed that in such event the Respondent would retain from the eminent domain award whatever reasonable fees and costs that he was, or would become, entitled to.

Accordingly, and based upon such understanding, the Respondant proceeded to PERSONALLY advance in behalf of Mr. Rosenberg more than $6,000.00 in appellate costs, including $5,500.00 for the preparation of the trial transcript (A. 22).

Later, and prior to the appellate Court's decision in the eminent domain appeal, the FAA issued an emergency order for the suspension of Mr. Rosenberg's license (A. 18).

Again, Mr. Rosenberg stated that he lacked funds to defend himself against such suspension, as well as for other FAA related proceedings and again the parties confirmed their earlier agreement that the Respondent would retain from the "nominal" proceeds payable from the jury's award full reimbursement for the costs advanced by him as well as reasonable attorney fees for all services rendered by him in Mr. Rosenberg's behalf.

Thereafter, and as an incident to the PCA affirmance of such appeal, the Respondent then filed his motion for the taxation of attorney fees and costs before the trial court seeking $75,915.00 in fees for services rendered in the trial court; the District Court of Appeal and in the Felicella expert witness case (A. 23).

Thereupon, and as an incident to such PCA affirmance, the trial court "struck" Respondent's claims for ALL appellate attorney fees and costs in addition to denying Respondent any fees in connection with the Felicella case (A. 24).

On March 12, 1993, the trial court only considered for an award of attorney fees, the services rendered by Respondent in the eminent domain trial and related proceedings. In so limiting Respondent's claim, the court awarded Respondent the sum $21,875.00 in attorneys' fees (A. 25).

As noted, such minimal award was $54,040.00 LESS than the amount of "reasonable fees" which had been claimed by Respondent, i.e. - $75,915.00 (claimed), less $21,875.00 (awarded).

As further noted, neither the amount of fees claimed, nor awarded, included any claim for Respondent's services in connection with the FAA proceedings.

Significantly, and despite Mr. Rosenberg's repeated denials of any knowledge as to the extent of the services rendered by Respondent and/or the amount of fees owed to him, Mr. Reosenberg, nonetheless, conceded at trial that he was fuly aware that fees in the amount of $75,000.00 had been fully earned by Respondent,

i.e.__

> MR. VERNELL: You mean I never discussed the fact with you that I was making a claim in the trial court for an award of $75,000.00 to cover the fees which I felt I earned in the appeal court, with

Mr. Fallaciously and the trial proceedings?

MR. ROSENBERG: No, we had no reason to discuss it because I was fully aware of it.

(T. 123).

Accordingly, in furtherance of his agreement to receive and retain the eminent domain proceeds as payment, the Respondent continued to represent Mr. Rosenberg, even to the extent of filing another suit against the FAA in January 1994 for damages and injunctive relief without the payment of any additional fees (A. 26)

Significantly, in adhering to such agreement, Respondent never received any additional money from Mr. Rosenberg from the time Respondent entered the eminent domain case in 1989 until this date, except for the nominal $5,500.00 retainer fees paid.

I

WHERE IT AFFIRMATIVELY APPEARS THAT THE FLORIDA BAR FAILED TO FOLLOW APPLICABLE AND PRESCRIBED PROCEDURE IN INITIATING AND/OR IN PROSECUTING DISCIPLINARY PROCEEDINGS AGAINST THE RESPONDENT, SUCH PROCEEDINGS SHOULD BE DISMISSED

In considering the within issue, it is deemed to be both appropriate and necessary to establish at the outset that the "complaint" purportedly filed in behalf Howard Rosenberg is, in fact, a "complaint" and not an "inquiry."

As noted, such precise issue was addressed at the July 16, 1997 hearing before Referee Fierro, with the Florida Bar conceding and otherwise stating as follows:

> Ms. Evans: "Judge, we concede that it is a complaint."
>
> (Tr. July 16, 1997, p. 35)

Suffice it to say that such admission by the Florida Bar is sufficient, per se, to mandate the application and implementation of Rule 3-7.3(c) of the Rules Regulating The Florida Bar, which specifically prescribes and mandates:

> "All complaints, except those initiated by the Florida Bar, shall be in writing and under oath."

In accordingly alluding to the Rosenberg "complaint," it is noted that the same is not even signed by Rosenberg, much less sworn to. To the contrary, it is obvious that the two page "statement" annexed to the Bar's Inquiry/Form was prepared by attorney Eisler. Indeed, nowhere in such complaint does it appear that Mr. Rosenberg ever saw or read the unsigned statement annexed thereto as "Exhibit A."

As noted, in Collins v State, 2 nd DCA 1985, 465 So 2 nd 1266, the Second District Court was called upon to define and to otherwise set forth the requirements of an "oath" and, in such instance, the Second District Court of Appeal expressly held:

> ". . Such an oath must be an unequivocal act in the presence of an officer authorized to administer oaths by which the declarant knowingly attests the truth of statement and assumes the obligations of an oath (cases cited)."

Similarly, in Younger v State, 4 th DCA, 1968, 433 So 2 nd 636, the Fourth District Court of Appeal reaffirmed as correct the definition of an "oath" as defined in Black's Law Dictionary, Fourth Edition, viz:

> " An oath may be undertaken by any unequivocable act in the presence of an officer authorized to administer oaths by which the declarant knowingly attest the truth the truth of a statement and assumes the obligations of an oath. (citing the Supreme Court Case of Market v State, 47 FLA 38, 37 So 53, 59.

Albeit, and aside from such well established and controlling law, even the Bar's own procedure mandates that a complaint "be sworn to before a duly authorized Notary Public. (A. 27).

Moreoever and as noted in The Florida Bar v Rue, Fla. 1994, 643 So 2 nd 1080 this Honorable Court expressly distinguished the requirements relating to a "complaint" from those pertaining to an "inquiry" and, in such case, this Honorable Court specifically mandated:

> "Rule 3-7.3 was adopted by this Court in 1990. The Fla. Bar re Amend, to the Rules Regulating the Florida Bar, 558 So 2 nd 1008, 1010-11 (Fla 1990). As explained by this Court, the rule differentiates between inquiries into professional conduct and

> complaints and sets forth the procedures to be followed by each." Id. The Rule requires Bar counsel to review inquiries and determine whether the alleged conduct would warrant imposition of discipline. See Rule 3-7.3(c). Rule 3-7.3(c) provides that "all complaints except those initiated by The Florida Bar shall be in writing and under oath,*"
>
> *emphasis supplied

Certainly, the Bar would be hard pressed to dispute its own directions and regulations. In this regard, the Bar appears to have gone to the extraordinary length of publishing the requirements which a complainant is required to follow in complaining against a member of the Florida Bar, i.e.

> "You must put your allegations in writing you can use a Bar form if you'd like- have it notarized and send it to the Bar office in your area (A. 28)

Incredulously, the Florida Bar has apparently forgotten its own admonitions wherein it specifically required that in furtherance of the "new rule" promulgated by the Supreme Court in 1990 a complaint against a member of the Florida Bar is now required to be sworn to and notarized" (A. 29)

Certainly, the Florida Bar is not free to "pick and choose" which rule it may or not rely upon or enforce; or to whom a particular rule may or may not apply.

The law in this regard was appropriately stated and mandated in The Florida Bar v Rubin. Fla. 1978, 363 So 12, where the Supreme court mandated"

> "The bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we will too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so." (Id, @16)

Accordingly, and in applying such rule to the case it bar, it is submitted that, based upon the foregoing facts and authorities, the Complaint as filed herein should have been and/or should be dismissed and Respondent discharged from all charges herein.

II

> WHERE IT AFFIRMATIVELY APPEARS THAT THE FLORIDA BAR UTILIZED AND RELIED UPON A WITNESS WHOSE TESTIMONY IS BARRED AND OTHERWISE PRECLUDED AS A MATTER OF LAW, THE FINDINGS AND RECOMMENDATIONS OF THE REFEREE SHOULD BE VACATED AND THE COMPLAINT DISMISSED AS A MATTER OF LAW.

In considering the within issue, it is significant to note that the Florida Bar deliberately and intentionally failed to disclose to the Respondent the fact that at the same time that Mr. Eisler was trying to extort the sum of $49,000.00 from the

Respondent, he had ALREADY filed and was pursuing a claim with the Florida Bar from the Client's Security Fund.

Certainly, the impeachment value of such fact is extraordinary and could very well "tip the scales" when determining the issue of Mr. Rosenberg's credibility.

In accordingly considering the profound significance of Mr. Rosenberg's claim for compensation from the Clients' Security Fund, it is essential to note that the Florida Bar Rules relating to such claim specifically prescribe, inter alia, as follows:

> Rule 7-2.4 Prerequisites to Payment
>
> (a) Members in good standing. Payments from the fund will not ordinarily be made while the lawyer guilty of the misappropriation remains a member in good standing of the Florida Bar.
>
> (b) Complaints Required. The filing of a grievance complaint with the Florida Bar against the attorney claimed against MAY be required as a prerequisite to the consideration of a clients security fund claim.

Significantly, and in applying its "own" interpretation to such rule, the Florida Bar opted to require that a grievance complaint must be filed before a claim against such fund can or will be considered.

The attention of this Honorable Court is accordingly directed to the Bar's own publication in its "Clients' Security

Fund" bulletin/pamphlet (A. 30), wherein the Bar specifically directs:

"You WILL be required to file a grievance complaint."

Needless to state, in the face of such admonition, the proceedings thus far conducted in the within cause are deemed to be not only erroneous, but frightening as well.

Respondent is accordingly obliged to state that from the very inception of the within cause, one question remained dominant in his mind, i.e.__. . why, in addition to the filing of false charges against the Respondent, would his "friend" for over 35 years not be willing to at least speak to Respondent or to discuss the situation with him?

It is accordingly noted from the record, that at no time did Mr. Rosenberg ever contact or attempt to communicate with the Respondent relating to the charges against him.

Indeed, on every occasion that Respondent has been in the presence of Mr. Rosenberg, he was continually guarded by Michael Eisler who not only previously sought to extort the sum of $49,000.00 from Respondent, but who apparently built a "brick wall" around Mr. Rosenberg to prevent him from speaking to Respondent.

Finally, and in desperation, the Respondent went "so far as to" write Mr. Rosenberg a letter on October 22, 1996 and to cause the same to be delivered to him, wherein, Respondent stated, inter alia, as follows:

> "Unfortunately, and because of the restraints imposed by your attorney, I have not been able to meet or speak with you, or to otherwise ascertain any possible, basis for the 180 degree turn in our relationship, nor' could I ever in my lifetime anticipate that I could possibly become the arch enemy which you have doubtless characterized me to be" (A. 29).

To say the least, it is difficult for Respondent to exaggerate the importance and impact of such letter upon the within proceedings, e.g.__ aside from the fact that the contents thereof truly reflect the lack of any intent or any action on the part of the Respondent to engage in any proscribed conduct, it is incredulous to note that the Referee found that the Respondent's delivery of such letter was, per se, a violation of 4-4.2 of the Rule Regulating The Florida Bar and recommended that Respondent be not only found guilty of such UNCHARGED offense, but that Respondent should be disbarred by reason thereof.

Notwithstanding, the Respondent respectfully submits that the testimony of Howard Rosenberg is not only untrustworthy, but the same should otherwise be totally rejected in accordance with

the pronouncements made in State v Glossom Fla. 1985, 462 So 2 d 1082, 1085, wherein this Honorable Court held it to be a violation of the accused's rights of due process to allow the prosecution to use or rely upon the testimony of one whose payment for testifying is conditioned upon the conviction of the accused. In such case, this Honorable Court reasoned:

> "Our examination of the case convinces us that the contingent fee agreement with the informant and vital state witness, Wilson, violated the Respondent's due process rights under out state constitution. . . .We can imagine few situations with more potential for abuse of a defendant's process right. The informant here had an enormous financial incentive not only to make criminal cases, but also to color his testimony or even commit perjury in pursuit of his contingent fee.* the due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions.
>
> * emphasis supplied

(id, @ 1085)

Certainly, in applying such well established and well reasoned principle of law to the case at bar, it is submitted that the testimony of Howard Rosemberg should be stricken in its entirety and that the Referee's findings and recommendations should be vacated.

III

WHERE THE REFEREE NOT ONLY CONSIDERS THE MERITS OF AN UNCHARGED OFFENSE, BUT RECOMMENDS A FINDING OF GUILT THEREON, AS WELL AS DISBARMENT THEREFOR, THE FINDINGS AND RECOMMENDATIONS AS MADE BY THE REFEREE SHOULD BE DETERMINED TO BE NULL AND VOID

As noted, this Honorable Court considered the precise issue as raised herein in The Florida Bar v Price, Fla. 1985, 478 So 2d. 812 and held that due process precluded a finding of perjury against the accused attorney where such offense was never charged in the complaint.

Similarly, and as in the case at bar, the Respondent was never charged in the complaint with any violation of Rule 4-4.2 of the Rule Regulating the Florida Bar.

Albeit, and notwithstanding such due process violation, it is submitted that in the Referee's "rush to justice" type proceedings, the Referee apparently never took either the time nor the interest to review the elements of such charge.

Certainly, where an attorney is a party in a cause, he has every right to speak and communicate with another party, irrespective of whether such other party is or is not represented by counsel.

Manifestly therefore, the Referee's ongoing violations of the due process rights of the Respondent herein mandates that

the Referee's findings and recommendations be declared null and void.

IV

WHERE IT AFFIRMATIVELY APPEARS THAT NONE OF THE OFFENSES CHARGED AGAINST THE RESPONDENT WERE PROVEN BY CLEAR AND CONVINCING EVIDENCE, THE COMPLAINT SHOULD LAWFULLY BE DISMISSED

The Respondent respectfully submits that the Referee herein necessarily failed to apply the proper standard of proof in his findings and recommendations.

Needless to state, the inherent bias of a witness seeking substantial rewards based upon the conviction of an accused must be considered suspect at the very least.

As noted, supra, without the filing of a grievance complaint against the respondent and, further, without the Respondent being ousted from "good standing" as a member of the Bar, Mr. Rosenberg will likely be precluded from receiving the "Judas" like "30 pieces of silver" from the Florida Bar's Clients' Security Fund.

Certainly, where as in the case at bar, the sina qua non witness in the Bar's proceedings is otherwise discredited and his testimony impeached, the required standard of "clear and convincing" evidance cannot be met.

In this regard, it is significant to note that the reputation of Mr. Rosenberg to circumvent the law and to "lie" is well known among his "peers" who, coincidentally, happen to be law enforcement officers, e.g.__

> Mr. Diaz:
> Q. Were there ever times that you recognized that he just out and out lied to you?
>
> A. In my opinion, Yes.
>
> * * *
>
> Q. Would you explain to the Court why you developed an impression that Mr. Rosenberg was a smooth liar in those conversations?
>
> A. Well, every time I would bring up the fact that, "you should really apply for an air carrier certificate. You Know, we'll help you all we can for you to get that certificate." He would say, "I don't need it, and you'll just have to catch me if you can."
>
> (T. 400)

In accordingly applying such standard to the case at bar, it is clear that the Bar has not established nor proven the Respondent's guilt as to any charged offense by "clear and convincing evidence" and, accordingly, the findings and recommendations of the Referee must necessarily be vacated, as required in Smith v. Department of Health, 1st DCA 1988, 522 So 2d, where the Court held:

> "Clear and convincing evidence requires that the evidence must be found to be credible; the facts to

which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of all allegations sought to be established."

V

WHETHER THE REFEREE HEREIN VIOLATED THE DUE PROCESS RIGHTS OF THE RESPONDENT TO AN EXTENT AS TO WARRANT AND MANDATE THE VACATING OF THE REFEREE'S FINDINGS AND RECOMMENDATIONS

At the outset, respondent submits that the seeming "race to justice" type proceedings conducted by the Referee herein is not only erroneous and improper, but, upon the facts and circumstances as presented herein, the same are unconscionable and in violation of Respondent's constitutional right of due process, in that, and among other things.

a. No written notice of "trial" has ever been entered in the within cause. Certainly, the notice provided relating to a proposed hearing upon "disciplinary proceedings" does not equate to a notice of trial.

As an incident to such lack of notice, both the Respondent and his attorney were totally unprepared for trial, especially since the Bar previously had foreclosed all forms of discovery being provided to Respondent.

Needless to state, although the Referee orally stated on the Record at the July 24th, 1997 hearing that he was converting the hearing on Disciplinary Proceedings as scheduled for August 6, 1997 into a trial whereat the "whole enchilada" would be heard, the same is hardly sufficient to pass constitutional muster both as to notice and/or the opportunity to be prepared for trial.

Moreover, the timely and urgent filing by Respondent of 3 consecutive motions for continuance within less than 10 working days should have required more consideration than the short shift provided by the Referee in denying the same.

Additionally, the Referee's failure to disqualify himself upon timely motion, affidavit and certificate of counsel underscores the extreme prejudice and bias demonstrated by the Referee herein against Respondent.

Clearly, a perusal of Respondent's motion would more than justify Respondent's well-founded fear that Referee Fierro would not provide a fair trial to the Respondent.

In this regard, the attention of this Honorable Court is directed to proceedings previously engaged in by the same Referee and the same Bar counsel wherein the Referee was put on

notice that Respondent did not approve of a uni-lateral proposed "Report" submitted to the Referee for entry (B 1).

As noted, Bar counsel had previously submitted two different proposed reports on respectively May 24, 1995 (B 2) and on May 25, 1995 (B 3); the same being duly approved by the Respondent.

Thereafter, and on June 15, 1997 Bar counsel unilaterally changed the language in such proposed report to include terms which had previously been disapproved and withdrawn by both parties (B 4). Indeed, in submitting such changed version, Bar counsel openly admitted making such change without the knowledge or consent of the Respondent (B 5).

Certainly, after being put on notice that Respondent objected to such change, the Referee should, at the very least, have provided the Respondent with a hearing and/or opportunity to heard, rather than to summarily enter the "revised" report ex parte.

Clearly, after unilaterally changing such proposed report, Bar counsel was in manifest error in presenting the same for entry after she was specifically advised that the Respondent had vigorously objected to the same.

Moreover, the Referee's actions in entering such proposed Report ex parte, after being advised of Respondent's objection is deemed to be even more egregious.

Certainly, the combined actions of Bar counsel and the Referee in engaging in such questionable actions should not be tolerated either as a matter of law or constitutional right.

Accordingly, and by reason of such and other impermissible violations of defendant's due process rights, the findings and recommendations of the Referee should be vacated.

CONCLUSION

The Respondent respectfully submits that the Bar has failed to produce requisite proof of Respondent's guilt as to any of the offenses included in the complaint, nor has the bar demonstrated that Respondent such offense by clear and convincing proof.

Moreover, the Referee's failure and refusal to accord to Respondent his requisite procedural and substantive rights of due process, mandate that the referee's report be vacated.

Respectfully Submitted

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CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing Brief of Respondent and a copy of Appendix thereto was mailed to Elena Evans, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and to John A. Boggs, The Florida Bar, 650 Apalchee Parkway, Tallahassee, FL 32399-2300.

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