IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Cross-Petitioner,

Supreme Court Case Nos.
91,148 & 91,281

v.

The Florida Bar Case Nos.
96-51,561(17C) &
97-50,410(17C)

DAVID SMITH NUNES,

Respondent/Petitioner.

_____/

ANSWER BRIEF AND INITIAL BRIEF OF THE FLORIDA BAR ON CROSS-PETITION

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CERTIFICATION

Bar counsel certifies that this brief has been prepared in Times New Roman 14 point type.

STATEMENT OF THE CASE AND OF THE FACTS

David Smith Nunes has a history of disciplinary violations with The Florida Bar. The current proceedings arose while Mr. Nunes was on probation for past violations and one of the current matters, in particular, which shall be referred to as "the Burton case", begins where a prior disciplinary proceeding ended. A brief recitation of this history is necessary for an understanding of the current matters.

As noted by the referee, Mr. Nunes has received a private reprimand, two public reprimands, and two suspensions. RR 15-16. The private reprimand, being more than seven years old was not taken into account by the referee for the purpose of assessing discipline. By order dated October 26, 1995, in case number 84,097, Mr. Nunes received a public reprimand, ten day suspension, and 18 months probation for communication with a person represented by counsel and for conduct prejudicial to the administration of justice.[1] RR 15. By order dated July 18, 1996, in case number 85,451, Mr. Nunes received a 90 day suspension and one year probation to run concurrent with the probation ordered in case number 84,097 for incompetence, lack

[1]*The Florida Bar v. Nunes*, 661 So.2d 1202 (Fla. 1995).

of appropriate client communication, and charging a clearly excessive fee.[2] RR 15. By order dated December 19, 1996, in case number 89,065, Mr. Nunes was publicly reprimanded for contempt of this Court for his failure to properly notify his clients of his suspension in case number 85,451.[3] RR 15-16.

The current proceedings arose while Mr. Nunes was on probation for his conduct in case numbers 84,097 and 85,541. Case number 85,541 concerned two separate immigration matters involving clients Gloria and Leon Burton and client Dennis Whynes. On about October 18, 1995, the referee rendered his report in these cases which found Mr. Nunes guilty of having failed to competently represent the Burtons, of having failed to properly communicate with the Burtons, and having charged a clearly excessive fee. RR 6. The referee also recommended that Mr. Nunes be found guilty of incompetent representation in the Whynes matter. RR 6. The referee's recommendations were approved by this Court on July 18, 1996 and various post-trial motions by Mr. Nunes were denied at that time. RR 6. On September 12, 1996, this Court denied Mr. Nunes' motion for rehearing, emergency motion for stay of suspension order and motion to reopen hearing before the referee. RR 6. On September 26, 1996, October 30, 1996, and March 7, 1997, this Court denied various

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[2]*The Florida Bar v. Nunes*, 679 So.2d 744 (Fla. 1996).

[3]*The Florida Bar v. Nunes*, 687 So.2d 1307 (Fla. 1996).

other post-decision motions by Mr. Nunes as outlined in the Report of Referee RR 6-7. Nunes then filed numerous federal court petitions in an effort to prevent his suspension from taking place or in an effort to overturn the decision of this Court. RR 7. Mr, Nunes was unsuccessful in the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit. *See,* RR 7. Ultimately, Mr. Nunes' petition for a writ of certiorari to the United States Supreme Court was denied by order dated March 31, 1997.[4] RR 7.

Subsequent to this Court's decision in case number 85,541, Mr. Nunes filed lawsuits against Leon and Gloria Burton, Jeffrey N. Brauwerman and Bruce Marmar (who testified for The Florida Bar in case number 85,541), and The Florida Bar. RR 7. Despite having been disciplined by this Court for incompetent representation, improper client communication, and charging a clearly excessive fee to the Burtons, the lawsuit against them claimed entitlement to quantum meruit and that the Burtons had been unjustly enriched by the same services which had resulted in discipline. RR 7. The lawsuit, which was one of the subjects considered in the current referee proceedings, sought damages from the Burtons for lost income during the period of Mr. Nunes' suspension. RR 8. Mr. Nunes admitted that he sued the Burtons for $432,000 calculated as ninety days (the period of his suspension) times twenty-four hours a day

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[4]*Nunes v. Florida Bar*, 117 S.Ct. 1336 (1997).

times two hundred dollars per hour. T 95. This lawsuit was filed in about November 1996, RR 8, and at that time, Nunes was still on the 18 months probation ordered on October 26, 1995, in case Number 84,097 and still on the one year probation ordered on July 18, 1996, in case number 85,451.

Mr. Nunes' lawsuit was dismissed as "frivolous" by the trial court and an appeal to the Fourth District Court of Appeal was also dismissed. RR 8-9. The Burtons were awarded attorneys fees of $3,600 and costs of $600 by the trial court RR 8, but according to Mrs. Burton's testimony, Mr. Nunes had not paid any of that money. T 12.

The lawsuits involving Jeffrey Brauwerman, Bruce Marmar, and The Florida Bar were also dismissed. Composite Bar Exhibit Two. In particular, with respect to the matter involving Mr. Brauwerman and Mr. Marmar, the United States District Court noted "the apparent frivolousness and improper motivation for the plaintiff's complaint." Bar Exhibit Two, Order to Show Cause dated November 4, 1997. In assessing sanctions against Mr. Nunes under Rule 11, the Unites States District Court for the Southern District of Florida stated:

> The Court held a hearing on pending motions on November 4, 1997, where Mr. Nunes was given the opportunity to cite to any authority that would support any of the causes of action alleged in the complaint. He could not cite to any. The Court gave Mr. Nunes another opportunity to cite to any legal authority that would support his complaint in its Order to Show Cause dated November 4, 1997, and to explain why his suit against these witnesses should

> not be viewed as having been filed for purposes of retaliation. The response filed by Mr. Nunes failed to address the questions raised by the Court concerning retaliatory motive and the lack of any precedent to support the causes of actions advanced. The lawsuit filed by Mr. Nunes lacked factual basis, is based on legal theories with no reasonable chance of success, and was filed in bad faith for an improper purpose.

Bar Exhibit Two, Order dated December 8, 1997.

In count one of the current disciplinary proceedings in case number 91,281, Mr. Nunes was found guilty by the referee of having violated Rule 4-3.1 of the Rules of Professional Conduct [A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous].

Frivolous litigation was not the only rule violation found by the referee with respect to the Burton matter. Although Nunes had acknowledged in writing that his representation had been terminated by the Burtons, he continued to file documents purportedly as Gloria Burton's attorney. RR 9. Mr. Nunes then used these documents to falsely argue that he was successfully continuing the Burton case and/or that Mr. Nunes had won the Burton case. RR 10. Examples of Mr. Nunes' argument were contained in the lawsuit that he had filed against the Burtons as follows:

> That Plaintiff [Mr. Nunes] utilizing his expertise, responded to the Notice of Intent to Revoke, setting forth the criminal immigration procedure which was to be utilized, and that said response required great effort and time in research and composition...

> That plaintiff did such an excellent job that the decision of the American Consulate in London was overturned and the Visa Application was granted...
>
> That plaintiff performed the legal services and obtained an approval of the reinstatement of the Green Card.

RR. 11.

Mr. Nunes, in fact, never obtained the reinstatement of Mark Burton's green card. RR 11. During the current referee proceedings, Mr. Nunes admitted that he had never spoken with or met with Mark Burton. T 130. Mrs. Burton testified that in July of 1996, she received a letter from Mr. Nunes that her son could go pick up his green card, that her son went to the American Embassy and showed them a copy of Mr. Nunes' letter, that her son was laughed out of the embassy, and that her son was assured that he would not set foot in America again. T 104-105. The referee in the current disciplinary proceedings found that Mr. Nunes did not successfully continue the Burton's case and certainly did not win the Burton's case but, as evidenced by his own letters, took certain actions only after Mr. Nunes' representation had been terminated. RR 11. Despite the fact that he had been terminated, Mr. Nunes continued to file documents on behalf of Gloria Burton as her attorney and then used those documents to falsely portray that he had won the Burton's case so that could argue that he was entitled to damages from the Burtons as well as from the witnesses who testified in the

disciplinary proceedings in prior case number 85,451 and from The Florida Bar. RR 11. With respect to these actions, the referee found that Mr. Nunes should be found guilty of Rule 4-1.16(a)(3) of the Rules of Professional Conduct [...a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if the lawyer is discharged,]; Rule 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise.. . may constitute a cause for discipline.]; Rule 4-3.3(a)(1)[A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.]; Rule 4-8.4(c)[A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.]; and Rule 4-8.4(d)[A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.. .].

Additionally, the referee considered the matter of Kenneth Schwartz which also arose during the time that Nunes was on probation for his previous violations. Kenneth Schwartz was opposing counsel to Mr. Nunes in the case of Kelly *v. Nunes.* T 21. Daniel Kelly was a dentist who maintained an office next to where Mr. Nunes maintained his law practice, and Kelly brought suit against Mr. Nunes and David Smith Nunes, P.A., a dissolved Florida corporation, for multiple acts of libel per se allegedly committed by Mr. Nunes. RR 2. The trial judge found that Mr. Nunes willfully failed

to comply with discovery and struck his pleadings. RR 2. During the course of the litigation with Kelly and subsequent appeal taken by Mr. Nunes, the referee found that Mr. Nunes made inappropriate, frivolous and/or disrespectful remarks about his opposing counsel, Kenneth Schwartz. RR 2-3. The referee also found that Mr. Nunes made statements prejudicial to the administration of justice and/or that Mr. Nunes knew to be false or with reckless disregard as to their truth or falsity concerning the integrity or qualifications of the judges handling the litigation. RR 4.

With respect to attorney Schwartz, these remarks included numerous assertions that Mr. Schwartz had stolen the court file such as the following:

"That prior to the hearing the Court File mysteriously disappeared and the record show [sic] that Plaintiffs counsel was the last person who had seen the Court File."

"Had the Court File being available, the Court would have seen that opposing counsel was not truthful."

In a Motion to Strike Contempt and Sanctions, which has a certificate of service on or about May 24, 1996[5] and which was filed with the Fourth District Court of Appeal, Mr. Nunes stated: "Appellee's counsel had now demonstrated his flagrant

[5]The date of this motion is significant as this Court will note that May 24, 1996 is during the period of the 18 months probation ordered by this Court on October 26, 1995.

disregard for Broward County Courts, Judges, the files, and, in general, the whole judicial system."

Later in the same motion, Mr. Nunes stated:

> In all documentation furnished to this Court, it was plainly alleged that Appellee's counsel had something to do with the disappearance of the Court file in this case and reconstruction had to be ordered. Having messed up that Court file he has now turned to another Court file, which is in a complete different Division.
>
> ***
>
> By the acts and conduct of Appellee's counsel, he should be sanctioned for destroying the present court file which he was forced to have it reconstructed. Now he has started out in a different division and has removed Pleadings therefrom. He should not be allowed to have access to any court files.
>
> ***
>
> Appellant never filed a Motion to Set Aside Order of Dismissal in front of this Court, and now Judge Moe's file will soon disappear.

RR 3-4.

All briefs and pending motions in the appeal were stricken by order dated June 19, 1996. RR 4. Mr. Nunes accusations as to Mr. Schwartz did not contain any citations to the record nor was there any finding in the trial or appellate court that Mr. Schwartz was responsible for the loss of the court file. RR 4.

With respect to the judges handling the litigation, Mr. Nunes' remarks included the following:

> The Order which was signed, was signed in error by the Honorable Judge Moe, who had an extended time on the Criminal Bench. As such, [sic] may not have been refreshed, relative to the practice of mediation. RR 4.

Further Mr. Nunes commented as follows with respect to Judge Moe:

> What opposing counsel did, he made up an order and had the judge sign it. The Judge, being on the Criminal Bench, may have overlooked the fact that, that was not an order for a date certain, which is normally done in criminal cases, and as such, he inadvertently placed in the order 'or it shall be dismissed.'

RR4.

As to Judge Moriarty, Mr. Nunes made the following comment in his Reply Brief filed with the Fourth District Court of Appeal,

> Thereafter? the case was assigned to the Honorable Judge Moriarty and obviously counsel now felt that what he could not get away with from the two (2) male judges, he could get away with the female judge.

RR 4-5.

As to the remarks made concerning Kenneth Schwartz, the referee found that Mr. Nunes had violated: Rule 3-4.3 of the Rules Regulating The Florida Bar [The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting ground for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of

misconduct be construed as tolerance thereof. The commission by a lawyer of act that is unlawful or contrary to honesty and justice.. .may constitute a cause for discipline]; Rule 4-3.1 [A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous]; Rule 4-4.4 [In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person...]; and Rule 4-8.4(d) [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. . .court personnel, or other lawyers on any basis.. .]. RR 12. As to the remarks made concerning the judges, the referee found that Mr. Nunes had violated Rule 4-8.4(d) of the Rules Regulating The Florida Bar [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.. .court personnel, or other lawyers on any basis...] and Rule 4-8.2(a) [A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge...].

After the finding of guilt on the Burton and Schwartz cases, the referee found the following aggravating factors: 9.22(a) prior disciplinary offenses, 9.22(b) dishonest or

selfish motive, 9.22(c) a pattern or misconduct, and 9.22(d) multiple offenses. RR 14. The referee found one factor in mitigation, 9.32(l) remorse, RR 14, and ordered a one year suspension. RR 13-14.

Mr. Nunes then filed a "motion to set aside referee's report" which was treated by this Court as a petition for review. Highlights of this document included the following:

> Because of the Jewish conspiracy against him, Respondent is made out to be some crack-pot filing frivolous lawsuits. It would appear that Ms. Lewinsky is gaining her reputation at the expense of the President of the United States, while Ronna Young [bar counsel] is attempting to gain fame at the expense of Respondent.
>
> ***
>
> That there is presently a Jewish conspiracy to remove the Respondent from practicing immigration. The conspiracy consists of among others, Ronna Friedman Young, Esquire from The Florida Bar; Jeffrey Brauwerman, Esquire, a fellow immigration practitioner; Bruce Marmar, an initial adjudicator for I.N.S.; and Albert Kaplan, another adjudicator for I.N.S.
>
> ***
>
> That it was only recent that this whole conspiracy came to the attention of the Respondent at a three (3) day conference held in Miami. That it is only of recent date that blacks have been practicing immigration and most of the time they only go to the first step.
>
> As this Court may recall, Respondent was given ninety (90) days suspension for violation of Federal Criminal Immigration Rules. As a result of litigation filing in his defense, it is now abundantly clear that Respondent was unjustly suspended.
>
> That the conspiracy between Ronna Young, Jeffrey Brauwerman, Esquire, Bruce Marmar and Albert Kaplan has been brewing for a long time.

The bar will not reiterate all of Mr. Nunes' motion here, but as will be discussed in the argument section of the bar's cross-appeal, the bar submits that this document evidences a lack of remorse. The Board of Governors of The Florida Bar authorized a cross-petition for review of the referee's finding of remorse and for review of the referee's recommended disciplinary sanction of a one year suspension. The Florida Bar, in accordance with the authorization of the Board of Governors, seeks disbarment.

SUMMARY OF ARGUMENT
(NUNES PETITION)

Mr. Nunes has argued that in lieu of the one year suspension ordered by the referee, this Court should impose a 90 day suspension. The bar submits that a 90 day suspension would be inadequate and as will be discussed in the bar's argument on the bar's cross-petition, the bar submits that the referee's recommendation of a one year suspension should be increased to disbarment, Although Nunes has claimed that he never misrepresented facts to the court, the referee's fmdings clearly establish that Nunes made false statements in pleadings so that he could argue he was entitled to damages from his former clients. Given that since 1995, Nunes has been found to have violated 12 different Rules Regulating The Florida Bar, many more than once, and additionally has been reprimanded for violating an order of this Court, case law recognizes that harsh discipline is in order not a 90 day suspension. ***See, The*** *Florida*

Bar v. *Inglis*, 660 So.2d 697 (Fla. 1995); ***The Florida Bar*** *v.* ***Williams, 604*** So.2d 447 (Fla. 1992); ***The Florida Bar*** *v. Mavrides, 442* So.2d 220 (Fla. 1983). *Moreover,* the Florida Standards for Imposing Lawyer Sanctions also support disbarment. The record in this case and legal precedent offer no reason to reduce the referee's recommendation.

ARGUMENT
(NUNESPETITION)

I. A 90 DAY SUSPENSION WOULD BE AN INADEQUATE SANCTION PARTICULARLY IN LIGHT OF NUNES' TWO PRIOR SUSPENSIONS AS WELL AS THE DISHONESTY FOUND IN THIS CASE.

A. THIS PROCEEDING INVOLVES MULTIPLE RULE VIOLATIONS, INCLUDING DISHONESTY AND MISREPRESENTATION.

According to Nunes' brief, he admits he made "made mistakes" but denies ever knowingly misrepresenting facts to either the client or the court, Nunes' brief 6. This statement of Nunes' is directly contrary to the findings of the referee who concluded:

> Mr. Nunes used the unauthorized documents that he had filed on behalf of Gloria Burton to falsely argue that Mr. Nunes was successfully continuing the Burton case and/or that Mr. Nunes had won the Burton case.

RR 10 (emphasis added).

> Despite the fact that Mr. Nunes had been terminated, he continued to file documents on behalf of Gloria Burton as her attorney and then used those documents to falsely portray that he had won the Burton's case so that he could argue that his suspension order

> should be overturned and that he was entitled to damages from the Burtons as well as from the witnesses who testified in the disciplinary proceedings against him and from The Florida Bar.

RR 11 (emphasis added).

In 1996, this Court found that Mr. Nunes had incompetently represented the Burtons. *The **Florida** Bar* v. ***Nunes,*** 679 So.2d 744 (Fla. 1996). Among other items, Nunes advised Mr. and Mrs. Burton that their son Mark was eligible for a "green card" which would entitle him to lawful, permanent residence in the United States. ***The Florida Bar*** v. ***Nunes,*** 679 So.2d at 744. The referee's findings, which were approved by this Court, stated that a reasonably competent attorney would have recognized that Mark Burton was not eligible for lawful, permanent residence in the United States and would have declined to represent the Burtons ***in*** this regard. ***The Florida Bar v. Nunes,*** 679 So.2d at 745, Jeffrey Brauwerman, a former U.S. Immigration Judge who had also served as Regional Counsel of the Southern Region of the Immigration and Naturalization Service ("INS") and as District Counsel for the Miami District, and Bruce Marmar, the Senior Immigration Examiner for INS, testified for The Florida Bar, that there was no way for Mark Burton to obtain a "green card." ***The** Florida **Bar v. Nunes, 679*** So.2d at 744-745.

Mr. Nunes attempted to overturn the decision of this Court by filing numerous petitions and motions, all unsuccessfully, culminating in his unsuccessful petition to the

Unites States Supreme Court. When all of his other actions proved fruitless, he filed lawsuits against the Burtons, Brauwerman, Marmar, and The Florida Bar. Nunes unequivocally stated in the lawsuit filed against the Burtons that he had obtained reinstatement of Mark Burton's "green card". RR Il. He did not. RR 11. Nunes' statement that he did not knowingly misrepresent facts does not comport with the evidence or the referee's findings.

Mr. Nunes' further states in his brief that: "Perhaps the Respondent's overzealous advocacy has led to this situation." Nunes' brief Il. The bar submits that much more than overzealous advocacy is involved in this situation. As found by the referee, what is involved is this case is dishonesty and misrepresentation, coupled with other significant violations.

B. APPLICABLE LAW DOES NOT STAND FOR THE PROPOSITION THAT THE ONE YEAR SUSPENSION RECOMMENDED BY THE REFEREE SHOULD BE DECREASED BUT RATHER MANDATES HARSH DISCIPLINE.

Mr. Nunes has argued that a full review of the record lends support for the contention that Mr. Nunes has at all times been a zealous advocate for his clients. Nunes brief 7. The bar notes that no clients or former clients testified in support of Mr. Nunes during the disciplinary proceedings. The only former client who testified was Gloria Burton, whose testimony was to the effect that after Nunes had been found

guilty of incompetent representation by this Court, Mrs. Burton had to hire a lawyer to defend the frivolous lawsuit filed against her by Nunes. See. T 1 l-l 2. In fact, Nunes presented not one single character witness in his defense.

The cases cited by Nunes do not stand for the proposition that this Court should decrease the one year suspension recommended by the referee. Furthermore, these cases do not support imposing the same disciplinary sanction (a 90 day suspension) that was just imposed in a prior case.

Nunes cited *The Florida Bar v. Corbin,* 701 So.2d 334 (Fla. 1997). Corbin received a 90 day suspension for misrepresenting material facts to a court. Corbin had three prior private reprimands. Unlike Nunes, Corbin had no record of prior public reprimands or prior suspensions. Unlike Nunes, Corbin's prior offenses were remote rather than close to the current offense. Unlike Nunes, Corbin's conduct was not coupled with a separate matter involving separate rule violations.

Nunes also cited *The Florida Bar v. Nowacki, 697* So.2d 828 (Fla. 1997). Nowacki received a 91 day suspension, not the 90 days requested by Nunes, for multiple rule violations, mainly related to neglect. Nowacki had two prior public reprimands. Unlike Nunes, Nowacki had no prior suspensions, Unlike Nunes, Nowacki was found to have been dealing with serious medical and emotional problems during the time that a number of the offenses occurred.

Finally, Nunes cited *The Florida Bar v. Laing,* 695 So.2d 299 (Fla. 1997), in which this Court increased the referee's recommended suspension of 90 days to 91 days. Laing's disciplinary history, consisting of one prior 60 day suspension and one private reprimand, was not nearly as extensive as Nunes'. This Court, also, recognized the principle that greater discipline should be imposed due to the cumulative effect of multiple violations. *The Florida Bar* v. *Laing,* 695 So.2d 299, 304. This Court further recognized that disbarment has been held to be appropriate for multiple violations of varied *nature. The Florida Bar v. Laing, 695* So.2d 299, 304, *citing, The Florida Bar v. Inglis, 660* So.2d *697* (Fla. 1995); *The Florida Bar v. Williams, 604* So.2d 447 (Fla. 1992); *The Florida Bar v. Mavrides, 442* So.2d 220 (Fla. 3 983).

Although separate instances of ethical violations, standing alone, would not require disbarment, the cumulative effect of eight violations was enough to warrant disbarment *in Mavrides. In Williams,* this Court found that the mitigating factors were outweighed by the significant aggravating factors as well as the cumulative misconduct to result in disbarment. Similarly, in *Inglis,* this Court held that cumulative misconduct and aggravating factors warranted increasing the referee's recomtnended suspension of 91 days and two reprimands to disbarment.

This Court has recognized that:

> The Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct.

The Florida Bar v. *Bern,* 425 So.2d 526, 528 (Fla. l982).

Excluding Mr. Nunes' private reprimand, he has been found to have violated 12 different Rules Regulating The Florida Bar, many more than once, and additionally, he has been reprimanded for violating an order of this Court. His rule violations are summarized as follows. In 1995, he was found to have violated Rule 4-4.2 (communication with person represented by counsel) and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). In 1996, he was found to have violated Rule 4-1.1 (competency) in two separate matters, 4-1.4 (client communication) and 4-1.5(a) (charging a clearly excessive fee). In the current Burton case, the referee found Nunes guilty of violating Rule 4-3.1 (frivolous litigation), 4-1.16(a)(3) (failing to withdraw upon termination), 3-4.3 (act contrary to honesty and justice), 4-3.3(a)(1) (false statement to a tribunal) and 4-8.4(d) (conduct prejudicial to the administration ofjustice). In the matter involving attorney Schwartz, the referee found Nunes guilty of 3-4.3 (standards of professional conduct not limited to enumerated acts), 4-3.1 (frivolous issue), 4-4.4 (harassment), and 4-8.4(d)(conduct prejudicial to the administration of justice). Additionally in the Schwartz case with respect to the trial

judges, Nunes was found to have violated 4-8.2(a)(statement that lawyer knows to be false or made with reckless disregard as to qualifications or integrity of a judge) and 4-8.4(d) (conduct prejudicial to the administration of justice).

The Florida Standards for Imposing Lawyer Sanctions recognize that disbarment is appropriate when a lawyer has been suspended for the same or similar misconduct: and intentionally engages in further acts of misconduct. Fla. Stds. Imposing Law. Sancs. 8.1. In this regard, Nunes was suspended in 1995 for conduct prejudicial to the administration of justice. That case also found as an aggravating factor, Nunes had submitted false evidence, false statements or engaged in other deceptive practices during the disciplinary process. Conduct prejudicial to the administration of justice and dishonesty are both involved in the instant case. In 1996, Nunes was suspended for multiple rule violations relating to two separate immigration matters and ordered to pay restitution to the Burtons. Nunes failed to accept and learn from his punishment. Instead, he sued his former clients, the bar and certain witnesses who testified against him in the trial. Not only did respondent file these frivolous lawsuits, but he also lied in pleadings filed therein in an attempt to sustain an indefensible position. These actions fall within the parameters of two other Florida Standards for Imposing Lawyer Sanctions for disbarment.

Florida. Standard for Imposing Lawyer Sanction 5.11 (f) states that in the absence of aggravating and mitigating circumstances, disbarment is appropriate when a lawyer knowingly engages in intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law. Similarly, Standard 6. I 1 (a) recommends disbarment when a lawyer knowingly makes a false statement or submits a false document with intent to deceive a court.

As will be discussed in detail with respect to the bar's cross-petition, this Court has not hesitated to disbar attorneys who have acted dishonestly, See, The *Florida* ***Bar v.*** *Orta*, ***689*** So.2d 270 (Fla. 1997); *The* ***Florida Bar v.*** *Kaufman*, 684 So.2d 806 (Fla. ***1996); The Florida Bar*** v. *Spann*, 682 So.2d 1070 (Fla. 1996); ***The Florida Bar v.*** Delves, 397 So.2d 919 (Fla. 1981); ***The Florida Bar v. Agar,*** 394 So.2d 405 (Fla. 1980); ***Dodd v. The Florida Bar,*** 118 So.2d 17 (Fla. 1960).

C. THE REFEREE DID NOT FAIL TO CONSIDER OTHER MITIGATING FACTORS; THE RECORD DOES NOT SUPPORT ANY OTHER FACTORS.

Nunes has argued that the referee failed to consider Nunes' reputation in the community for being a zealous advocate. Given that no character witnesses testified as to Nunes' reputation, the bar submits that the referee made no error in this regard.

Nunes has also argued that because this Court previously imposed a sanction in the Burton case, that should have been taken into account as mitigation. As will be

discussed in the next section, the instant case involves new rule violations with respect to the Burtons. The instant case begins where the last case ended. The prior sanction is not an appropriate factor to be taken into account as mitigation.

D. THE REFEREE DID NOT "DOUBLE COUNT" RELATED MISCONDUCT.

Nunes has argued that the prior discipline was double counted and in effect, he has been subjected to double jeopardy for the same offense. Nothing could be further from the truth. The rule violations charged in the current proceeding are not the same as the ones charged in the prior proceeding involving the Burton and Whynes immigration matters. The facts of this case concern action taken subsequent to this Court's decision in the prior matter. The bar sees no need to say anything further on this subject.

CONCLUSION
(NUNES PETITION)

This Court should not reduce the one year suspension recommended by the referee.

SUMMARY OF ARGUMENT
(BAR CROSS-PETITION)

The bar submits that this Court should disbar David Smith Nunes. First of all, with respect to the finding of remorse in mitigation, the bar submits that Nunes'

subsequent conduct shows a lack of remorse or at a minimum, his willingness to engage in the same type of conduct for which he has been previously disciplined. The bar contends that this Court should re-examine the referee's finding that Nunes was remorseful or alternatively, give the finding little weight. Second, regardless of the issue of remorse, Nunes' conduct and his disciplinary history are so egregious so as to warrant disbarment.

ARGUMENT
(BARCROSS-PETITION)

I. NUNES' EXTENSIVE DISCIPLINARY HISTORY AND THE CIRCUMSTANCES 0F THIS CASE MANDATE DISBARMENT.

A. ALTHOUGH MR. NUNES ESPOUSED REMORSE TO THE REFEREE? HIS OWN MOTION TO SET ASIDE THE REFEREE'S REPORT EVIDENCES LACK OF REMORSE.

Although Nunes' was found to have been remorseful for the unethical remarks made against opposing counsel in the Schwartz case, he made similar attacks on the bar prosecutor shortly after the referee's report was entered. While he did not accuse the bar prosecutor of "stealing" the file, the personal attacks on the integrity and character of the prosecutor bear striking similarity to his attacks against Schwartz.

The Court may also wish to compare Nunes' current motion with Nunes' letter concerning attorney Maurice Garcia, which letter was discussed in prior case number

84,097. In case number 84,097, Nunes was disciplined because of a letter he had sent which seriously criticized attorney Maurice Garcia and which Nunes had provided to Garcia's client. Attorney Garcia was Nunes' opposing counsel in a foreclosure case, and Nunes accused him of having seriously breached ethical standards. There appears to be a pattern of Nunes engaging in personal attacks on opposing counsel as well as others, such as the Burtons, Jeffrey Brauwerman and Bruce Marmar, who have opposed him.

It should also be noted that although Nunes was found to have been remorseful for the frivolous litigation he filed, his current motion made numerous unfavorable references to prior witnesses Brauwerman and Marmar.[6] Instead of remorse for his actions, Nunes claimed that there was a "Jewish conspiracy" against him. He clearly asserts that the prior suspension was "unjust" and that there was "fraud, misrepresentation, and other misconduct of an adverse party" in the current proceedings.

The bar can only describe this motion as bizarre. Although counsel for Nunes later appeared and filed an amended petition for review, Nunes' own motion evidences,

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"The motion also makes some gratuitous attacks on an Albert Kaplan, who did not appear in any of the disciplinary proceedings. Among other statements, Nunes claimed that Mr. Kaplan, "is very well known for the mistreatment of minorities" and "walks around eating donuts in front of the hungry children.. ."

in the bar's view, a lack of remorse and a shocking malice and ill will toward persons in the disciplinary process. In order to be remorseful for past conduct, the bar submits that an attorney should make some acknowledgment of wrongdoing and also evidence a desire to avoid similar misconduct in the future. Nunes does neither.

The bar also notes that Nunes has engaged in a pattern of misconduct with which this motion is consistent. Instead of learning from his first public reprimand and suspension in case number 84,097, Nunes engaged in the conduct that resulted in his second suspension in case number 85,451. lnstead of learning from that matter, Nunes engaged in the conduct that resulted in his public reprimand in case number 89,065. Those prior matters failed to prevent him from engaging in the conduct that is now before this Court,

In light of Nunes' motion, the bar contends that this Court should re-examine the finding of the referee that Nunes was remorseful. If this Court chooses to sustain the finding of remorse, the bar submits that the fmding should be given little weight. Remorse does not prevent disbarment in an appropriate case. ***See, The Florida Bar v. Forbes,*** 596 So.2d 105 1 (Fla. 1992) [Disbarment ordered for bank fraud although Forbes was remorseful and had no prior disciplinary record]; ***See also, The Florida Bar*** v. *Orta,* ***689*** So.2d 270 (Fla. 1997)[Despite remorse, interim rehabilitation, cooperative

attitude toward proceedings, and remoteness of prior offenses, Orta was disbarred for dishonest conduct],

B. NUNES SHOULD BE DISBARRED.

This Court's review in this area is broad since this Court bears the ultimate responsibility to order an appropriate sanction in attorney discipline cases. *The Florida Bar v. Spann*, 682 So.2d 1070, 1074 (Fla. 1996). In response to Nunes' petition for a lesser sanction, the bar has already discussed certain case law on cumulative misconduct, applicable Florida Standards for Imposing Lawyer Sanctions as well as the facts of this matter. The bar will not repeat those arguments here but requests the Court to incorporate them by reference, The bar will discuss certain cases involving dishonesty in which this Court saw fit to impose disbarment.

This Court has expressed its disdain for those who seek to corrupt the judicial process through misrepresentation and fraud upon the *court. See, The Florida Bar v. Merwin, 636* So.2d *717* (Fla. 1994); *The Florida Bar v. Rightmyer, 616* So.2d 953 (Fla. 1993). In *The Florida Bar v. Rightmyer*, Rightmyer was disbarred after being convicted of perjury charges. The court stated that:

> An officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded. from that process.

The Florida Bar v. Rightmyer, 616 So.2d 953,955.

Nor has this Court hesitated to disbar attorneys who have acted dishonestly. See, *The Florida Bar v. Orta*, 689 So.2d 270 (Fla. 1997); *The Florida Bar v. Kaufman. 684* So.2d 806 (Fla. 1996); *The Florida Bar v. Spann, 682* So.2d 1070 (Fla. 1996); *The Florida Bar v. Delves, 397* So.2d *919* (Fla. 1981); *The Florida Bar v. Agar, 394* So.2d *405* (Fla. 1980); *Dodd v. The Florida Bar,* 118 So.2d 17 (Fla. 1960).

For example, *in The Florida Bar v. Orta, 689* So.2d 270 (Fla. 1997), Orta was disbarred for committing multiple offenses involving dishonesty while still under suspension for similar misconduct. This Court noted that the violations took place at a time when Orta should have been conducting himself in the "most upstanding manner." *The Florida Bar v. Orta,* 689 So.2d 270, 273. Given that Nunes' violations occurred while he was on probation, the same may be said in this case.

In '*The Florida Bar v. Kaufman,* 684 So.2d 806 (Fla. 1996), Kaufman had a prior private reprimand, two years probation, and a public reprimand. Kaufman's disciplinary history was not nearly as extensive as Nunes'. None-the-less, Kaufman was disbarred, after the entry of a default judgment against him, for dishonesty relating mainly to his concealment of assets from a judgment creditor. Kaufman's activities were apparently caused by the same type of dishonest or selfish motive as was found in the instant case.

In ***The Florida Bar*** *v. Spann*, 682 So.2d 1070 (Fla. 1996), Spann was disbarred for conduct involving forged signature on a release form with a number of other violations over an extended period of time. This Court recognized the long standing principle that disbarment is appropriate where multiple and serious disciplinary offenses have occurred. ***The Florida Bar v. Spann,*** 682 So.2d 1070, 1074. There can be no question but that Nunes' violations are multiple and serious.

In ***The Florida Bar v. Delves, 397*** So.2d 919 (Fla. 1981), the referee recommended a one year suspension, as did the referee in the instant case. Delves' misconduct included dishonesty, misrepresentation, conduct reflecting adversely on fitness to practice law, and mishandling of funds arising out of two separate factual situations. Delves had previously been suspended for similar misconduct. This Court rejected the one year suspension and imposed disbarment. The bar requests that the Court do the same in this case.

Nunes's misconduct is another step in a troubling and continuing pattern of disrespect and disregard for all that Nunes is, by his oath, required to respect and revere: the court system, its judicial officers, and particularly, this Court. He has displayed "an attitude or course of conduct wholly inconsistent with approved professional standards" ***[The Florida Bar*** v. *Pahules*, 233 So.2d 130, 131 (Fla. 1970) *quoting* State ex rel, ***The Florida Bar v.*** *Murrell*, ***74*** So.2d 221, 223 (Fla. 1954)].

Having given Nunes ample opportunity to change his conduct, this Court should now impose disbarment.

CONCLUSION

The referee's recommendation of a one year suspension should be increased to disbarment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief And Initial Brief of The Florida Bar was served by regular U.S. mail to Richard L. Rosenbaum, Attorney for David Smith Nunes, One East Broward Boulevard, Suite 1500, Barnett Bank Building, Fort Lauderdale, FL 33301 and a copy to John A. Boggs,

Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399 this 28th day of September, 1998.

RONNA FRIEDMAN YOUNG

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