

077

IN THE SUPREME COURT OF FLORIDA

CASE NO: 91,148 and 91,281

**FILED**

SID J. WHITE

NOV 5 1998

11-17

THE FLORIDA BAR,

Complainant/ Cross-Petitioner,

CLERK, SUPREME COUR

By \_\_\_\_\_

Chief Deputy Clerk

vs.

DAVID S. NUNES,

Respondent/ Petitioner.

---

**REPLY BRIEF AND ANSWER BRIEF OF  
DAVID S. NUNES ON CROSS-PETITION**

---

RICHARD L. ROSENBAUM, ESQ.  
LAW OFFICES OF RICHARD L. ROSENBAUM  
Attorney for Respondent  
One East Broward Boulevard  
Suite 1500, Barnett Bank Building  
Fort Lauderdale, Florida 33301  
Telephone (954) 522-7000  
Florida Bar No: 394688

## TABLE OF CONTENTS

	<b><u>Page</u></b>
Table of Contents .....	i-ii
Table of Citations and Authorities.....	iii-iv
Preliminary Statement.....	1
Summary of Argument (Nunes Petition).....	2
Argument (Nunes Petition).....	3-9
I. THE REPORT OF THE REFEREE SHOULD BE REJECTED AND A 90 DAY SUSPENSION FOLLOWED BY PROBATION AND SUPERVISION ORDERED .....	3-9
A. The Purposes Of Bar Disciplinary Action Would Be Adequately Served By A 90 Day Suspension And Imposition of Special Conditions.....	3-4
B. David Nunes Is An Inept <del>Pro</del> litigant .....	4-5
C. A 90 Day Suspension Followed By Probation And Supervision Is Appropriate.....	<b>5-6</b>
D. David Nunes Exercised His Right To Free Speech.....	6-9
Conclusion (Nunes Petition).....	10
Summary of Argument (Bar Cross-Petition).....	11

**TABLE OF CONTENTS (Continued)**

	<b><u>Page</u></b>
Argument (Bar Cross-Petition).....	12-14
II. DISBARMENT WOULD BE WHOLLY INAPPROPRIATE BASED UPON THE FACTS AND CIRCUMSTANCES. ....	12-14
Conclusion (Bar Cross-Petition).....	15
Certificate of Service.....*	15

TABLE OF CITATIONS AND AUTHORITIES

	<u>PAGE</u>
<u>Bridges v. California</u> , 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941) . . . . .	7
<u>Butterworth v. Smith</u> , 494 U.S. 624, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) . . . . .	7
<u>Gentile v. State Bar of Nevada</u> , 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) . . . . .	6, 7
<u>In Re: Oliver</u> , 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) . . . . .	7
<u>In Re: Shimek</u> , 284 So. 2d 686 (Fla. 1973) . . . . .	5
<u>Landmark Communications, Inc. v. Virginia</u> , 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) . . . . .	7
<u>Richmond Newspapers, Inc. v. Virginia</u> , 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) . . . . .	7
<u>The Florida Bar v. Adler</u> , 505 So. 2d 1334 (Fla. 1987) . . . . .	12
<u>The Florida Bar v. Corbin</u> , 701 So. 2d 334 (Fla. 1997) . . . . .	2, 4
<u>The Florida Bar v. Forbes</u> , 596 So. 2d 1051 (Fla. 1992) . . . . .	10
<u>The Florida Bar v. Glick</u> , 693 So. 2d 550 (Fla. 1997) . . . . .	3
<u>The Florida Bar v. Laing</u> , 695 So. 2d 299 (Fla. 1997) . . . . .	5
<u>The Florida Bar v. Lawless</u> , 640 So. 2d 1098 (Fla. 1994) . . . . .	3
<u>The Florida Bar v. Nowacki</u> , 697 So. 2d 828 (Fla. 1997) . . . . .	4, 5
<u>The Florida Bar v. Reed</u> , 644 So. 2d 1355 (Fla. 1994) . . . . .	2

**TABLE OF CITATIONS AND AUTHORITIES (cont'd)**

	<b><u>PAGE</u></b>
<u>The Florida Bar v. Rightmeyer</u> , 616 So. 2d 953 (Fla. 1993) .....	10
<u>The Florida Bar v. Schultz</u> , __ So. 2d __ (Fla. 1998)[1998 WL 3067881 .....	3
<u>The Florida Bar v. Siegal</u> , 511 So. 2d 995 (Fla. 1987) .....	11
<u>The Florida Bar v. Vemell</u> , 502 So. 2d 1228 (Fla. 1987) .....	12
<u>The Florida Bar v. Wasserman</u> , 675 So. 2d 103 (Fla. 1996) .....	5

**AUTHORITIES**

First Amendment, United States Constitution. ....	.5,6,7
Article I, Section 4, Florida Constitution. ....	5
Article I, Section 2 1, Florida Statutes .....	7

## 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" or "Cross-Petitioner" 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.

## CERTIFICATION

Counsel for the Respondent, David Nunes, certifies that this Brief has been prepared in Times New Roman 14 point type.

## **SUMMARY OF ARGUMENT (Nunes Petition)**

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.

## ARGUMENT

### **I. THE REPORT OF THE REFEREE SHOULD BE REJECTED AND A 90 DAY PERIOD OF SUSPENSION FOLLOWED BY PROBATION ORDERED.**

---

David Nunes maintains that the Referee's Report is erroneous and the discipline recommended disproportionate to that imposed in similar cases. See The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997) and The Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997).

David S. Nunes requests that the Supreme Court reject the Recommendation of the Report of the Referee and sanction him to 90 days suspension with probation, supervision, and other appropriate conditions. Clearly, this Court has the ultimate responsibility to determine the appropriate sanction. The Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). Under the facts and circumstances of this case and precedent authority, only a 90 day period of suspension, together with probation and supervision is warranted.

#### **A. The Purposes Of Bar Disciplinary Action Would Be Adequately Served By A 90 Day Term of Suspension And Imposition Of Special Conditions.**

---

It is well settled that a Bar disciplinary action must serve three (3) purposes, to wit: 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 similar misconduct. The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994); see also The Florida Bar v. Schultz, \_\_\_ So. 2d \_\_ (Fla. 1998)[1998 WL 3067881; The Florida Bar v. Glick, 693 So. 2d 550, 552 (Fla. 1997).

Sub judice, the Respondent, David Nunes, is 65 years of age and an active member of the Florida Bar since October 23, 1980. A full and complete review of the Record reveals that David Nunes has at all times been a zealous advocate for his clients. A sanction fair to society and the attorney would be a short term of supervision followed by an extended probationary term. Such punishment would allow David Nunes to continue to assist minority and other clients. It is severe enough to deter others from similar conduct.

**B. David Nunes Is An Inept Pro Se Litigant.**

In its Answer Brief, the Florida Bar avoided addressing David Nunes' assertion that his cases should be treated differently because the alleged misconduct emanated from his self-representation. In his assessment, Respondent felt he was sublimating his beliefs and opinions. He took personal umbrage at every pleading and adverse ruling personally and expressed the same inappropriately. In his Initial Brief, David Nunes argued that an appropriate sanction might be to disallow him from further self representation in Bar proceedings. The Bar ignored this proposed

resolution, despite the fact that it would be an appropriate sanction satisfying the three (3) purposes of Bar disciplinary action. Because each of the disciplinary cases at bar stemmed from self-representation, which can be avoided in the future by a short term suspension, long term probation and specific exclusion of pro se representation,

C. **A 90 Day Suspension Followed By Probation And Supervision Is Appropriate.**

David Nunes asserts that a well balanced penalty and sanction **sufficient** to **punish** him for the breach found by the Referee, while encouraging rehabilitation should include a 90 day suspension period. A 90 day suspension would penalize but not dissolve this highly spirited lawyer

A suspension of this kind does not make less visible the breach, but still “sends a message” to all lawyers. Again, such a sanction would encourage and allow for David Nunes’ rehabilitation. Further, David Nunes is amenable to any additional conditions pursuant to a term of probation and supervision, which this Honorable Court deems just and appropriate.

Despite The Bar’s attempt to distinguish cases relied upon by David Nunes in support of his argument, the cases cited by the Respondent are analogous to the facts 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 Florida Bar v. Laing, 695 So. 2d 299 (Fla. 1997)(see Initial Brief of David Nunes pgs. 7- 10).

The cases relied upon by The Bar involve misconduct which was far greater and more onerous than found by the Referee in the instant case. It would be disparate to uphold a one (1) year recommended suspension period considering this Court's prior similar decisions resulting in a 90 day suspension period.

**D. David Nunes Exercised His Right To Free Speech.**

David Nunes asserts that his rights pursuant to the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution were violated by the Referee's imposition of discipline for what amounts to his proper exercise of free speech. While David Nunes acknowledges that the First Amendment is not an impermissible shield from discipline of a lawyer for speech directed at the judiciary and adversaries, he nevertheless enjoys the constitutional right to be critical of his adversaries, and enjoys the right of access to the courts.

See In Re: Shimek, 284 So. 2d 686,689 (Fla. 1973); The Florida Bar v. Wasserman, 675 So. 2d 103, 104 (Fla. 1996).

David Nunes' "speech" forms the factual backdrop for the cases at bar. David Nunes' filing of a lawsuit against the **Burtons** and witnesses who testified against him during bar proceedings was an exercise of free speech. While the court

characterized the suit filed as “frivolous,” this exercise of constitutional freedoms does not warrant the penalty proposed by the Referee nor disbarment as sought by The Bar.

Further, the Schwartz matter involved a case wherein David Nunes was sued for libel. David Nunes’ pleadings were stricken as a result of a discovery violation (RR 2). David Nunes was found by the Referee to have made inappropriate, frivolous and/or disrespectful remarks about opposing counsel. David Nunes verily believed that the “mysterious disappearance” of a necessary court file was the result of Mr. Schwartz, last having known possession of it (RR 3-4). He asserts he was entitled to express his beliefs.

In Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991), the United States Supreme Court reversed discipline imposed by the Nevada Supreme Court when a lawyer made extrajudicial statements to the press that he knew or should have known had a “substantial likelihood of materially prejudicing” an adjudicative proceeding. This case squarely addresses the First Amendment rights of an attorney commenting upon a case. As set forth in Gentile:

There is no question that speech critical of the exercise of the State’s power lies at the very center of the First Amendment. Nevada seeks to punish the dissemination of information[501 U.S. 1035] relating to alleged governmental misconduct, which only last Term we

described as ‘speech which has traditionally been recognized as lying at the core of the First Amendment.’ Butterworth v. Smith, 494 U.S. 624,632, 110 S.Ct. 1376, 1381, 108 L.Ed.2d 572 (1990).

The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations. See e.g. Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-839, 98 S.Ct. 1535, 1541-1542, 56 L.Ed.2d 1 (1978). [I]t would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted]. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555,575, 100 S.Ct. 2814, 2826, 65 L.Ed.2d 973 (1980). Public vigilance serves us well, for ‘[t]he knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. . . . Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.’ In Re: Oliver, 333 U.S. 257, 270-271, 68 S.Ct. 499, 506-507, 92 L.Ed. 682 (1948). As we said in Bridges v. California, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), limits upon public comment about pending cases are ‘likely to fall not only at a crucial time but upon the most important topics of discussion... .’

Gentile at 111 S.Ct. 2724.

Pursuant to Gentile, David Nunes was entitled to speak out, even file suit over perceived wrongs. He could not lawfully be denied access to the courts.

Article I, Section 2 1, Fla. Stat. states:

The courts shall be open to every person for redress of

any injury, and justice shall be administered without sale, denial or delay.

Id.

Again, David Nunes verily believed he was entitled to redress. He sued. He lost. Bar discipline should not be triggered as a result of his exercise of his State and Federal Constitutional rights.

Since 1980, David Nunes has rendered legal services and provided advice to minority and non-minority clients throughout the State of Florida and in federal court. “Being a lawyer” has been David Nunes’ only profession since he became an attorney at age 47. To strip him forever from practicing law shall make it impossible for David Nunes to continue to support he and his family. Such a result would be unjust and improper. A 90 day period of suspension and imposition of special terms of probation are appropriate.

### **CONCLUSION (Nunes Petition)**

Based upon the Record below as well as argument, the Respondent, David Nunes, respectfully requests this Honorable Court modify the Report of the Referee by suspending him from the practice of law for a period of 90 days, with a special condition that he 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 and refraining **from pro** **se** litigation.

## **SUMMARY OF ARGUMENT (Bar Cross-Petition)**

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.



**II. DISBARMENT WOULD BE WHOLLY  
INAPPROPRIATE BASED UPON THE FACTS  
AND CIRCUMSTANCES.**

Despite The Florida Bar's protestations to the contrary, suspension rather than disbarment is a just and appropriate sanction for David Nunes' conduct. The Bar's Cross-Appeal lacks merit and is not supported by precedent. The Bar's cavalier appeal for disbarment controverts the Referee's recommendation and flies in the face of the evidence. Suspension is appropriate. Suspension is consistent with prior rulings of this court and is fair under the specific facts and circumstances of this case.

The actions at bar did not constitute criminal conduct. Accordingly, the majority of the cases cited by The Florida Bar are not factually applicable. For example, The Bar cites The Florida Bar v. Forbes, 596 So. 2d 1051 (Fla. 1992), wherein the attorney committed a crime - bank fraud. The Bar cites to The Florida Bar v. Rightmeyer, 616 So. 2d 953 (Fla. 1993), wherein the lawyer was convicted of perjury. David Nunes does not quarrel that disbarment is appropriate in the above-cited cases. Each lawyer's criminal activities, under the specific facts and circumstances warranted the resultant punishment.

The central allegation of misconduct David Nunes is accused of committing with regards to the Bruton matter was that the lawsuit filed by Nunes was

“frivolous.” While engaging in frivolous litigation, pro se is admittedly sanctionable, in this case David Nunes has already been sanctioned monetarily by the court (RR 8). The Bar has previously acted on those alleged improprieties. More importantly, disbarment shall not accomplish any of the three (3) purposes of disciplinary proceedings.

Importantly, The Bar represents that “Mr. Nunes had not paid any of that money [owed to the Burtons]” in support of its request for rejection of the Referee’s recommendation and request for **disbarment**. A Writ of Garnishment issued on May 22, 1997, a copy of which is attached as Exhibit A, clearly establishes that David Nunes’ bank account at Union Bank of Florida was garnished for attorneys’ fees and costs owed (AE 4).

The Bar’s assertion that David Nunes’ conduct was dishonest or selfishly motivated is misplaced and not supported by the Record. On the contrary, whether a claim made by him was frivolous or libellous, even if true’ is not tantamount to dishonesty.

Routinely, attorneys who engage in conduct involving dishonesty, misrepresentation, fraud, or deceit receive suspension. Those who engage in criminal activity are disbarred. For example, in The Florida Bar v. Siegal, 5 11 So,

---

‘Which David Nunes contests.

2d 995 (Fla. 1987), a lawyer was suspended for a period of 90 days for engaging in a deliberate scheme to misrepresent facts in order to secure financing to purchase a law office. In The Florida Bar v. Adler, 505 So. 2d 1334 (Fla. 1987), a lawyer was suspended for 90 days for fraudulently backdating instruments to obtain tax deductions. Similarly, this Court found the suspension of a lawyer for a term of 91 days appropriate when a lawyer materially altered a negotiable instrument by adding his name as payee on a settlement check. The Florida Bar v. Vernell, 502 So. 2d 1228 (Fla. 1987).

David Nunes does not deny his prior involvement in bar disciplinary proceedings. Yet, the Respondent contends that the Referee gave an undue amount of weight to his prior disciplinary record. The Referee ignored the fact that the conduct herein was not directly related to the conduct he was previously disciplined for. The Bar overstates the significance of David Nunes' prior disciplinary history. Rather than involving dishonesty and misrepresentations, David Nunes' conduct is more akin to over aggressiveness and overzealousness associated with lawyering.

Based upon the facts and circumstances of this case, suspension rather than disbarment is appropriate. Accordingly, the Government's Cross-Petition should be denied.

**CONCLUSION (Bar Cross-Petition)**

Based upon the Record in this case as well as the argument lodged by the Respondent, David Nunes, respectfully requests this Honorable Court reject the appeal of the Florida Bar and order the discipline sought in the Respondent's Petition for Review.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original plus seven (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; to **Ronna Friedman Young**, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309; and to John F. Harkness Jr., The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 2nd day of **NOVEMBER, 1998**.

Respectfully submitted,

RICHARD L. ROSENBAUM, ESQUIRE  
LAW OFFICES OF RICHARD L. ROSENBAUM  
Attorney for Appellant  
One East Broward Boulevard  
Suite 1500, Bamett Bank Plaza  
Fort Lauderdale, Florida 33301  
Telephone (954) 522-7000  
Florida Bar No: 394688

BY 

\_\_\_\_\_  
RICHARD L. ROSENBAUM