IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 91,472
[TFB Case No. 97-30,055(10A)]

v.

WILLIAM B. FREDERICKS, JR.,

Respondent.
_____/

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on March 6, 1998, shall be referred to as "T" followed by the cited page number(s).

The Report of Referee dated March 30, 1998, will be referred to as "ROR" followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex. ___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. ___, followed by the exhibit number.

The respondent's Initial Brief dated July 6, 1998, will be referred to as "RB", followed by the cited page number(s).

STATEMENT OF THE CASE

To expand as necessary on the initial brief, the Tenth Judicial Circuit Grievance Committee "A" voted to find probable cause in this matter on June 10, 1997. The bar filed its complaint on September 26, 1997. On October 10, 1997 this court entered an order directing the chief judge of the Ninth Judicial Circuit to appoint a referee to hear the matter. On January 30, 1998, the respondent filed his response to the complaint. The final hearing was held before The Honorable Jay Paul Cohen, the duly appointed referee, on March 6, 1998. On March 24, 1998, the bar filed its affidavit of costs in this matter.

The referee entered his report on March 30, 1998, wherein he recommended the respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.3 for failing to act with reasonable diligence and promptness in representing a client, 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee recommended the respondent receive a six (6) month suspension and that he pay the bar's costs totaling $1,467.25.

The board of governors considered the referee's report and recommendations at its meeting which ended May 22, 1998. The board voted not to seek an appeal.

Respondent's counsel served his notice of appearance and notice of appeal on May 19, 1998. The respondent filed his petition for review on June 4, 1998. On July 6, 1998, respondent served his initial brief along with his request for oral arguments.

STATEMENT OF THE FACTS

To expand as necessary on the initial brief, respondent was retained by Peter Winston in late 1983 regarding his termination from employment as a result of his involvement in the Army National Guard which resulted in absences from work [T17-20]. Respondent waited until the National Labor Relations Board (NLRB) concluded its investigation of Mr. Winston's complaint [T106]. Respondent took Mr. Winston, or at least arranged visits, to various agencies, including to then Senator Chiles' office [T93-94, 100, 105-106]. Respondent told Mr. Winston that he filed a claim in the state court when the visits proved fruitless and the NLRB report was unfavorable [T22-25]. Respondent ultimately told Mr. Winston he received a $25,000.00 judgment after default in state court [T24].

In 1983, respondent wrote to the defendant and informed them that a suit would be filed in thirty (30) days. [Respondent Ex. 5]. In 1985, respondent informed Mr. Winston a suit had been filed in federal court [T25-27]. For the next eleven years, respondent gave Mr. Winston various complex legal explanations as to why he has not received his monies. Respondent claimed the clerk's office would not release the monies [T28]. Later Mr. Winston was told there was a dispute over the interest earned on the money [T28, 55, 62]. Mr. Winston was informed by respondent the federal case was going to mediation and he subsequently told Mr. Winston the case had been resolved in mediation [T26-27]. Part of the reason for the time

frames involved was that Mr. Winston would periodically go on active duty and be absent for significant periods of time [T28, 48-49]. Mr. Winston's testimony was corroborated by his wife, [T66], and his mother, [T73-74], that respondent advised that monies from the suit were forthcoming.

During this same period of time, the respondent handled other legal problems for Mr. Winston. There was a divorce and an on again, off again, paternity action [T37, 40, 53]. Respondent did not receive any payment for this representation. Respondent and Mr. Winston had an agreement that respondent would be compensated for representing Mr. Winston in all of these matters from the proceeds of the employment lawsuit [T49-51]. Personnel from respondent's law office inquired about the payment of costs [T52]. During this time period, Mr. Winston placed many telephone calls to respondent [T36-37, 85, Bar Ex. 1].

Respondent admits that he never informed Mr. Winston that he would not be handling the lawsuit nor that the statute of limitations would expire if litigation was not commenced [T139]. Respondent misrepresented to Mr. Winston that his case had been progressing when it had not [ROR, p. 3].

SUMMARY OF THE ARGUMENT

The respondent argues that the bar must show proof, by clear and convincing evidence, of the respondent's violation, in order to uphold the referee's findings of fact. This court has clearly established that a referee's findings of fact and recommendations of guilt are presumed correct. Further, the burden to overcome this presumption falls upon the party disputing the referee's findings. The respondent has not met this burden, therefore, the referee's findings of fact should be upheld.

Much of the respondent's arguments in his brief are based on challenging the credibility of Mr. Winston. The referee was in the best position to judge credibility and he chose to believe Mr. Winston and not the respondent. While the respondent suggests that the referee characterized Mr. Winston's testimony as bizarre, a careful reading of the referee's report indicates that it is the actions of the respondent to which the referee refers.

The referee's allowance of prior discipline into evidence before a finding of guilt was with the specific concurrence of the respondent. The respondent did not object to the introduction of this evidence. Respondent also presented arguments to explain the circumstances surrounding his prior discipline. Further, it is clear from the referee's report that the respondent's prior

discipline was only one factor he considered in making his recommendation as to guilt.

The referee's recommendation of a six (6) month suspension is supported by the evidence and existing case law and is not excessive or erroneous as the respondent suggests. Rather, a serious discipline is needed to encourage the respondent's reformation where his previous disciplinary sanction has failed to do so.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE WEIGHT OF THE EVIDENCE AND ARE NOT ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

In bar proceedings, a referee's findings of fact are presumed to be correct and this court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support, *The Florida Bar v. Bustamante*, 662 So. 2d 687, 698 (Fla. 1995). The party seeking to challenge the referee's findings of fact has the burden of showing those findings are clearly erroneous or without support in the evidence, *The Florida Bar v. Neu*, 597 So. 2d 266, 268 (Fla. 1992). The bar submits the respondent has failed to prove the referee's findings that the respondent neglected a client's legal matter, failed to maintain adequate communication with the client, and made misrepresentations to the client regarding the status of his case, are not supported by clear and convincing evidence.

The respondent argues that the referee did not adequately and/or properly weigh the testimony of the witnesses. The evidence presented before the referee boils down to a credibility contest between the respondent and Mr. Winston as to whether the respondent misrepresented to Mr. Winston that his lawsuit was progressing

when, in fact, he had never filed it. The determination of the credibility of witnesses is part of the referee's responsibilities. The referee made a detailed and candid analysis of the facts and of his findings and the evidence upon which the findings were based. The referee listened to and observed the three witnesses on behalf of Mr. Winston and the respondent, as his own sole witness, and, as the fact finder, resolved the conflicts in the evidence, *The Florida Bar v. Hoffer*, 383 So. 2d 639, 642 (Fla. 1980). The referee was in the best position to judge credibility because he was able to observe the witnesses' demeanor while testifying and acts to resolve conflicts in the testimony, *The Florida Bar v. Stalnaker*, 485 So. 2d 813, 816 (Fla. 1986). The referee here chose to believe Mr. Winston and not the respondent. When the referee's report refers to the events as bizarre, it is to characterize respondent's actions, not to attack Mr. Winston's testimony, [ROR, p. 2]. As the referee candidly noted, respondent's actions in misleading his client for many years regarding the status of his case was "eleven years of various forms of the check is in the mail story," [ROR, p. 2]. It should be noted that Mr. Winston perceived his relationship with the respondent as a friendship based upon their shared military honorability, [T60], and Mr. Winston had no legal knowledge of court proceedings whatsoever and innocently relied upon the respondent's representations, [T63].

Respondent argues the referee erred in admitting and considering respondent's prior disciplinary history as evidence of his guilt. It should be noted that the respondent was the last witness to testify at the final hearing. The referee had already heard the testimony of three other witnesses. When the bar stated its intent to enter the affidavit of disciplinary history as the bar's exhibit 2, the referee specifically asked the respondent whether he objected to its admittance. Respondent replied "I don't have any objection, Your Honor" [T78]. Thereafter, the referee allowed Bar Ex. 2 be admitted.

Respondent had an opportunity to put forth his explanation of the circumstances surrounding his prior discipline [T78-83]. He further argued that his prior discipline cases were not similar to the instant case [T110-112]. It is clear that respondent was afforded an opportunity to object to the introduction of this evidence. Respondent did not do so, but he chose to instead give his account of the events, with a full opportunity to present any and all mitigating evidence. Thus, any error was waived by the respondent's knowing agreement to the introduction of his past history and was harmless. The referee clearly notes the basis for finding the respondent's testimony unbelievable. In his report, the referee notes that the respondent's lack of payment for representation in subsequent family law matters is consistent with Mr. Winston's testimony that the fees were to be collected in the court settlement [ROR, p. 3]. Further, it is uncontested that the

respondent never wrote to Mr. Winston to advise him to seek other counsel in the lawsuit or to advise of the statute of limitations dates. During the respondent's testimony, the court's questioning of the respondent underscores the facts behind his incredulousness at the respondent's testimony, [T113-115].

POINT II

THE REFEREE'S FINDINGS OF FACT AS TO GUILT ARE NOT ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

Respondent argues that the referee failed to find intent as to R. Regulating Fla. Bar 4-8.4(c) regarding his misrepresentations to Mr. Winston. In *Neu*, supra, and *The Florida Bar v. Burke*, 578 So. 2d 1099 (Fla. 1991), the Court held that in order to find a violation of Rule 4-8.4(c), intent is a necessary element. However, those cases involved misuse of client funds. In a case factually similar to the instant matter, *The Florida Bar v. Witt*, 626 So. 2d 1358 (Fla. 1993), the attorney received a 91-day suspension from the practice of law for his continuing pattern of inaction in client representation. Violations of Rule 4-8.4(c) were found regarding the attorney's misrepresentations to a client regarding the status of his worker's compensation and personal injury claims. The attorney's "intent" was not specifically discussed. In the instant matter, the referee found that the respondent told Mr. Winston a claim was filed in state court, that a judgment had been entered in his favor as the result of the other parties' default, that a suit had been filed in federal court, and that the federal suit had been resolved in mediation. The referee specifically found that "[a]t no time did Fredericks keep Winston properly informed as to the *true* status of the case." (Emphasis added.) (ROR, p. 3). Clearly the referee's findings in regard to the

respondent's misrepresentations to Mr. Winston are similar to the findings in *Witt* wherein violations of Rule 4-8.4(c) were also found.

Respondent argues that his due process rights were violated when the referee found him guilty of R. Regulating Fla. Bar 4-1.3 and 4-1.4. Respondent cites both civil and criminal cases in support of this argument. However, bar proceedings are neither civil, nor criminal, but are rather quasi-judicial in nature. R. Regulating Fla. Bar 3-7.6(e)(i), *The Florida Bar v. Vannier*, 498 So.2d 896, 898 (Fla. 1986). This court has held, time and again, that the referee may properly "include information not charged in the bar's complaint...as it is relevant to the question of the respondent's fitness to practice law and thus relevant to the discipline to be imposed." *The Florida Bar v. Stillman*, 401 So. 2d 1306, 1307 (Fla. 1981). Respondent acknowledges that "this Court has held that an attorney may be convicted of violating a rule for which he was not charged." In fact, he also provided the citation to several cases which have in fact held so (RB21).

POINT III

THE REFEREE'S DISCIPLINARY RECOMMENDATION IS NOT ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

This Court has held that a referee's recommendation of discipline will not be second-guessed so long as that discipline has a reasonable basis in existing case law, *The Florida Bar v. Lecznar*, 690 So. 2d 1284, 1287 (Fla. 1997). In the instant matter the referee's recommended discipline is in agreement with other discipline cases involving neglect, lack of communication, and misrepresentation to the client.

In *The Florida Bar v. Palmer*, 504 So. 2d 752 (Fla. 1987), when the attorney's client expressed concern over the running of the statute of limitation in a personal injury lawsuit, the respondent told her that he had already filed suit when in fact he had not done so. Later he lied to her concerning the securing of court dates. He falsely told her that the case had been settled out of court and that the settlement check was in the mail. Respondent received an eight-month suspension from the practice of law. Respondent had no prior disciplinary history.

In *The Florida Bar v. Bazley*, 597 So. 2d 796 (Fla. 1992), the respondent made misrepresentations to his client regarding the status of his suit. The client was not injured. The referee found, in mitigation, that the attorney's actions may have been due to alcohol abuse and recommended a thirty (30) day suspension.

However, the Court found the similar factual circumstances in *Palmer* to be persuasive. Respondent received an eight-month suspension from the practice of law. Respondent had a prior private reprimand.

As in the instant matter, the attorney in *Witt*, supra, argued that suspension was inappropriate because he had not gained anything in the cases prompting the disciplinary proceedings and no clients were injured due to his inaction. However, the Court found the potential for client injury had there not been an intervening factor or event. In the present matter, it is quite conceivable that Mr. Winston could still be in the dark about his law suit and "recovery" had he not inquired into the matter with The Florida Bar. But for the bar's investigation, Mr. Winston could still believe he had a substantial amount of money coming to him based upon the respondent's representations.

The Florida Standards for Imposing Lawyer Sanctions support suspension in this case. Respondent argues that Standard 7.2 requires a finding of injury to the client. This is not the case. Standard 7.2 calls for suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. While the Standard does not require injury to the client, Mr. Winston was injured by respondent's misrepresentations. Mr. Winston borrowed money to purchase a 1939 Pontiac Coupe based

on respondent's assurances to him that the judgment money was forthcoming [T61]. The Standard is also applicable when injury is caused to the legal system. This court has held in *The Florida Bar v. Gaskin*, 403 So. 2d 425, 426 (Fla. 1981), that "[w]hen a lawyer fails to fulfill his responsibilities the image of the entire legal profession is tarnished...Absolute candor to a client by a lawyer is mandated because the very foundation of an effective attorney-client relationship is predicated upon mutual trust. Lawyers should never mislead their clients."

This Court has long held that it deals more severely with cumulative misconduct than with isolated misconduct and past disciplinary history will be considered in determining the appropriate sanctions. *The Florida Bar v. Greene*, 515 So. 2d 1280, 1283 (Fla. 1987). "As a general rule a suspension is appropriate when an attorney is found guilty of misconduct that causes injury or potential injury to the legal system or to the profession and that misconduct is similar to that for which the attorney has been disciplined in the past." *The Florida Bar v. Grigsby*, 641 So. 2d 1341, 1342 (Fla. 1994).

Respondent argues the following mitigating factors should be considered: 9.32(b) absence of dishonest motive; 9.32(c) personal and/or emotional problems; 9.32(e) full and free disclosure or cooperative attitude; 9.32(f) inexperience in the practice of law;

and 9.32(i) unreasonable delay in disciplinary proceedings. The bar disagrees that these factors are applicable in the instant case. The referee found respondent guilty of violating rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation which indicates a dishonest motive in hiding the truth of his neglect from his client to avoid retribution. The information regarding respondent's parents' poor health was brought before the referee, [T58-59], and appropriately weighed by the referee. Respondent was admitted to The Florida Bar in 1979 and at the time the misconduct began in or around 1985, he had been practicing law for six years. The bar has expeditiously proceeded in this matter upon learning of this situation, many of the most salient events of which took place after the filing of the 1997 complaint when Mr. Winston learned for the first time that respondent had never filed the suit.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendations as to guilt and find that the referee's discipline recommendations of a six (6) month suspension to be appropriate and that the bar's costs be taxed against the respondent totaling $1,467.25.

Respectfully submitted,

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ATTORNEY NO. 381586

By: 

JAN K. WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to counsel for the respondent, Robert H. Gray, Polk County Courthouse, 225 North Broadway, 3rd Floor, Post Office Box 9000, Public Defender, Bartow, Florida, 33831; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 24th day of July, 1998.

Respectfully submitted,

JAN K. WICHROWSKI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 91,472
[TFB Case No. 97-30,055(10A)]

v.

WILLIAM B. FREDERICKS, JR.,

Respondent.
_____/

APPENDIX TO THE FLORIDA BAR'S ANSWER BRIEF

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APPENDIX INDEX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,
Complainant,

v.

CASE NO:91,472

William B. Fredericks, Jr.
Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held on the following date:

The following attorneys appeared as counsel for the parties:
For The Florida Bar: Joan Fowler
For The Respondent: William B. Fredericks, Jr., pro se

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged:

After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

William B. Fredericks, Jr. (hereinafter Fredericks) was retained by Peter Winston (hereinafter Winston) in late 1983 reference his claim that he had been discharged from employment because of his participation in the Army National Guard and resulting absences from work. Fredericks waited until the N.L.R.B. completed its investigation of Winston's complaint. Fredericks apparently took Winston to various agencies or at least arranged visits, including to then Senator Chiles' office. When that proved fruitless and when the N.L.R.B. report was unfavorable, Fredericks told Winston that he filed a claim in the State Court. Fredericks ultimately told Winston he received a

$25,000.00 judgment after default. In 1985, Winston was informed by Fredericks that a suit had been filed in Federal Court. What occurs over the following years can only be characterized as bizarre. There proceeds to be eleven years of various forms of the check is in the mail story. Fredericks claimed the clerk's office would not release the monies. Later Winston was told there was a dispute over the interest earned on the money. Winston claims that Fredericks informed him the Federal case was going to mediation and subsequently told Winston the case had been resolved in mediation. Part of the reason for the time frames involved was that Winston would periodically go on active duty and be absent for significant periods of time. While all this was going on, Winston had other legal problems handled by Fredericks. There was a divorce and an on again, off again paternity action. There seems to be no dispute that Fredericks was not paid for any of this representation. Winston's testimony was that the agreement was that Fredericks would be compensated from the proceeds of the employment lawsuit. There is also no dispute that personnel from Fredericks law office were inquiring about the payment of costs and that during this time period there were many phone calls from Winston to Fredericks.

What is even more incredible is that there is not one writing between either of the parties to memorialize anything. It is hard to see the rationale or logic in Fredericks house of cards. It inevitably had to crumble. It was so preposterous that in light of Winston's lack of documentary evidence, the allegation could easily be dismissed. There are however two pieces of evidence that corroborate Winston's allegations. First and foremost is Fredericks disciplinary history (Bar Exhibit 2) that demonstrates that

this type of conduct is not isolated, that other clients have made similar accusations against Fredericks. The other factor is Fredericks willingness to handle other legal matters for Winston without compensation. This is consistent with the position taken by Winston that the fees were to be collected from the phantom settlement.

At no time did Fredericks ever inform Winston that he would not be handling the lawsuit or that the statute of limitations would expire if litigation were not commenced. At no time did Fredericks keep Winston properly informed as to the true status of the case.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty:

It is the recommendation of the referee that Fredericks be found guilty of the one count in the complaint, specifically Rule 4-8.4(c). It is further recommended that he be found guilty of Rule 4-1.3 and 4-1.4. The complaint alleged conduct involving dishonesty, fraud, deceit, or misrepresentation. The referee finds that Fredericks did misrepresent the status of the client's matter. The referee also finds that Fredericks did not act with reasonable diligence and promptness in representing a client and did not keep the client reasonably informed about the status of the matter. It was incumbent upon Fredericks to inform Winston, in writing, that he would not be handling the employment case.[1]

IV. Recommendation as to Disciplinary Measures to be Applied:

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[1]Fredericks did refer Winston to another lawyer. Winston claims this was to handle an independent suit involving the interest earned on the phantom settlement. Fredericks claims it was to have the claim reviewed. Again, nothing was in writing.

I recommend that the Respondent be suspended for a period of six (6) months and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-5.1(e).[2]

V. Personal History and Past Disciplinary Record:

After finding of guilt and prior to recommending discipline to be reommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 51
Date admitted to Bar: September 18, 1979
Prior disciplinary convictions and disciplinary measures imposed therein:

Fredericks received an admonishment in case no. 91-21,395(10A) and 90-31,203(10A) by a Report of Minor Misconduct dated November 9, 1991, William B. Fredericks accepted the report on November 18, 1991.

VI. Statement of Costs and Manner in Which Cost Should be Taxed:

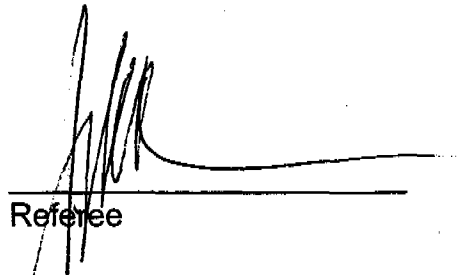
I find the following costs were reasonable incurred by The Florida Bar.

Costs incurred at the grievance committee level as reported by bar counsel	$ 31.50
Administrative Costs Rule 3-7.6(k)(1)(E)	$ 750.00
Sheriffs costs for service of process	$ 0.00
Witness fees	$ 61.50
Bar counsel copy costs	$ 10.80
Court reporter costs	$ 613.45
Referee's travel and out-of-pocket costs	$ 0.00
TOTAL ITEMIZED COSTS	$1467.25

[2]Restitution for the $1,100.00 retainer is not recommended because during the course of the relationship, the Respondent handled two other matters for the client without compensation. The testimony was that the Respondent even paid the costs of the two actions involved.

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

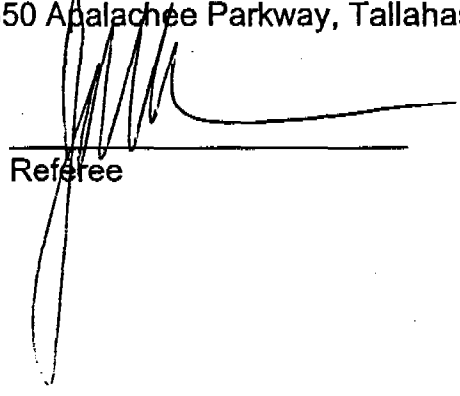
Dated this 30th day of March, 1998.



Referee

Certificate of Service

I hereby certify that a copy of the above Report of Referee has been served on Joan Fowler, Bar Counsel, The Florida Bar, 880 North Orange Avenue Ste 200, Orlando, Florida 32801, William B. Fredericks, Jr., 2910 Winter Lake Rd., Lakeland, Florida 33803-9753 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 30th day of March, 1998.



Referee