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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

MARK EVAN FREDERICK,

Respondent/Appellant,

vs.

THE FLORIDA BAR,

Petitioner/Appellee.
_____/

Case Nos.: 90,007 and 90,387
TFB File Nos.: 96-00987-01B
and 97-00094-01B

APPELLANT'S SECOND AMENDED INITIAL BRIEF

ON APPEAL FROM
THE FLORIDA BAR REFEREE,
HONORABLE ALLEN REGISTER,
COUNTY JUDGE OF WASHINGTON COUNTY'S
REPORT AND DISCIPLINE RECOMMENDATION
DATED MAY 28, 1998

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I - PRELIMINARY STATEMENT

This is an appeal from a Florida Bar ("Bar") disciplinary prosecution against Mark Evan Frederick, Esquire ("Frederick") resulting in adverse findings and recommendations for discipline by the Referee, the Honorable Allen Register, County Judge of Washington County, Chipley, Florida. (A 1)

Two separate and unrelated complaints were consolidated, the first of which will be referred to as the "Barnes" complaint (Case No. 90,387) and (The Florida Bar File No. 96,00987-01B) and the second as the "McCorvey" complaint (Case No. 90,387) and (The Florida Bar File No. 97-00097-01B).

After a statement of the issues and respondent's burden of persuasion in this appeal, these consolidated cases will be addressed separately, but in traditional brief format.

The parties will be referred to as "the Bar" and the respondent as"Frederick" or "lawyer," and complainants as "Barnes" and "McCorvey," or collectively as the "group" or "clients," consisting of originally 14 men, but later reduced to only 9 clients.

Because of the great bulk of the record on appeal, which has been filed with the Clerk, references to the record will be to an

Appendix, designated by the letter "A" followed by a number indicating its location in the appendix enclosed in parenthesis, such as "(A 1)". Where appropriate, reference to a page number (following the appendix document number) within that document will appear as i.e., "(A 1 p. 5)."

Other references will be to witnesses' last name or title. References to the Rules Regulating the Florida Bar will be i.e. "Rule 3-7.7" and an opinion issued by the Florida Bar Ethics Committee Opinions as "Opinion 93-2, October 1, 1993."

A - THE BARNES CASE #90,007

II - STATEMENT OF THE ISSUES AND BURDENS OF PERSUASION

1 - ISSUES

Barnes involved a fee-cost dispute with Frederick, in which the Referee found that Frederick failed to deposit money paid as a cost advance into a trust account [Rule 4-1.15(a)]; used those funds as payment of fees, contrary to the written fee agreement [Rule 5-1.1(a)]; and in a release resolving the dispute, with the clients, included a provision in the release that the clients would not pursue a Bar complaint, which was found to be prejudicial to the administration of justice. [Rule 4-8.4(d)] (A 1)

Frederick contends that the Referee erred in admitting and

relying on parol and extrinsic evidence of negotiations on August 17 and 18, 1994, and which precluded and materially conflicted with the terms of a valid, clear and unambiguous written fee and cost agreement that was executed two weeks later on August 31, 1994.

After the clients threatened to complain, Frederick included in a release the clients' agreement not to pursue a complaint to the Bar. This was ill-advised, but not unethical under the circumstances, because it was unenforceable, as the clients well knew. The clients admitted that they did not intend to honor the release and used a Bar complaint as leverage, to extract the remaining $5,500 fee balance from Frederick.

2 - BURDEN OF PROOF AND PERSUASION

In a Bar disciplinary proceeding, the Bar has the burden of proving each element of a violation of the Rules For Professional Conduct, by *clear and convincing evidence*.

In an appellate review of a referee's recommendations as to guilt and punishment, the burden is on the party seeking review. Frederick, therefore, must demonstrate that the Referee's report is *erroneous, unlawful or unjustified*.

It is respectfully submitted that the clear and convincing evidence was that no offense was committed in either case. For those, in addition to other compelling reasons, the Referee's

report was *erroneous*, as well as *unlawful* and *unjustified*.

III - STATEMENT OF THE FACTS

BARNES CASE

On August 17, 1994, a group of 14 civil service employees met with Frederick to discuss filing a civil rights suit, for racial discrimination against the United States Navy, pursuant to the Civil Rights Act, 42 U.S.C. §1983 *et seq*. After their first meeting on August 17, 1994, Frederick, by letter of August 18, 1994, (A 2) submitted the following proposal to the group for consideration of a fee agreement, the group then consisting of 14 men. The letter provided:

> Please advise if you will be able to pay the $2,000 per individual, which for now would stand at 14 x $2,000, or $28,000, $5,000 of which could go as a cost retainer. The balance would go to us as fees to be taken against a percentage of the recovery. These fees are applied only as to me representing at least ten (10) individuals.
>
> Again, you all have a good case, and we look forward to a positive response on your parts. (A 2)

After considering this proposal for 2 weeks, 4 men dropped out, and 10 men met with Frederick in his Destin office on August 31, 1994, to negotiate the agreement. During the meeting, at the request of the group's leader, Sammy Barnes, he and 2 of the

leaders, James Cox and Roy Dunklin, met privately with Frederick to resolve the details.

After reaching a proposed agreement with the 3 leaders, Frederick, using a printed contingent fee agreement form, entitled "Agreement For Representation" (A 4), in his own hand, wrote the following terms in the blank space provided:

> "$20,000 non-refundable retainer;
> 8,000 cost deposit;
> 13,100 received today;
> balance of $14,900 by Sept. 22, 1994.
> Retainer of $20,000 to be credited
> against attorney's fee percentage recovered."[1]
> (A 4)

The 3 leaders and Frederick then met with the entire group and explained the agreement. At the clients' suggestion, only Barnes and Robert Jones, who acted as Treasurer, signed the contract, for the entire group, and the Clients Rights Statement, because at least one was not sure he would participate.[2] All of the group

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[1] Following the handwritten portion the printed form provided: "COSTS AND EXPENSES"

In addition to the attorney's fees provided for above, I further agree to pay all court costs, expenses of litigation where applicable as well as any and all out-of-pocket expenses paid or incurred by my attorney for my benefit and hereby authorized said attorney to deduct said amounts from all money collected on my behalf."

[2] One man did not participate and pay his $2,000 non-refundable retainer, but the remaining 9 made their payments totaling $18,000.

apparently did not want to commit by signing at that time. As noted in the agreement, $13,100 was paid that day, which Frederick accepted as part of his $20,000 non-refundable retainer fee for the 10 men, and deposited it in his general account and used it as a payment toward his retainer. (A 3 p.2-3)

Over the next several weeks, no one paid any money toward the cost deposit, and one man dropped out completely. Each of the remaining 9, however, paid his $2,000 non-refundable retainer, but a number of the group either could or would not pay their share of the $8,000 cost deposit, as agreed and provided for in the written fee agreement. (A 2) Frederick's office called to encourage payment of the cost deposit, but no one paid and this became a problem. As a result, the group asked to meet with Frederick, which they did at the Bay County Courthouse, several weeks after the formal written fee agreement had been signed on August 31, 1994.

At the meeting, several of the group stated they could not afford the cost deposit. Some could, but several others stated that they would not, because they could negotiate a better deal with South Florida lawyers. Frederick and the group then agreed to an oral modification of the agreement. Frederick accepted the $18,000 paid as the total non-refundable retainer, and eliminated

the contract requirement for an advanced cost deposit. Frederick agreed to advance the necessary litigation costs and expenses on the contingency that he would be reimbursed from the recovery. As to their understanding of the $2,000 payment, the leaders testified that the $2,000 was the non-refundable retainer fee, and there was no discussion that it was for costs. (A 3 p.2)

The litigation followed during which Frederick paid a paralegal, Tammy Tikel ("Tikel") to exclusively work on this and a few other cases over the next 15 months. Unfortunately, for Frederick and his one-man office, he had an *informal* manner of identifying costs and expenses that he advanced in contingent fee cases. Costs would be reconstructed from the file and other records. This meant, at the end of the case, he would have a less than adequate means of identifying these contingent cost advances from his own funds.[3] Frederick, however, did have a trust account system in which to properly handle clients costs when necessary. He was paid the $18,000 as a fee, and never received costs, so he did not use this account. As a result, Frederick might be unable, at the conclusion of the case, to obtain *full* reimbursement of his

[3]During trial, Frederick was unable to respond to a production request and order, because the files he needed to reconstruct the costs were in the possession of another lawyer and the clients.

contingent cost advances from the clients' ultimate recovery. Frederick's inability to recover unidentifiable contingent costs, however, would be to his financial disadvantage, but to the client's financial advantage. This is not submitted as an excuse, but for the purpose of an explanation.

In November 1995, Frederick was considering withdrawing and allowing another attorney to proceed with the case, because of his caseload, and other reasons. At this time, he was also having a disagreement with his paralegal, Tammy Tikel, over a salary increase. She became very angry and saw an unsigned draft of a proposed letter of withdrawal Frederick had prepared, and was considering to submit. Without Frederick's knowledge, Tikel showed the letter to the clients. (A5)

The clients, coached by paralegal Tikel, responded by delivery an angry letter dated November 16, 1995 to Frederick. In this letter the group terminated him, and demanded a refund of $15,000 of the $18,000 and threatened to file a complaint with the Bar and sue him for malpractice if he refused. (A 6) (A 3 p.12) Frederick's surprise is indicated by his response of November 17, 1995, in which he countered with an explanation and an offer to refund $7,500.00. (A 7)

As earlier stated, unknown to Frederick, the group was being advised on how to get their fee money back by several other lawyers, and direct coaching from Tikel, the paralegal, who was about to quit, because she had not received a raise. She was planning to work for another lawyer and take the case and fee with her. Particularly, the paralegal was aware of recent and pending disciplinary action taken against Frederick, (A1 p.5) and knew that he would be sensitive to threats from the clients to complain to the Bar.

Frederick, quickly concluded settlement negotiation in the midst of threats, prepared a release exchanged his check payable to the clients for $12,500 for the release. (A 8) Frederick did not tender the check on any condition, as found by the Referee. Indeed, team leader Dunklin testified specifically to the contrary. Frederick delivered the check, said nothing, even in the face of the group's announcement, after receipt of the check, that they still were going to pursue a complaint to the Bar. He did not demand return of the check or stop payment, despite the clients' announced intention to repudiate the agreement. (A 3 p.15-16)

The release provided in part that "we (clients) agree not to write the Florida Bar and, if we have already, we agree to voluntarily withdraw it." (A 8) Frederick, unwisely, included

this provision, because the threats to complain to the Bar and sue him for malpractice which were totally unfounded (as established in the record) because he had done nothing wrong. Despite his conviction that he had done nothing wrong, the threats were the motivating influence for his payment of an *earned* fee because of the pending disciplinary matter. There was no evidence of a violation to cover up, as where a lawyer has violated an ethical rule, knows it, and then bargains with the client to avoid the consequences of his wrongful act. To the contrary, the clients, with advice of outside counsel (and Frederick's angry paralegal) used the threat of a Bar complaint, to extract money from the attorney who had clearly earned it, with no intention to honor the release agreement.

It was candidly admitted by the clients that, despite the signed release agreement, they had no intention whatever of either not complaining, or withdrawing a complaint already filed with the Bar, or not suing for malpractice.[4] They knew from the paralegal, and their independent attorneys' advice, that such an agreement is not enforceable. In Mr. Cox's words: "she (Tikel) said , 'this

[4] The "malpractice" action referred to by the complaints, was their separate claim filed with the Bar directed to the Clients' Security Fund, seeking recovery of the remaining fee balance of $5,500.

didn't mean a hill of beans.' " (A 3 p.14) It was also candidly admitted by the complaining clients, as early as the Grievance Committee hearing, that the clients had no intention of complying with the release. Instead, they intended, after receiving Frederick's check for the agreed sum of $12,500, to ignore the release and, again use a Bar disciplinary process to extract the remaining $5,500 of the non-refundable retainer from Frederick. (A 3 p.11-13)

Again, at the trial before the Referee, the clients admitted that their purpose of pursuing the Bar complaint was to recover the remaining $5,500 of the non-refundable retainer from Frederick, or the Florida Bar client Security Fund. In fact, the clients testified that they understood the purpose of the Bar prosecution was to recover that balance. This was their apparent sole motivation for pursuing this case.

IV - SUMMARY OF ARGUMENT

BARNES CASE

1. The fee agreement was clear and unambiguous, required a non-refundable retainer of $2,000 from each of the 9 clients, which was paid to Frederick, who accepted and treated it as payment of his fee. The clients also testified that the payment was intended as payment of each man's $2,000 share of the non-refundable

retainer. Although called for in the written agreement, no portion of the $8,000 cost deposit was ever paid by any client, because a few weeks after the written agreement was executed, it was verbally agreed by all, that no cost deposit was required. Frederick agreed to advance the necessary costs, and proceed with the 9 clients and $18,000 retainer fee instead of the minimum of 10 and $20,000 required in the written agreement. The irony is that even if the pre-contract fee proposal required a cost advance, as did the written agreement, this condition was clearly eliminated by the later oral agreement. A subsequent oral agreement of a prior written agreement is enforceable, especially where the parties act in reliance on it, as Frederick did by advancing costs from his own funds.

2. The August 31, 1994 written fee agreement is clear and unambiguous. Admission into evidence of the pre-contract discussions on August 17, and proposal letter of August 18, 1994, as evidence of the agreement between the parties, was a patent violation of the extrinsic evidence and parol rule, which is the substantive law of this state. This constitutes fundamental error.

3. The Bar must prove its case by clear and convincing evidence. However, the clear and convincing evidence is that the non-refundable retainer of $18,000 was paid and received for that

purpose. As such, that fee was earned when paid and deposit of that fee into a trust account is neither required nor appropriate. *Fla. Bar Opinion 93-2.* The Referee erred in his conclusion that the $18,000 paid was designated for costs and required to be held in trust. It was *unlawful* and *unjust* for the Referee to have concluded that the $12,500 earned retainer returned should have been returned by Frederick, after his discharge, and it is grossly unjust to require that the $5,500 fee retained should be paid by Frederick ,to the Florida Bar Client Security Fund. This constitutes a forfeiture and unjust enrichment.

4. Including an agreement in a release, that the clients would not pursue a complaint to The Florida Bar, was invalid and inappropriate, but not an ethical violation under the circumstances. It was done in the face of threatened litigation and settlement of the issues, and with the full knowledge of the clients that it was unenforceable. Indeed, it was their admitted intent not to comply, and after getting the $12,500 refund, proceeded with the complaint and malpractice action, despite having agreed not to do so to obtain the remaining $5,500. Although including such a claim is ill-advised, it does not prejudice the administration of justice, and constitute an ethical violation

under the circumstances surrounding this case. No rule cited or exists that makes this a violation.

5. Frederick earned and was entitled to keep his non-refundable retainer, despite his discharge. He also had done nothing improper when discharged. There was no ethical violation to report to the Bar, and none occurred or was ever found. The clients engaged in threats to extract money from Frederick which he did not owe. Their execution of the release to obtain the money and then proceed was at the very least, in bad faith. It is inappropriate for the Florida Bar to pursue a disciplinary action for the benefit of a client in a dispute with a lawyer over a fee, particularly in a case like this. The Bar must be ever vigilant not to do so, especially when the clear and convincing evidence does not support a bona fide prosecution. Costs of this proceeding and attorney's fees should be taxed against The Florida Bar.

V. ARGUMENTS

POINT ONE: THE REFEREE COMMITTED FUNDAMENTAL ERROR IN CONSTRUING THE TERMS OF A VALID UNAMBIGUOUS WRITTEN AND EXECUTED FEE AGREEMENT BY:

A. CONSIDERING AND APPLYING EVIDENCE OF PRIOR ORAL AND WRITTEN NEGOTIATIONS TO VARY THE TERMS OF THE WRITTEN AGREEMENT

B. IGNORING THE PROBATIVE EFFECT OF A LATER ORAL AGREEMENT WHICH MODIFIED AND ELIMINATED THE COST ADVANCE REQUIREMENT OF THE

WRITTEN AGREEMENT AND THE LAWYER ACTED IN RELIANCE THEREON.

POINT TWO: THE REFEREE'S DECISION TO REQUIRE THE LAWYER TO PAY THE BALANCE OF HIS EARNED FEE OF $5,500 TO THE CLIENT SECURITY FUND AFTER THE REMAINING $12,500 HAD BEEN PAID, WAS UNJUST, UNLAWFUL AND CONSTITUTED A FORFEITURE AND UNJUST ENRICHMENT.

POINT THREE: INCLUDING CLIENTS' AGREEMENT NOT TO COMPLAIN TO THE BAR IN RELEASE, WHERE NO UNETHICAL CONDUCT OCCURRED, IS NOT A VIOLATION.

* * * * * *

POINT ONE: THE REFEREE COMMITTED FUNDAMENTAL ERROR IN CONSTRUING THE TERMS OF A VALID UNAMBIGUOUS WRITTEN AND AGREEMENT BY:

A. CONSIDERING AND APPLYING EVIDENCE OF PRIOR ORAL AND WRITTEN NEGOTIATIONS TO VARY THE TERMS OF THE WRITTEN AGREEMENT.

The Bar, in the proceeding below, not once argued or even implied that the written fee agreement dated August 31, 1994 was not perfectly clear and unambiguous. The agreement[5] plainly states that the clients were obligated to pay the non-refundable retainer which at all times was $2,000 from each man.

The written agreement also clearly required an additional advance cost deposit of $8,000 from the group, which followed the requirement for the $20,000 non-refundable retainer fee. Of the

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[5]Although the agreement, provided for a $20,000 non-refundable retainer at $2,000 from each of the expected 10 participants, 1 man declined, and Frederick agreed to proceed with just the 9 and the $18,000 retainer fee paid. The cost advance requirement was later dropped, also at the clients' request.

anticipated 10 clients, only 9 paid their $2,000 non-refundable retainer. There was absolutely no question as to what this payment was for - - the non-refundable retainer.

It was not until the Bar introduced Frederick's earlier August 17,1994 initial proposal letter and related pre-contract testimony, about discussions on August 17th,that the fee and cost issue became confused. (A 2) In that letter there was a mention of a $5,000 cost deposit which nowhere appears in the clear written agreement. The Bar's sole thrust was that this initial meeting and proposal letter, which occurred two weeks earlier, constituted the actual agreement for payment of costs. Pursuit and use of this tactic at the final hearing totally confused the issue, as well as the former clients who testified. Fortunately, their prehearing testimony was not so confused. It became obvious that the persistence of these men, in insisting that the $5,000 figure set forth in their earlier letter, was the agreement, was to support their contention that it was for costs and should be returned. It was clear, however, that the full $18,000 paid was only for fees.

The irony of the Bar's contention is that all clients agreed that the cost advance requirement, whether in the proposal letter or written agreement, was modified and eliminated several weeks later at the Bay County Courthouse meeting. As a result, no costs

were due and none were paid under any circumstances. Frederick thereafter acted in reliance on the modification and advanced substantial costs and expenses, to his substantial financial detriment.

The clear and unambiguous terms of the August 31, 1994 written fee agreement and the parol evidence rule were the direct focus of Frederick's Motions for Judgment on the Pleadings or alternatively, for Summary Judgment before trial. (A 9) The motion, however, was denied and it became apparent during trial, that the Bar was solely relying on the earlier negotiations and the August 18, 1994 letter, as the basis for the prosecution. Prompt objections were made on the basis of the extrinsic or parol evidence rule. These repeated objections, however, were consistently overruled.

1. EXTRINSIC AND PAROL EVIDENCE RULE

Oral or extrinsic evidence occurring or existing prior to execution of a valid, clear and unambiguous written agreement, which is repugnant or tends to vary or modify the written agreement, is inadmissible to vary the terms of that agreement. *J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484, 485 (Fla. 1957); *Mastry v. St. Petersburg Bank & Trust Company*, 185 So.2d 481 (Fla. 2d DCA 1961); *Presoctt v. Mutual Beneficial Health*

& Accident Assoc., 133 Fla. 510, 183 So.2d 311 (1938). This rule is known as the parol or extrinsic evidence rule. *Atkins v. Bianchi*, 162 So.2d 694 (Fla. 1st DCA 1964). All prior verbal, parol or written (extrinsic) evidence which conflicts with the unambiguous terms of a valid agreement, is deemed to be waived, and considered merged into the written agreement. *Jacksonville Paper Co. v. Smith & Winchester Mfg.*, 114 Fla. 311, 2 So.2d 890 (1941); *Windowmaster Corp. v. Jefferson Construction Co.*, 114 So.2d 626, 628 (Fla. 3d DCA 1959); *Monumental Life Insurance Co. v. Commonwealth Land Title Insurance Co.*, 435 So.2d 975 (Fla. 3d DCA 1983), *Prescott, id.*

Where the parties deliberately state their agreement, in a clear and unambiguous writing and in such terms that import a legal obligation without any uncertainty, it is conclusively presumed that the entire agreement is contained therein. *Ross v. Savage*, 66 Fla. 106, 63 So. 148 (1913). This rule prohibits the use of prior parol or extrinsic written evidence to vary, defeat, or modify a complete and unambiguous written instrument. *Sears v. James Talcott, Inc.*, 174 So.2d 776 (Fla. 2d DCA 1965). The parol evidence rule is not merely a rule of evidence. It is a *substantive* principle of law which serves to shield valid, complete and

unambiguous written instruments from collateral attack based on prior negotiations, statements and perceptions. *Knabb v. Reconstruction Finance* Corp., 144 Fla. 110, 197 So.2d 7087 (1940); *Atkins v. Bianchi*, 162 So.2d 694, 697 (Fla. 1st DCA 1964) which held:

> While the parol evidence rule has been variously stated in different decisions, a succinct statement of the rule is that parol evidence is inadmissible to vary the terms of a valid written instrument. *J. M. Montgomery Roofing Co. v. Fred Howland, Inc.*, 98 So.2d 484 (Fla. 1957) as we pointed out in *Paradise Beach Homes, Inc. v. South Atlantic Lumber Co.*, Fla.App., 118 So.2d 825 (1960), this rule is not a rule of evidence but of substantive law, and it rests upon a rational foundation of experience and policy and is essential to the certainty and stability of written obligations.

In summary, each of the clients paid his $2,000 non-refundable retainer fee to Frederick. It was earned when paid and Frederick quite properly accepted and used it as his fee. He had no obligation to deposit it in trust, and as stated in the Bar's *Ethics Opinion*, should not have done so. (*infra* page 20) None of the clients paid anything toward the $8,000 cost deposit, and at their request, the cost requirement was eliminated. Frederick has never received any payments in excess of his earned retainer fee. The Bar's prosecution and Referee's recommended finding of guilt are totally without foundation and should be rejected.

POINT ONE: THE REFEREE COMMITTED FUNDAMENTAL ERROR IN CONSTRUING THE TERMS OF A VALID UNAMBIGUOUS WRITTEN AND AGREEMENT BY:

B. IGNORING THE PROBATIVE EFFECT OF A LATER ORAL AGREEMENT WHICH AND ELIMINATED THE COST ADVANCE REQUIREMENT OF THE WRITTEN AGREEMENT AND THE LAWYER ACTED IN RELIANCE ON THE MODIFIED AGREEMENT THEREON.

The evidence in the case, *sub judice*, clearly establishes that no money was ever paid by the clients which was intended or received by Frederick as costs. It was received as a non-refundable retainer fee and he *should* not have deposited it in a trust account. *Fla. Bar Ethics Opinion* 93-2, October 1, 1993. (A 9) To the contrary, after paying their $2,000 non-refundable retainers, the clients' written obligation to pay the additional sum of $8,000 as a cost deposit, became a problem, and the clients paid no money for costs at all. Indeed, one of the 10 who agreed to proceed with the litigation under the August 31, 1994 agreement dropped out.[6]

Seven of the men, speaking for the group, met with Frederick, who had been requesting payment of the cost deposit, to discuss the matter at the Bay County Courthouse several weeks later. The group

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[6] This is doubtless the reason the group only wanted Barnes and Jones to sign the agreement, because of the uncertainty of others, as to whether or not they wanted or could afford to proceed on that financial basis.

complained of the cost requirement. Some could not afford it, and others felt they could find a lawyer in South Florida, who would agree to a better deal, and advance costs. Frederick then agreed to eliminate the required cost deposit, advance the necessary litigation costs and expenses, on the contingency that he would be reimbursed out of any recovery ultimately obtained. Frederick also accepted the non-refundable retainer paid of $18,000 by the remaining 9 men, instead of the $20,000 required by the written agreement, and everyone seemed happy.

Parties to a written contract may subsequently modify that contract by later oral agreement. *11 Fla.Jur. 2d* Contracts §162, *Restatement*, Contracts §407, *Spann v. Baltzell*, 1 Fla. 301 (1847) This is particularly true where the modification has been accepted and one party acted in reliance thereon, as did Frederick, by advancing the costs from his own separate funds. *Tussing v. Smith*, 125 Fla. 578, 171 So. 238 (1936). This case classically illustrates that legal principle.

1 - A NON-REFUNDABLE RETAINER FEE IS EARNED WHEN PAID AND SHOULD NOT BE DEPOSITED IN TRUST

Bar Ethics Opinion 93-2, October 1, 1993

The August 31, 1994 written fee agreement provided for a payment of a non-refundable retainer fee of $20,000 from the 10

members of the group who agreed to proceed with the action. One man dropped out, but each of the remaining nine paid his non-refundable retainer to Frederick. The $8,000 cost deposit, became a problem, because no one paid it, and, it was eliminated by mutual oral agreement modifying the contract, as requested by the clients. At the meeting in the Bay County Courthouse several weeks after the written agreement was executed.

At that point, the clients had only paid $2,000 each, for a total of $18,000. There was no longer an obligation of the clients to pay any costs. None had been and none were paid. Frederick had no obligation to deposit any money into a trust account, since this was in payment for his "earned fee." Frederick advanced all necessary costs and expenses from his own funds, as he had agreed at the courthouse meeting. Frederick's inadequate accounting, although certainly not commendable, operated to his financial disadvantage and the clients' advantage. This never became an issue because Frederick was discharged before he could collect it. This was a bitter, but perhaps appropriate, lesson learned by Frederick from this experience.

A timely Professional Ethics Opinion, 93-2, was rendered by the Bar Committee on October 1, 1993. (A 9) It clearly defines the non-refundable retainer received by Frederick as a "true

retainer." At page 3 it states: "the 'true retainer' is, therefore, *earned upon receipt and should not be deposited in the trust account.*" Citing Drinker, *Legal Ethics*, at 172; 7 *Am Jur 2d*, Attorneys at Law, §245, at 286, the Committee defined a retainer directly quoting 7A *CJS*, Attorney and Client, §282, at 522 as follows:

> A retaining fee is a preliminary fee given to an attorney or counsel to insure and secure his future services, and induce him to act for the client. It is intended to remunerate counsel for being deprived, by being retained by one party, of the opportunity of rendering services to the other and of receiving pay from him; and the payment of such Its payment has no relation to the obligation of the client to pay his attorney for services which he has retained him to perform. [Footnotes omitted.]
>
> A fee that a lawyer and client have clearly agreed (preferably in writing) is non-refundable should be considered as earned by the attorney upon receipt, even though the attorney might not yet have performed all of the contemplated services . . . .
> Because the payment is described as a non-refundable fee, it appears that client and lawyer intend that the money is to be the lawyer's, regardless of what happens thereafter, even though it is anticipated that the money would ultimately be applied to the complete fee for legal series. Such payment is not subject to refund whether or not the lawyer actually has to perform the legal services contemplated.

Opinion 93-2 also defines a non-refundable retainer as a "true

retainer" fee. The Committee then states, at page 1253:

> In essence, a "true retainer" is akin to an option contract: the client pays the attorney a fee for the right to employ the attorney. The "true retainer" is therefore *earned upon receipt and should not be deposited in the trust account."*

POINT TWO: THE REFEREE'S DECISION TO REQUIRE THE LAWYER TO PAY THE BALANCE OF HIS EARNED FEE OF $5,500 TO THE CLIENT SECURITY FUND AFTER THE REMAINING $12,500 HAD BEEN PAID, WAS UNJUST, UNLAWFUL AND CONSTITUTED A FORFEITURE AND UNJUST ENRICHMENT.

It seems clear that the Referee *erred*, in finding that any of the $18,000 paid to Frederick was for costs. He has, in effect, ruled, that the entire $18,000 should be refunded, by requiring Frederick to pay the balance of his fee of $5,500 to the Clients Security Fund. This latter ruling s clearly *unlawful* and *unjust*, particularly given the circumstances of this case.

Frederick had done nothing wrong when he was terminated after 15 months. He clearly had earned this non-refundable retainer fee, had received no money for costs, but had advanced substantial costs and expenses, in reliance upon the oral modification. The fact that he had done nothing wrong when terminated in November 1995, is indicated by the fact no charge was made (other than the claim the fee should have been paid into trust), or evidence presented of any misconduct, based on competent evidence.

The clients, in an unusual move, with outside advice from other lawyers, and under paralegal Tikel's guidance, engineered and executed a ruthless plan to extract $12,500 from Frederick's earned non-refundable retainer fee. The clients were fully aware: of Frederick's sensitivity to a threat of a Bar complaint; that the related agreement in the release was unenforceable; and that they had no intention of honoring the release provisions.

With this knowledge and intent they accepted Frederick's $12,500 check as consideration for the release, and promptly announced they would see him at the Bar with a complaint. Frederick, made no effort to dissuade them nor to stop payment on the check. Despite their admitted intent, the Referee ordered Frederick to pay the remaining balance of his earned retainer fee of $5,500 to the Bar's Client's Security Fund. the injustice is obvious.

We are very concerned about the manner in which the clients have handled this matter. Our grave concern, however, is that the Bar, has used the disciplinary process to accomplish their aim.

This case, squarely brings into focus comments made by Henry Trawick, Jr., in his fine treatise, *Trawick's Florida Practice and Procedure*, 1997 Edition, §4-14, at page 59:

> A recent disturbing development is the increase of grievance complaints by litigants during the lawsuit in an effort to exert disciplinary pressure to obtain legal relief. The Florida Bar actively participates with litigants and their lawyers in this form of pressure. most of the complaints are sham, but it is a method of creating a conflict between lawyer and client. It is a reprehensible practice and should not be condoned. A lawyer who is subjected to a grievance complaint must obtain independent counsel. The disciplinary department of The Florida Bar (1) deems every lawyer to be unethical; . . . (3) will use the lawyer's explanation to find him unethical if possible while his attorney's responses cannot be so used; and (4) are not ashamed to use the prejudiced testimony of fired or disgruntled employees. In short, the lawyer is guilty until he proves otherwise.[20]
>
> 20. . . . Many times a party threatens a lawyer with a grievance unless he does something the party wants. *The Florida Bar eagerly cooperates in what would be extortion in any other case. A more unfair proceedings than a grievance does not exist.* (Emphasis ours)

We join Henry Trawick in expressing our deep and angry concern over the prosecutorial and conviction-minded attitude of the Bar, as revealed in this prosecution. If this philosophy continues unabated, the noble purpose of the Florida Bar's disciplinary process will be thwarted, undermined and lost. Instead of protecting innocent citizens from unscrupulous and unethical lawyers, innocent lawyers will be prosecuted for the financial gain of a few

unscrupulous citizens, who use the Bar disciplinary process *gratis*, at the ultimate expense of the lawyers who fund the Bar.

It offends one's principles of equity and justice, under these circumstances, to realize that Frederick has incurred great expense in defense of these charges and now faces 91 days suspension, required proof of rehabilitation, followed by three years' probation, and payment of the $5,500 to the Client Security Fund, and $8,282.86 in costs to the Bar. This is a multiple insult to the fundamental principles of justice and equity. Even more shocking, is the fact that this result is sought to be accomplished in a proceeding before this Court.

POINT THREE: INCLUDING CLIENTS' AGREEMENT NOT TO COMPLAIN TO THE BAR, WHEN NO MISCONDUCT OCCURRED IS NOT A VIOLATION

Until Frederick considered withdrawing from the case, the group was perfectly pleased with his representation Frederick's paralegal, Tikel had been assigned to the case from its inception, and worked closely with the clients. In November 1995 Tikel was planning to leave to work for another lawyer because she became very angry with Frederick over a salary dispute. At this time, Frederick was considering withdrawing as counsel of record for the group, and had drafted an unsigned letter to that effect he was considering sending. Before he could decide, however, according to

one of the team leaders, Dunklin, she took a copy of the draft to the leaders.

The group became upset and Barnes had several angry telephone conversations with Frederick, in which he demanded return of the fee. Tikel, during this time, was advising the clients, without Frederick's knowledge.[7] She convinced them to terminate Frederick and demand a return of the $18,000 fee, which Frederick declined, because he had earned it and incurred substantial costs and expenses. In fact he had almost paid that amount to Tikel as salary for her work on the case. Tikel had told Dunklin and the other leaders that she was leaving to work for another lawyer, and without her, Frederick would "fall on his face." The group, however, had total confidence in Frederick as being "the best" and appreciated his "fantastic staff." Tikel urged them to terminate Frederick, demand the money, and she could take the case with her to her new employer, who could be paid a retainer. (A 3 p.9)

During the brief negotiations in November 1995, Tikel coached the group leaders on how to terminate Frederick and get their money back, by threatening to complain to The Florida Bar and suing for

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[7]The group also had the independent advice of several lawyers at the time, including the successor lawyer and a lawyer who is a sister of one of the group.

malpractice. Specifically, she suggested that they get as much money back as they could, in consideration for signing the release in which they agreed not to pursue a Bar complaint and malpractice. After they got the first payment of $12,500, she counseled them to repudiate the agreement, demand the $5,500 balance or threaten to complain to the Bar and sue for malpractice. (A3 p.9-13)

That is precisely what occurred. Frederick agreed to return $12,500.00 of the fee and ill-advisedly included in the release the provision that a complaint would not be filed or, if filed, would be withdrawn by the clients. Frederick concluded, that he had not done anything improper or unethical. In fact, Frederick had not done anything that would constitute professional "misconduct" which would violate rule 4-8.4(d) for several independent reasons, which will next be discussed.

Rule 4-8.4(d) Addresses Discrimination In A Judicial Proceeding

This charge, conduct prejudicial to the administration of justice (Rule 4-8.4), is directed to Frederick's placement of the clients' agreement, not to pursue a complaint to the Bar, in the release. The Bar is contending that Frederick violated this rule by trying to discourage a report to the Bar. Even assuming Rule 4-8.4(d) was designed to fit this situation, which it is not,

this rule requires that the conduct be "knowingly, or through callous indifference." This means that to be guilty of a violation, Frederick must have knowledge that he was guilty of improperly using his clients' trust money and was attempting to *cover up* this misconduct to avoid the consequences. We have established, however, that no misconduct or trust violation occurred, because the $18,000 was a fee earned as a matter of law, as stated in *Florida Bar Ethics Committee Opinion* 93-2, page 20 *supra*.

The rule, under which Frederick was prosecuted and guilt recommended, is designed to prohibit lawyers from engaging in racial, sexual or other discriminatory conduct against any other participant in a judicial proceeding administering justice. Rule 4-8.4(d) states:

> A lawyer shall not . . .
>
> engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic;

We cannot imagine how this rule applies to the facts of this case. It was plain *error* to have made such a finding and recommendation.

4-8.3 REPORTING PROFESSIONAL MISCONDUCT

Since Rule 4-8.4(d) does not apply, we submit that another rule was designed to directly address required reports of misconduct to the Bar. This rule, 4-8.3(a), is entitled "Reporting Professional Misconduct," and is much more to the point, but is also patently inapplicable. Specifically, we are not aware of a rule that requires an errant lawyer to report his own misconduct, to the Bar.[8]

Rule 4-8.3 provides:

> **(a) Reporting Misconduct of Other Lawyers.**
> A lawyer *having knowledge* that *another lawyer* has *committed a violation* of the Rules of professional Conduct that *raises a substantial question* as to that lawyer's *honesty, trustworthiness,* or *fitness* as a lawyer in any other respects *shall inform the appropriate professional authority.* (emphasis ours)

The above *italicized* words emphasize why this rule is

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[8] It has been, however, the undersigned's practice, for many years, to encourage lawyers who have committed violations to do so on their own notion or through the undersigned. *The Florida Bar v. Daniel C. Perri*, 435 So.2d 827 (Fla. 1983); *The Florida Bar v. Jon Wilkins Searcy*, Case #92,464, decided March 26, 1998.

inapplicable. We assume that we are correct in our interpretation of Bar Opinion 93-2 is applied to the facts of this case. Frederick was perfectly correct in treating the $2,000 paid by each of the 9 participating clients, for a total of $18,000, as a non-refundable retainer. He received no other money. A non-refundable retainer, is a "true retainer" fee, is earned when it is received and should not be deposited in a trust account.

We apologize for repetition, but believe it is justified, in the context of this rule.

First, borrowing words from the rule, Frederick clearly had no "*knowledge*" that he had "*committed a violation.*" Without this there is no obligation, albeit reason to report misconduct to the Bar.

Second, the rule applies only to "*another lawyer.*" A lawyer has no duty to report himself to the Bar..

Third, there seems to be no questions, if our analysis is correct, that there is any question, much less "*substantial questions*" as to this "*lawyers honesty, trustworthiness, or fitness*" in this matter.

Fourth, absent all of these essential elements, there is no duty or reason to report this matter to the Bar.

This brings us to the final question: "Did Frederick commit a violation of the rules, in the midst of this dispute, by including the agreement in the release that the clients would not pursue a complaint to the Bar?" We submit clearly, he did not, for reasons set forth above, which do not bear repetition.

VI - CONCLUSION

The Referee's findings and recommendations should be rejected in their entirety. There was no violation of the rules regulating the handling of cost advances and money which should be held in trust. The findings and recommendations were based on an *erroneous* and *unlawful* violation and disregard of the parol and extrinsic rule which is substantive law of Florida. Likewise, there was patently no violation of Rule 4-8.4(d), discrimination in a judicial proceeding. The rule directed to a lawyer's duty to report misconduct to the Bar was not mentioned, and also does not fit.

The recommended discipline also should be entirely rejected. Particularly the required payment of $5,500 to the "*Bar's Client's* Security Fund,"[9] which is grossly *unjust*.

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[9] With apologies for what appears to be sarcasm, reference to the "Bar's Client's Security Fund" is a coincidental, but accurate characterization of the ultimate effect of the proceeding below, which was grossly abused by the clients to obtain this unjust

Respondent-Appellant's Motion for Attorney's Fees and Taxation of Costs will be addressed separately in that motion.

B - THE MCCORVEY CASE (#90,387)

I - STATEMENT OF THE CASE AND FACTS

The McCorvey matter involved a finding that Frederick directed his employee, disciplinarily resigned attorney William D. Barrow ("Barrow"), to have direct client contact, contrary to Rule 3-6.1(c), and failed to reasonably familiarize himself with the scope of Barrow's permissible activities. Rule 4-5.3(a) and (b). The issues can be stated as follows:

The contact complained of consisted of 21 telephone calls taken by Barrow, in Frederick's absence, the substance of which was contemporaneously memorialized and conveyed to Frederick. Responses from Frederick were either from him by telephone, or messages conveyed through Barrow to McCorvey, who was located in and New Mexico. Frederick contends Rule 3-6.1(c) is vague and does not define direct client contact, but acknowledges this is a close question.

Frederick admits not adequately researching the rule in advance, and relying on Barrow's two telephone conversations with

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result.

the Bar, followed by Frederick's call about Barrow's employment and activities. Frederick contended that, under the very unusual circumstances of the case, Barrow was the only person who was willing to accept McCorvey's long-distance calls because of his vile and abusive language. Had Barrow not done so when Frederick was unavailable, a serious communications problem would have developed.

Frederick operates his one-man trial practice from Destin, and his daily practice extends from Panama City to Pensacola, a distance of 100 miles. The scope of his practice varies from domestic and personal injury litigation and state administrative and federal litigation. He is frequently out of his office attending depositions, hearings and trials, but maintained a staff of 9 people to operate his office.

In March 1996, Frederick was approached by William Dean Barrow, a disciplinarily resigned attorney, for employment. Barrow, was a former judge, state senator and practicing lawyer who had practiced in the Crestview-Fort Walton Beach area for many decades. Barrow had been convicted of a crime (money laundering), had served his time, and was making a serious effort toward rehabilitation. He was very active in his church and community and wanted to be close to the practice of law, in the hope of someday

being readmitted to practice.

Frederick hired Barrow to assist in office work and as a paralegal. Before doing so, however, Frederick instructed Barrow to discuss the matter with the Bar, and determine the permissible scope of his activities. Barrow did so, obtained a package of material from the Bar, and reported back to Frederick. Frederick then called the Bar and confirmed that Barrow had in fact called. The information package received from the Bar was misplaced and another package was requested and received.

Neither Barrow nor Frederick had become aware of Rule 3-6 entitled "Employment of Certain Disciplined Attorneys." Rule 3-6.1(c) provides:

> **Generally.** When attorneys have been placed on the inactive list, suspended, disbarred, or allowed resignation pursuant to Rule 3-7.12 by order of this Court, they are ineligible to practice law until reinstated or readmitted. However, this shall not preclude a lawyer, law firm, or professional association form employing the suspended, disbarred, or resigned individual to perform such services only as may be ethically performed by other lay persons employed in attorneys' offices under the following conditions:
>
> . . .
>
> (c) **Client Contact.** No suspended, resigned, or disbarred attorney shall have *direct contact with any client* or receive, disburse,

or otherwise handle trust funds or property.[10]

Frederick represented an out-of-state client in a Pensacola post-judgment domestic proceeding involving custody of his children. The client, Simp McCorvey, was wildly furious with the trial judge, whom he constantly cursed, and directed slanderous, vicious and despicable remarks toward. McCorvey was totally disgusted with the judicial system, judges, his prior lawyer and lawyers in general. He had been held in contempt for his open courtroom misconduct.

He frequently called Frederick's offices, and cursed and degraded the office staff in a cruel and vulgar manner. He reduced some of Frederick's female staff to tears and infuriated the others to the point that all refused to take his calls and continued verbal abuse. Near the end of the relationship, McCorvey threatened Frederick's life and the lives of his family, and thereafter complained to the Bar.

McCorvey did not testify at trial, but his history of abuse and conduct was so bad, the Referee did not want to accept Frederick's offer of his letters into the record. McCorvey's

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[10]This rule was modified this year in an effort to define its scope, but not sufficiently to effect the case *sub judice*.

complaints against Frederick did not survive the Grievance Committee, except the Bar's present complaint, which arose during the hearing, when the committee, on its own motion, learned of the telephone conversations between McCorvey and Barrow.

McCorvey persistently berated the trial judge, particularly after losing the post-judgment proceeding to get custody of his son. He wanted to appeal and expose the trial judge for "expected corruption (and) cover up." In one letter, he accused the judge of "encouraging his (the judge's) Team members to submit fraudulent documents and testimony in order that he could hide behind their dress and issue out his predictable orders." He also concluded that he had "forced (the judge's) Team to admit that they had willfully submitted fraudulent documents and testimony that lead to the (judge's) Team holding their secret December 20, 1994 hearing where they held me in contempt of their December 12, 1994 order that they both knew I did not have or have any knowledge of 1700 miles away in New Mexico." (A 6)

He micro-managed the case and insisted that it be included in the appeal that "the (judge's) Team conspiracy with (judge #2) where on January 4, 1996 my son was kidnapped and that I received their illegal ex parte order at 10:00 p.m. on January 4, 1996 and the conspirators started to hold their contempt hearing on January

5,1996 at 9:00 a.m. and was conducting their illegal hearing before I arrived. In this hearing where I was arrested by the (judge's) Team." (A 6)

The problem exacerbated to such an extent that none of the ladies on the office staff would speak with McCorvey and take his abuse any longer. Barrow then volunteered, in order to maintain necessary communication with the client. In this process, when Frederick was not available, Barrow's sole function was to convey messages by written memos to Frederick, for discussion and response.

It was admitted at the hearing that Frederick had not properly researched or read Rule 3-6.1. It was agreed that the rule was overly broad and vague. It was also argued that there was no direct contact between Barrow and McCorvey, because all calls were memorialized and no advice was given, or requested by McCorvey. All calls were either the subject of inquiries, complaints or instructions on how the case should be handled, because McCorvey did not trust lawyers, or anyone for that matter. It was also admitted that Frederick had knowledge of the calls, and a few return calls were made by Barrow at his request.

The Referee found violations of Rules 3-6.1(c), in that the telephone conversations constituted "unsupervised client contact"

which constituted "direct contact" prohibited by Rule 3-6.1(c). It should also be noted that the Referee did not direct a particular sanction to a specific violation in either the Barnes or the McCorvey cases.[11] The sanctions were lumped into a universal sanction of suspension for 91 days and thereafter until proof of rehabilitation, three years' probation, CLE and special training with Law Partner, Inc., repayment of the remaining Barnes fee ($5,500.00) and costs of $8,282.86. (A 3 p. 4)

IV - SUMMARY OF ARGUMENT

MCCORVEY CASE

Frederick's failure to adequately research and carefully determine the permissible scope and limits of Barrow's activities, was wrong and not excusable. No harm resulted, because of the unusual nature of McCorvey's conduct and expressions of anger directed to the courts, judges and lawyers. Unfortunately, by his abuse, he eliminated all of Frederick's staff to respond to his calls, except Barrow, when Frederick was not available.

Barrow's response and activities under those circumstances, seemed in line, if this contact was not in and of itself a

[11] Nor was he asked by counsel to do so.

violation. Barrow merely served as a telephone conduit between McCorvey and Frederick, and carefully memorialized each message for Frederick and the file. Unfortunately, because of the Referee's concern, that Barrow's employment was an aggravating factor, Barrow lost his job and opportunity for rehabilitation.

Rules of conduct that when violated place a lawyer's license to practice in jeopardy, should be as clear and precise as circumstances allow. In this instance, it is a difficult or impossible task to define with accuracy and particularity. In that instance, only clear violations should be prosecuted, and substantial weight given to damage or injury resulting therefrom.

We submit a rule prohibiting any contact between a disciplined lawyer and a client with or without supervision, that constitutes the unauthorized practice of law might suffice. In any event, we ask that Frederick's punishment be limited to the opinion published by this Court in this case.

III - ARGUMENT

POINT ONE: RULE 3-6.1(c) IS OVERLY BROAD AND VAGUE

Rule 3-6.1(c) is overly broad and vague, as in part illustrated by the facts of this case. We do not challenge the Referee's finding that Frederick failed to make a reasonable effort

to initially familiarize himself with acceptable parameters of Barrow's activity. We feel, however, that Frederick's negligence in not researching the rule resulted in no harm to the client. Indeed, this was necessary during Frederick's unavailability, because, due to McCorvey's irrational and vile abuse, no one else would talk to him. Even Barrow eventually expressed an unwillingness to have any "more *person-to-person* dealings with the man."[12] Had Barrow not accepted these calls, McCorvey's reaction would have been unpredictable.

Rules governing the professional conduct of members of the Bar, violation of which may result in jeopardizing our hard-won privilege to practice law, should be as definite, specific, clear and unambiguous as possible. Hair trigger and imaginative prosecutions by the Bar, as illustrated by these cases, are dangerous, expensive and can irreversibly damage a lawyer's reputation, when lawyers are already in low esteem in the eyes of the public. Rules of conduct that may put a practicing lawyer's license at risk should be as clear, precise and unambiguous as the circumstances permit. With all due respect to this Court and the

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[12] The Referee relied heavily on Barrow's statement "person-to-person dealings" in concluding that he had "direct contact" with the client. (A 3 p.2, paragraph 6).

Bar, we submit that Rule 3-16.1(c) falls short of that aim, as applied to this case and the unusual surrounding circumstances. We admit this is a close question, but it is of critical importance , not only in resolving this case but to the Bar in general.

Affording employment to a disciplined lawyer, who wants to stay close to the law so he can someday hopefully, resume his lifetime ambition of practicing law, is an admirable, but dangerous undertaking. The danger of this undertaking is mostly unappreciated by the Bar in general. Most lawyers and firms shy away from associating disciplined lawyers, for fear of damaging their reputation. This fear is real, yet understandable.

We submit, the hiring of a disciplined lawyer is not only a service to that lawyer, but to the disciplinary process as well. It allows him to remain close to the practice of law, so that when he is reinstated, he can make an easier and more effective transition. This falls in line with the guiding disciplinary principle as stated in *The Florida Bar v. Fitzgerald*, 541 So.2d 602, 605 (Fla. 1989), ... "The judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation."

Barrow has, in large part, served his punishment. His

employment with Frederick, in March 1996, was calculated to reacquaint himself with the practice of law, with the ultimate goal of seeking readmission to again pursue his hard-earned dream of practicing law. Unfortunately, his and Frederick's too casual approach, resulted in ending that pursuit.

The painful irony of this tragedy is that Frederick retained Barrow, until it was obvious to him that the Referee considered doing so an "aggravating factor" which was adversely affecting his discipline. In finding this as an aggravating factor, the Referee stated:

> "Respondent had, previous to receiving the above rough draft (of the Referee's report), been placed on notice of the impropriety of Barrow's practices not only by the Bar's complaint, but also by a pre-hearing ruling on this matter filed by this Referee on March 13, 1998. Respondent, by his own admission, took no corrective action in this matter until mid to late April, 1998." (A 3 p. 6q)

Frederick, since learning that he was accused of violating rule 3-6.1(c), more stringently monitored Barrow's activities. It never dawned on him that doing so, this would aggravate and worsen his punishment.

Unfortunately, despite severely limiting Barrow's activities, Frederick concluded from the Referee's report, that retention of Barrow, even in a very limited capacity, was going to

increase his punishment, so he had no alternative than to terminate his employment. This seems to be as cruel a twist of justice as the requirement that Frederick must pay.

However, a rule that is too broad in scope should serve an advisory purpose and not be used to discipline. The Bar, in the proceeding below, in essence, argued that the rule meant, no contact with any client whatsoever, *either direct or indirect*. We do not believe the rule was intended to be that broad. If that were the intent, the word "direct" simply could have been deleted. The rule would have then states "no contact with any client."[13] The rule also could have stated that "*all*" or "*any*" contact between a disciplined lawyer and a client is prohibited.

We think it is reasonable to conclude that by using the word "*direct,*" the intent is to allow "*indirect*" contact with a client." This is the interpretation that would be applicable under the classic principle of construction "*expressio unis est exclusio*

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[13] Compare *The Florida Bar v. Thomson*, 310 So.2d 300, 302 (Fla. 1975) with *The Florida Bar v. Thomson*, 354 So.2d 872, 873 (Fla. 1978) which discusses direct client contact, and the shrinking permissible parameters of a disciplined lawyer's activity. In the latter case, the Court concludes by stating . . . "this Court, in the future, will (not) tolerate direct client contact by a suspended attorney performing lay legal services." Citing *Rule 11.10(7)(3)*, Article XI, *Integration Rule of The Florida Bar*.

alterius," (to express one is to exclude the other).

At the request of the Bar this past spring, Rule 3-6.1 was modified, and the scope of the rule redefined as follows:

> (d) **Client Contact.** No employee shall have *direct contact with any client*. Direct client contact does not include the participation of the employee as an observer in any *meeting, hearing* or *interaction* between a supervising attorney and a client.

With this new definition, a face-to-face meeting between a client and disciplined attorney employee is allowed and the disciplined attorney can participate in the meeting, hearing or interaction, so long as the supervising attorney is present. In the instant case, we have a disciplined employee, merely preparing an accurate memo of the subject matter of a telephone conference and discussing it with the attorney, who was unavailable at the time of the call. In this case, there was a need because none of the ladies in the office would accept the call, we believe with justification.

We wonder whether the reason is a matter of trust, confidence, control or some other consideration? Given the great variety of people, personalities and circumstances, we submit, that judgment and responsibility should be squarely placed in the discretion of the supervising attorney. The attorney then bears that responsi-

bility and will be tested on what constitutes the practice of law. We and respectfully advance this suggestion to the Court.

We suspect that this may well have been the Court's intent when adopting the rule, to vest that discretion in the supervising lawyer. In the event a client is damaged, his case prejudiced, or the disciplined lawyer invades the practice of law - - then, a violation should result in disciplinary action. If this is not the case, perhaps the privilege of a disciplined attorney to work in a legal environment should be eliminated altogether. We submit it is impractical, if not impossible, to design a rule to micro-fit every situation.

We respectfully submit that no harm was done and a warning would be appropriate, such a warning inescapably, must come in an opinion from this Court. In that event, it will serve, if appropriate, as a public reprimand. In any event, it will be of benefit to the Bar and the public.

IV - CONCLUSION

This Court's publication of an opinion squarely addressing the intent and operable scope of Rule 3-6.1(c) [now (d)], would serve a multiple purpose. It would meet the threefold purpose of attorney discipline, announced in *Fitzgerald, id.* and it would

be:

1. Fair to society to protect the public, but not deny its access to a qualified lawyer;

2. Fair to the respondent as punishment for his breach of this rule, yet encourage his reformation and rehabilitation; and

3. Serve as formal public reprimand to Frederick for his negligence in failing to determine the scope of a disciplined lawyer's activities in a law office.

An opinion could also provide a much-needed explanation or redefinition of the intent, scope and purpose of Rule 3-6.1(c). This would protect the public, punish Frederick and serve as a warning and guidance to all lawyers who might employ disciplined lawyers who are seeking rehabilitation and readmission to the Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Second Amended Initial Brief has been provided to Olivia Paiva Klein, Assistant Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 by Overnight Express Mail this 23 day of November, 1998.

CERTIFICATE OF FONT USED

I HEREBY CERTIFY that Courier New, 12 point, was used to prepare this Appellant's Amended Initial Brief.

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