IN THE SUPREME COURT OF FLORIDA

CASE NO: 91,148 and 91,281

THE FLORIDA BAR,

Complainant,

VS.

DAVID S. NUNES,

Respondent.

INITIAL BRIEF OF RESPONDENT DAVID S. NUNES

ON PETITION FOR REVIEW OF REPORT OF A REFEREE

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PRELIMINARY STATEMENT

The following symbols, abbreviations and references will be utilized throughout Respondent's Initial Brief in support of Petition for Review of Report of Referee dated February 11, 1998.

The term "Complainant" shall refer to the Petitioner below, The Florida Bar.

The term "Respondent" or "David Nunes" shall refer to the Respondent below, David S. Nunes.

References to the Report of Referee, shall be indicated by an "R" followed by the appropriate page number (R).

All emphasis indicated herein have been supplied by Respondent unless otherwise specified herein.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the Report of Referee dated February **11,** 1998, pursuant to Article V, § 15, Florida Constitution. Additionally, the Supreme Court of Florida has exclusive jurisdiction over the discipline of persons admitted to the practice of law as proscribed by Rule 3-3 1, Rules Regulating the Florida Bar.

STATEMENT OF THE CASE AND FACTS

On or about August 13, 1997, The Florida Bar filed a formal Complaint against the Respondent, David S. Nunes in case number 96-51,561 (the "Schwartz case"). The aforementioned case involved a lawsuit brought against David Nunes by Daniel Kelly, seeking damages for libel, per se, allegedly committed by David Nunes. On or about May 30, 1995, Judge Estella M. Moriarty found that while litigating the lawsuit, the Respondent failed to comply with discovery requests and entered an Order striking David Nunes' pleadings.

In the Report of Referee filed on February 11, 1998, the Referee specified what occurred factually in the "Schwartz case." (Report of Referee, pp. 2-4)[1] Count I of the Bar Complaint alleged that the Respondent accused opposing counsel (Schwartz) of causing the court file to disappear without citation to any record or findings from a trial or appellate court. In Count II, the Respondent, according to the Referee's Report, allegedly made statements "prejudicial to the administration work of justice and/or that Respondent knew to be false or with reckless disregard as to their truth or falsity concerning the integrity or the qualification of the trial judges handling the litigation." (R 12) Thereafter, the Referee cited to specific statements which the Respondent authored in his various motions and petitions to the courts.

On or about August 27, 1997, a Second Complaint was filed against the Respondent in case number 97-50,410 (the "Burton case"). The case involved a Bar Grievance against the Respondent which was filed by Gloria and Leon Burton on or about August 19, 1994. That particular grievance resulted in a finding of probable cause that the Respondent had committed ethical violations with respect to representation of the Burton's son, Mark Burton.

'Hereinafter indicated by and "R" following by the appropriate page number (R).

The Burtons hired the Respondent to obtain permanent residence through Immigration and Naturalization Service for their son, Mark Burton. Respondent took the representation for a fee of approximately $1,875.00 plus a $350.00 filing fee. Count I of the Bar Complaint alleged that the Respondent filed a lawsuit against the Burton's. Count II alleged that the Respondent continued to represent the Burtons after his services were terminated. Count III alleged that the Respondent falsely portrayed that he had won the Burton's case (R 5-11).

In the instant Referee's Report, the Respondent was found guilty on Counts I and II, in the Schwartz case and guilty on all Counts in the Burton case. Thereafter, in Section IV of the Referee's Report, the recommendations presented by the Referee are that the Respondent be suspended from the practice of law for a period of one (1) year and thereafter until he has shown proof of rehabilitation. It was recommended that the Respondent pay costs and complete 25 hours of Continuing Legal Education class in the area of ethics. Additionally, the Referee recommended that the Respondent be placed on a probationary period for two (2) years after the date of his reinstatement.

The Respondent timely sought review of the Referee's Report. This appeal ensues.

SUMMARY OF ARGUMENT

The Report of Referee is erroneous, unlawful and unjustified. In this case, the Referee's findings of guilt were not justified by the Record. As a result, an unfair judgment has resulted.

Additionally, because the Referee failed to consider mitigating factors in recommending an unjustified suspension, and because the Referee double counted related misconduct stemming from the same client, the recommendation of one year suspension is wholly inappropriate. The Respondent, David S. Nunes, asserts that a 90 day suspension, although severe, is appropriate herein.

ARGUMENTS

I. THE REPORT OF REFEREE IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

David Nunes acknowledges that the burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified is on him. Rule 3-7.7(c)(5), Rules Regulating the Florida Bar. In this case, the Referee's Report is unfair and erroneous in many respects. Further the punishment and discipline recommended is grossly disproportionate with discipline imposed in precedential situations set forth more fully herein. See The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997); The Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997).

The Respondent admits that he "made mistakes" but denies ever knowingly misrepresenting facts to either the client or court or ever having stolen from any client. The Respondent contends he is a zealous advocate and strongly represents the interests of his clients. Any mistakes which he made sub iudice, are the result of his "over zealous" representation of his clients. See Report of Referee (p. 14-15).

David S. Nunes requests that the Supreme Court reject the recommendation of the Report of the Referee and sanction him to a 90 days suspension. While a Referee's reputation for discipline is persuasive, this Court has the ultimate responsibility to determine the appropriate sanction. See The Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). Under the facts and circumstances of this case and precedential authority, only a brief period of suspension is warranted.

In The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994), this Court stated that a Bar disciplinary action must serve three (3) purposes: 1) the judgment must be fair to society; and 2) it

must be fair to the attorney; and 3) it must be severe enough to deter other attorneys from some more misconduct. Id. As more fully articulated by the Florida Supreme Court in The Florida Bar v. Neu, 597 So. 2d 266, 269 (Fla. 1992), the Court stated the following:

> Discipline for unethical conduct must serve 3 purposes: First, the judgment must to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. See also The Florida Bar v. Stark, 616 So. 2d 41, 43 (Fla. 1993).

Id.

Sub judice, the Respondent is 65 years of age and has been a member of the Florida Bar since October 23, 1980. A fair judgment would be a short term supervisory period followed by an extended probationary term. Such a judgment would allow David Nunes to continue to assist minority and other clients.

A. A Fair Judgment?

Respondent, David Nunes asserts that a fair judgment in this case, in light of the facts and circumstances, is a 90 day suspension followed by an extended probationary term. David Nunes contests the findings of guilt set forth in the Report and Recommendation. A full and complete review of the record lends support for David Nunes' contention that he has at all times been a zealous advocate for his clients. Representing mostly minority clients, unable to pay large legal fees charged by law firms and other members of the Bar, David Nunes has taken on powerful government entities, zealously advocating his client's rights. While the cases at bar surround Mr.

Nunes' self-representation, it is respectfully suggested that an appropriate sanction might be to forbid the Respondent, David Nunes, from representing himself in proceedings, This might include Bar proceedings and civil litigation. David Nunes acknowledges the proverb that "He that is his own lawyer has a fool for a client," (Proverb, Rosalind Ferguson, The Facts On File Dictionary Of Proverbs, (1983). David Nunes admits that he is a much better lawyer than he is a client. Each of the cases below stemmed from self-representation, which can be avoided in the future.

David Nunes asserts that a penalty and sanction which would be fair to him, and at the same time sufficient to punish the breach of ethics founds by the Referee, at the same time encouraging reformation and rehabilitation, is a 90 day suspension from practice. Such a suspension would penalize David Nunes, yet not annihilate the 65 year old lawyer's ability to practice law, represent clients zealously, earn a living, and feed his family. The breach of ethics would not go unnoticed. On the contrary, a 90 day suspension "sends a message" to lawyers engaged in similar misconduct. Further, such a sanction would encourage David Nunes' rehabilitation. As a specific condition of any sanction imposed, David Nunes agrees to any term of probation and supervision which this Honorable Court deems just and appropriate. David Nunes suggests that he be supervised by an appropriate member of the Florida Bar, who can provide assistance and guidance concerning ethical matters, should the same be required.

In The Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997), Corbin was found guilty of violating Rules 4-3.3(A)(1); 4-8.1(A); and 4-8.4(E). Corbin had made false statements to a tribunal. He had made false statements of material fact in a disciplinary matter and he had engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation. All were in multiple

violation of the Rules of Professional Conduct of the Florida Bar. Id. at 336.

Corbin was 55 years old and had been admitted to the Bar in 1972. He had prior disciplinary actions in 1978, 1984, and 1988. In reaching a disciplinary recommendation of a six (6) month suspension, the Referee noted the prior disciplinary offenses in addition to dishonest motive to advance the causes of client, refusal to acknowledge the wrongful nature of his conduct, and substantial experience in the practice of law. Id. at 336-37.

Corbin sought review of the recommended discipline arguing that his six (6) month suspension was unduly harsh. The court agreed and changed Corbin's suspension to 90 days from the practice of law instead of the six (6) months recommended by the Referee. Id. at 337

Based on the factual analysis sub judice and that in Corbin, the sanction recommended by the Referee in the Respondent's case should be changed to a 90 day suspension. Sub judice, the Referee specifically stated that he found some aggravating factors in addition to the prior disciplinary offenses: dishonest or selfish motives, a pattern of misconduct, and multiple offenses.[2] The only mitigating factor taken into consideration by the Referee was remorse.

The aggravating factors found in Corbin, as compared to those in the instant cause were more severe. Sub judice, the Referee found a mitigating factor existed. See, the lawyer refused to acknowledge the wrongful nature of his conduct. Based on Corbin, an appropriate sanction for David S. Nunes' should be limited to a 90 day suspension.

In The Florida Bar v. Nowacki, 697 So. 2d 828 (Fla. 1997), Nowacki was found guilty by a Referee on five (5) separate counts for violations of Rules 4-1.3 (failing to act with reasonable

[2]David Nunes asserts the Referre erred in finding each and every one of the aggravators was proven. David Nunes had no dishonest or selfish motive. No "pattern" of misconduct existed.

diligence and promptness in representing a client); 4-1.4 (failing to keep a client reasonably informed); 4-8.4 (engaging in conduct involving dishonesty); 4-5.1 (having direct supervisory authority over another lawyer and failing to make reasonable efforts to insure that lawyer conformed to the Rules of Professional Conduct). The Referee noted that Nowacki had two (2) prior past disciplinary acts of misconduct involving client relations. In 1992, Nowacki received a public reprimand for improperly limiting her scope of representation and later in 1993, was again reprimanded for the same misconduct. Id. at 833. Nowacki was suspended from the practice of law for 91 days which was upheld by the Florida Supreme Court. The facts as set forth in the instant cause and in the Referee's Report against the Respondent are far less egregious than the acts and alleged discipline found in Nowacki, supra.

In The Florida Bar v. Laing, 695 So. 2d 299 (Fla. 1997), Laing was found guilty by a Referee on six (6) separate counts of misconduct. Additionally, Laing had an extensive bar disciplinary history in that he had been suspended by the Supreme Court in 1985 for 60 days which involved five (5) separate cases, and again he was reprimanded in 1991 involving one (1) case. Altogether, Laing had been disciplined for six (6) prior different case numbers and six (6) different counts in the 1997 petition, the six (6) counts of misconduct as described in Laing, included numerous prior reprimands. The Supreme Court sanctioned Laing by suspending him from the practice of law for 91 days. Id. at 304.

Laing's misconduct was far greater than the actions by the Respondent in the instant case. Therefore, the sanction that should be imposed on David S. Nunes is that of 90 days suspension. Based on the foregoing, it would be egregious for this Court to uphold the recommendation of the Referee and suspend the Respondent's practice for a one (1) year period. Based on the

aforementioned cases, this Court should rely on its prior decisions and suspend David S. Nunes' ability to practice law for 90 days.

B. **A 90 Day Suspension Is Severe Yet Appropriate**

David Nunes acknowledges that a 90 day suspension is severe. However, in light of the Referee's findings, such a sanction would be appropriate. Such a sanction, in a published decision, read by all attorneys licensed to practice law in Florida, would be severe enough to deter others who might be prone or attempt to become involved in similar violations. Obviously, the Respondent must zealously advocate his client's position. Clearly, the Referee's Report reminds all practitioners that zealous representation must be, at all times, within the bounds of the law. Perhaps the Respondent's over zealous advocacy has led to this situation. Clearly, a term of suspension, and the result of loss of livelihood during the suspension period, is a severe deterrent not only to David Nunes, but to others, who shall become aware of the Referee's findings and this Court's admonition. A 90 day suspension is appropriate herein.

C. **The Referee Failed To Consider Mitigating Factors In Recommending An Uniustitied Susaension.**

David Nunes asserts that in light of the facts and circumstances at bar, the Referee has recommended an erroneous and unjustified term of suspension. David Nunes suggests that a sanction of 90 days suspension, coupled with other stringent conditions, including a lengthy period of probation with intense supervision would accomplish the purposes of discipline for unethical conduct. This is not a case where any sanction is presumed. See e.g. The Florida Bar v. McIver, 606 So. 2d 1159, 1160 (Fla. 1992)[client's trust funds misused - extreme sanction of disbarment is the presumed discipline].

In the instant case, the Referee failed to consider clear mitigating circumstances permissible pursuant to 9.32, Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to Florida Standards). Pursuant to Florida Standards, Standard 9.3 Mitigation, the Referee should have considered other mitigating factors. The Respondent certainly enjoys a reputation in the community of being a zealous advocate on behalf of his clients. 9.32 (g). Further, penalties or sanctions had already been imposed in case numbers 85,45 1 and 89,065 for conduct which encompassed the same facts and circumstances as the instant "Burton case." 9.32 (k). Finally, a combination of other mitigation evidence should have prompted a reduced penalty.

D. The Referee "Double Counted" Related Misconduct Stemming From The Same Client.

The Referee erred in the manner in which he considered the past disciplinary record of the Respondent. In 1986, the Respondent received a private reprimand which the Referee properly refused to consider for purposes of aggravation. Thereafter, the Respondent received a public reprimand and a ten (10) day suspension and 18 months probation for communication with a person represented by counsel and for conduct prejudicial to the administration ofjustice. In 1996 in case number 85,45 1,[3] he received a 90 day suspension and a one (1) year probation for lack of appropriate client communication and charging a clearly excessive fee. On December 19, 1996, in case number 89,065, the Respondent was publicly reprimanded for contempt for failure to notify his clients of his suspension in case number 85,45 1. (Note that this case number extends

[3]Case number 85,45 1 is the same case under consideration in the instant cause "the Burton case."

from the same issues surrounding the "Burton case").[4] Since the initial filing of the Burton Complaint, the Respondent unsuccessfully appealed the sanction of the Supreme Court in case numbers 85,45 1 and 89,065. Thus, the discipline imposed in those case numbers is final.

Both the United States Constitution and the Florida Constitution guarantee that no individual will be put in jeopardy more than once for the same offense. United States Constitution, Amendment V; Florida Constitution, Article I, Section 9. See also North Carolina v. Pearce, 395 U.S. 711, 717 89 S.Ct. 2072, 2076, 23 L.Ed. 2d 656 (1969). Therefore, the Respondent requests that this Court recognize that the prior history and disciplinary record which was taken under consideration by the Referee encompassed the same facts and circumstances that were charged to the Respondent in the instant cause. Therefore, the Respondent requests that this court not consider case numbers 85,45 1 and 89,065 as past unrelated discipline. Accordingly, a 90 day suspension is appropriate, reasonable, and just.

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[4]Although David Nunes acknowledges that his right to be free from "Double Jeopardy" might not specifically apply to Bar proceedings, he is being "doubly sanctioned" for the same conduct, in violation of his rights to due process of law and equal protection.

CONCLUSION

Based upon the Record in this case as well as the arguments lodged by the Respondent, David Nunes, the Respondent respectfully requests this Honorable Court modify the Report of the Referee by suspending the Respondent from the practice of law for a period of 90 days, with a special condition that the Respondent serve a probationary term, with strict supervision, and pay the costs of the proceedings. Further, during the course of the probationary period, the Respondent has no objection to a requirement that he complete a specified number of hours of continuing legal education in the area of ethics.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original plus 7 copies were mailed to the **Clerk of** Court, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies mailed to **John A. Boggs**, Director, Legal Division, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL **32399-2300;** and to **Ronna Friedma** Young, Bar Counsel, The Florida Bar, 5900 North **Andrews** Avenue, Suite 835, Fort Lauderdale, Florida 33309, this **3rd** day of **AUGUST, 1998.**

Respectfully submitted,

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