097

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	:	
Complaint,	:	
vs.	:	Case No. 91,472
WILLIAM B. FREDERICKS, JR.	:	
Respondent.	:	
_____	:	

FILED
SID J. WHITE
JUL 6 1998
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

7/31

PETITION FOR REVIEW OF FINDINGS OF THE REFEREE
IN A DISCIPLINARY MATTER CONDUCTED UNDER AUTHORITY OF
RULES REGULATING THE FLORIDA BAR

INITIAL BRIEF OF PETITIONER ON THE MERITS

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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE CASE

On September 26, 1997, the Florida Bar filed a complaint charging Respondent with violating Rule Regulating the Florida Bar 4-8.4(c) regarding representation of Complainant Peter E. Winston. A hearing was held on March 6, 1998 before the Honorable Jay Paul Cohen, Circuit Judge for the Ninth Judicial Circuit, duly appointed Referee. Following the hearing Judge Cohen filed a Report of Referee on March 30, 1998 making findings of facts, recommending that Respondent be found Guilty of Violating Rule 4-8.4(c), as well as Rules 4-1.3 and 4-14, and recommending that Respondent be suspended from the practice of law for a period of six months and thereafter until Respondent proves rehabilitation pursuant to 3-5.1(e). Respondent filed a Petition for review on June 4, 1998.

STATEMENT OF THE FACTS

Complainant Peter E. Winston was employed by American Cyanamid from October 1979 until October 1982 (R17--2-7). In October 1982 Winston was terminated from American Cyanamid (R18--14,15). Despite the fact the termination was due to American Cyanamid's reduction in workforce (R18--18,19) and as a member of management he had no seniority rights (R18--23,24), Winston felt that he was wrongfully terminated as a result of his service in the National Guard. Based upon this belief he was referred to Respondent William B. Fredericks, who was also in the National Guard, by a mutual acquaintance in the Guard (R16--20-25,R17--1).

Winston initially testified that he met Respondent for the first time (R21--11-13) when he paid a retainer to him "around January or the first part of '84" (R21--14-18). Later in the proceeding Winston indicated he retained Respondent in November or December of 1993 (R42--14-25). Respondent testified that he was retained in early 1983 (R83--24,25), R84--1) and produced correspondence dated March 31, 1983 (Respondent's Exhibit 1) April 18, 1983 (Respondent's Exhibit 7), May 6, 1983 (Respondent's Exhibit 6) as well as a memo from his secretary in Winston's file dated July 7, 1983 (Respondent's Exhibit 3) which verified his employment prior to that as alleged by Winston.

Winston testified that he retained Respondent after the Labor Relations Board denied his claim (R19--17-25, R20--1-20). Respondent's Exhibit 3, a memo from Respondent's secretary in Winston's file, states "Mr. Winston has indicated that he does not

want us to proceed further until the allegations have been investigated by the U.S. Department of Labor and when these investigations are complete, then we will determine whether or not to file suit." Respondent further produced a letter from Edward Finley, assistant state director for veteran's employment and training for the U.S. Department of Labor closing the file based on lack of evidence which was dated September 21, 1983 (R92--1-9).

Winston testified the retainer was in the amount of eleven hundred dollars (R21--9,10) but could provide no corroboration of that fact (R21--25, R22-1-6). Respondent testified that he believed the retainer was less than eleven hundred dollars but could not say the exact amount because he had no financial records for 1983 (R7--18-21).

Winston testified that Respondent might have talked with him about going to congressional offices in an effort to have them intervene on his behalf but he never personally spoke with any senators or congressional aides (R38--15-25). Later when confronted with this testimony Winston indicated he had gone to Senator Chiles' office prior to retaining Respondent (R45--16-24). Respondent testified that he sent Winston to the offices and produced correspondence from Senator Chiles' and Congressman Bilerakis' offices in March and September of 1983 responding to their visits (R46--7-20, R93--1-25, R94--1-25).

Winston testified that Respondent indicated to him that he had filed a lawsuit in state court late in 1984 (R22--13-22). He further testified Respondent advised him in November, 1985 the

other side had defaulted and he had been awarded twenty-five thousand dollars (R22--24,25, R23--1-25, R24--1-6). Winston then indicated Respondent claimed he was filing a concurrent federal lawsuit and the state award could not be disbursed (R24--10-25). Winston claims Respondent advised him in December of 1993 that a mediator had worked out a settlement wherein Winston would receive a fifty-seven thousand dollar lump sum payment at the end of 1993 or beginning of 1994 with a twenty thousand dollar a year payment for ten years thereafter (R27--14-21). He indicated he called Respondent on an almost daily basis for years and accepted this story (R29--1-25, R29--1-5).

The Bar offered only the testimony of Winston's wife, Jennifer Winston and mother, Sue Winston, in an effort to corroborate this tale.

Both Jennifer and Sue Winston's testimony regarded the narrow time frame of 1995-1996 (R66--4,5, R72--3-6, R75--9-25) while Respondent was handling paternity and child custody cases for Winston.

Jennifer Winston testified that she had discussed a federal lawsuit with her husband (R66--6-12) and references to conversations with Respondent about disbursement of funds (R66--22-25) and needing to finish some paperwork (R71--7-25, R72--1,2). Jennifer Winston's contacts with Respondent were in reference to paternity issues (R67--5-26, R71--13-16). Sue Winston testified she had contact with Respondent on several occasions at the request of her son (R73--20-25, R74--106). The contacts involved the exchange of

checks and/or papers between Respondent and Sue Winston (R74--7-25, R75--1-13). On cross-examination it was revealed the papers related to the paternity action (R76--16-24).

Respondent testified that Winston left on active duty and was gone for an extended period of time (R94--14,17, R95--1) and upon his return advised Respondent not to proceed with a suit because he wanted to try and get his job back (R95--9-16) and then left for Fort Sill for a year (R95--17-25). Upon his return Winston wanted to file the lawsuit (R96--22-25, R97--1-13). Respondent advised Winston that he was running out of time to file the suit and that it would cost money to do so (R96--22-25, R97--1-25).

It is unrebutted that at this time Respondent referred Winston to Sgt. Major Joe Warner of the National Guard in Orlando in an effort to obtain legal aid (R99--3-6). It is also unrebutted that Respondent referred Winston to Michael Raiden, then a Clerk for the Second District Court of Appeal and currently a County Court Judge in and for Polk County (R99--14-25, R100--1-3). Respondent also testified that at this point he referred Winston to Thomas Clark, a former judge who was currently practicing with the firm of Lane, Trohn (R86--6-15) although Winston denies this. It is, however, uncontroverted and agreed upon by both that Respondent referred Winston to Thomas Clark at some point in the 90's (R86--1-25, R87--1-13, R117--17-23, R110--16-25, R54--14-25, R55--1-13), although Winston maintains it was for the purpose of suing for damages and interest on the award that had not been disbursed (R55--7-13).

It is uncontroverted and agreed by both parties that Respondent was never paid by Winston for divorce, paternity and child custody cases he performed and that Frederick's secretary made repeated requests for payment in these matters (R52--3-10, R--50-6-10). Winston maintained that there was an agreement that Respondent would be paid from the proceeds of the phantom settlement (R--49-24-25, R50--1-5) but conceded that Respondent's secretary knew nothing about this arrangement (R50--10,11, R52--21-23).

Respondent testified he had received a letter from Winston several years ago advising that he intended to sue Respondent and requesting to know who his malpractice carrier was (R114--19-25, R115--1-6). Winston initially denied writing a letter threatening to sue Respondent, stating "The only letter I ever wrote was to the Bar Association asking for help" (R121--24,25, R122--1,2, but when specifically asked about a letter inquiring of Respondent's insurance carrier admitted that he had written such a letter (R122--6-22).

SUMMARY OF THE ARGUMENT

The Florida Bar alleges Respondent lied to Winston over a period of 13 years regarding the existence of a settlement in a wrongful termination case. In order to uphold the findings of the referee the Bar must show the proof of Respondent's violation by clear and convincing evidence.

The referee erred in making his findings of facts and recommendation of guilt.

In analyzing testimony, the Court did not accord proper weight to unrebuted testimony, the evasive, inconclusive and uncorroborated testimony of the complainant nor the testimony regarding two judges. The referee clearly did not attach great significance to the testimony of the complainant, characterizing the nature of his testimony as "bizarre", "incredible" and "preposterous".

Morever, the court committed fundamental reversible error by specifically citing the improper consideration of Respondent's prior disciplinary record as evidence of guilt and failing to recognize the alternative reasonable hypothesis of innocence for failing to receive payment from complainant for other legal services rendered.

ARGUMENT

ISSUE I

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

The Florida Supreme Court's review of the referee's findings of fact is not in the nature of a trial de novo. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987), The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). The Court does not sit in bar disciplinary hearings as a finder of fact, having delegated that responsibility to the referee. The Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990)

Rule 3-7.5 (K)(1) of the Rules Regulating the Florida Bar provides that the referee's findings of fact "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." The Florida Bar v. Hooper, Supra, The Florida Bar v. Gross, 610 So.2d 442 (Fla. 1992).

The burden is upon the party seeking review to demonstrate that the referee's report is "erroneous, unlawful or unjustified." Rule Regulating Fla. Bar 3-7.(6)(c)(5), The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990). While some opinions, The Florida Bar v. Spann, 682, So.2d 1070 (Fla. 1996), The Florida Bar v. Laing, 695 So.2d 299 (Fla. 1997), The Florida Bar v. Jordan, 705 So.2d 1387 (Fla. 1998), state that the party contesting that the referees findings of fact and conclusions as to guilt are erroneous in attorney disciplinary proceedings carries the burden of demonstrat-

ing that there is "no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions," (emphasis added), this is probably an overstatement.

The Florida Bar v. Conto, 668 So.2d 583 (Fla 1996), and The Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997), indicate that the party seeking review has the burden of showing that the referee's findings are "clearly erroneous or unsupported by the record."

The majority of cases seem to indicate that the referee's findings of fact should be upheld "unless clearly erroneous or without support in the record." (fn [1]) or a slight variation of

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[1] The Florida Bar v. Boland 702 So.2d 229 (Fla 1998), The Florida Bar v. Carter, 410 So.2d 920 (Fla. 1982), The Florida Bar v. Hayden, 583 So.2d 1016 (Fla. 1991), The Florida Bar v. Krovitz, 694 So.2d 725 (Fla. 1997), The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981), The Florida Bar v. McMillan, 600 So.2d 457 (Fla 1992), The Florida Bar v. Martocci, Supra, The Florida Bar v. McClure, 575 So.2d 176 (Fla 1991), The Florida Bar v. Miele, 605 So.2d 866 (Fla 1992), The Florida Bar v. Neu, 597 So.2d 266, (Fla. 1992), The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990), The Florida Bar v Spann, Supra, The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986), The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986), The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968).

this language - "clearly erroneous or without support in the record "(fn [2]) and" clearly erroneous or nonsupported by the record" (fn [3]). Several cases use the conjunctive and state the findings of fact will be upheld unless "clearly erroneous and lacking in evidentiary support."(emphasis added) (fn [4]).

If the referee's findings of fact are clearly erroneous or lacking in evidentiary support the Florida Supreme Court may substitute it's judgment for that of the referee, Bar v. Weiss, 586 So.2d 1051 (Fla. 1991).

In order to be upheld, the referee's findings must be based upon "legally sufficient evidence." The Florida Bar v. Abramson, 199 So.2d 457 (Fla. 1967), The Florida Bar v. Hooper, Supra.

Where there is not "competent, substantial evidence" to support the referee's findings the Supreme Court may reweigh the evidence and substitute it's judgment for that of the referee. The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995). The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).

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[2] The Florida Bar v. Barcus, 697 So.2d 71, (Fla. 1997), The Florida Bar v. Lipmon, 497 So.2d 1165 (Fla. 1986), The Florida Bar v. McKenzie, 442 So.2d 934 (Fla. 1983), The Florida Bar v. Rue, 643 So.2d. 1080 (1994), The Florida Bar v. Orta, 689 So.2d 270 (Fla 1997).

[3] The Florida Bar v. Conto, supra.

[4] The Florida Bar v. Nealy, 502 So.2d 1237 (1987), The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988). The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994), The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995).

In the instant case there is not competent, substantial evidence to support the referee's findings of fact.

The Bar's case consists almost entirely of Winston's uncorroborated story. Throughout the course of his testimony Winston was constantly impeached by concrete evidence or his own admissions.

Apparently the referee placed no weight upon the testimony of the mother and wife of Winston, insofar as he failed to cite them in his findings of fact.

In evaluating Winston's allegations the referee referred to the facts as "bizarre," "incredible," "preposterous" and stated it is "hard to see the rational or logic" in Respondent's alleged actions. The referee held "in light of Winston's lack of documentary evidence the allegations could easily be dismissed," but failed to do so for two specific pieces of evidence - Respondent's prior disciplinary record and failure to secure payment from Winston for handling the other cases.

1. The Court erred in admitting and considering Respondent's previous disciplinary history as evidence of Respondent's guilt.

Upon calling Respondent as a witness, counsel for the Bar immediately examined Respondent at length regarding his prior disciplinary history (R77--9 through R 83--15).

Rules of Civil Procedure apply after appointment of referee if no provision in the rules governing procedures before the referee apply. R. Regulating Fla. Bar 3-7-6 (e)(1), The Florida Bar v. Daniel, 626 So.2d 178 (Fla. 1993). Although Fla. Standards to Impose Lawyer Sanctions 9-22 provides for the consideration of

prior disciplinary history at the sanction phrase of the report, there is no express provision for it's consideration in the guilt phase, The Florida Bar v. Jordan, supra.

Disciplinary hearings are neither civil non criminal, but are quasi-judicial, R. Regulating Fla. Bar 3-7-6 (e)(i), The Florida Bar v. Vannier, supra, The Florida Bar v. Clement, supra.

As such the Court has held that failures to comply with certain evidentiary provisions were not violations of due process and the referee is not barred by technical rules of evidence State ex.rel. The Florida Bar5 v. Junkin, 89 So.2d 481 (Fla. 1956), State ex. rel. Kehoe v. McRae, 49 Fla. 389, 38 So. 605 (1985), The Florida Bar v. Vannier, supra.

This has included the admissibility of hearsay, The Florida Bar v. DeSerio, 529 So.2d 1119 (Fla. 1988), The Florida Bar v. Vannier, supra, and failure to comply with statutory requirements regarding affidavits and testimony The Florida Bar v. Clement, supra.

However, in the instances where the Referee failed to comply with the evidentiary rules the Court went to great lengths to demonstrate that any error was harmless.

In DeSerio the Court observed that the record supported the finding of fact and there was no reliance upon uncorroborated hearsay.

In Vannier the Court made it clear that the hearsay in question was adequately authenticated and its reliability established. In Clement the Court ruled any error was harmless in light

of the attorney's testimony admitting the substance of the witnesses' testimony.

Nevertheless, in Clement the Court ruled that even though disciplinary hearings are not governed by the rules of evidence, it would be better practice to comply with the statutes.

All relevant evidence is admissible except as provided by law Florida Statutes 90.4025.

But otherwise relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. Florida Statutes 90.403.

Florida Statutes 90.404(2)(a) provides similar fact evidence is admissible when relevant to prove a material fact in issue. Brown v. State, 513 So.2d 213 (Fla. 1st DCA 1987). Evidence of collateral crimes is not admissible on the basis of mere similarity, there must be something unique or unusual that renders it to become a means of proof of a relevant issue. Wicker v. State, 445 So.2d 581 (Fla. 2d DCA 1983), Williams v. State, 110 So.2d 654 (Fla. 1959). In the instant case there has been no showing of unique similarity or compelling relevance.

Similar fact evidence is inadmissible when the evidence is relevant solely to prove bad character or propensity.
Florida Statutes 90.404(2)(a).

In Parks v. Zitnik, 453 So.2d 434 (2d DCA 1984). The Court ruled that it was error to allow questioning of defendant's convictions where there was no predicate laid to show the information would be relevant to proving a material fact in issue. The

error was deemed not be harmless where the credibility of the parties was crucial even though the case was tried by the Court rather than the jury. In the instant case certainly the credibility of the parties was critical. Therefore the questioning regarding Respondent's prior disciplinary history was not harmless error.

2. The Court erred in it's finding of fact that Respondent's failure to receive payment from Winston for his representation in other matters was an indication of Respondent's guilt.

At most the failure to receive payment for Winston constitutes circumstantial evidence of guilt. In The Florida Bar v. Marable, 647 So.2d 438 (Fla. 1994), the Court ruled circumstantial evidence can be used to prove intent in bar discipline hearings. However, to be legally sufficient evidence of guilt the circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence.

The Referee concluded that this failure to receive payment corroborated Winston's claim that the money would be paid from the settlement. This is a ludicrous assertion insofar as Respondent would be, in effect, cheating himself since he would have known the money was not forthcoming. It also fails to explain Respondent's secretary's uncontested repeated requests for payment. Even if the requests were merely for filing costs why wouldn't they have been taken from the phantom settlement as well?

In the instant case, as well as Marable, the facts do not eliminate a reasonable hypothesis of innocence and do not constitute competent substantive evidence.

3. The Referee erred in relying upon the erroneous and inconclusive testimony of the complaining witness in making his findings of facts.

Winston was repeatedly impeached and changed his story regarding the date he retained Respondent, (R21--11-13, R21--14-18, R42--14-25) and Respondent's Exhibits 1, 6 and 7, whether Respondent assisted him with the Labor Board (R19--17-25, R20--1-20, R92--1-9) and whether Respondent assisted him with congressional representation (R38--15-25, R45--16-24, R46--7-20, R93--1-25 and R94--1-25).

The testimony of Winston is not free of substantial doubts or inconsistencies, The Florida Bar v. Raymar, supra. The degree of evidence necessary to convict does not flow from the testimony of one witness unless it is corroborated to some extent by facts or circumstances. The Florida Bar v. Raymar, supra.

Solely testimony of complaining witness, evasive and inconclusive, does not establish to any degree of certainty the notion of the employment nor exact amount of money received by him. State v. Ex. Rel. The Florida Bar v. Jenkins, supra. In Jenkins the Court found that except for the accused's statements there was no evidence in the record that the money was not used for the purpose it was given, as in the instant case. Furthermore, in dismissing

the charge the Court noted the ill will the complainant bore Respondent as well as the lapse of time in receiving the testimony.

4. The Referee erred in arbitrarily rejecting the unrebutted testimony addressed by Respondent in making his findings of fact The Florida Bar v. Clement, supra.

It is uncontroverted that Respondent sent Winston to former Judge Thomas Clark at the law firm of Lane Trohn (R86--6-15) as well as to current Judge Michael Raiden, who was then a law clerk at the Second District Court of Appeal (R99--14-25, R100--1-3) to review the merits of the case. The referral of Winston to two prominent attorneys at the risk of having his purported fraud uncovered is entirely inconsistent with the Bar's unrebutted testimony. The Florida Bar v. Clement, supra.

5. The Referee erred in failing to give serious consideration in the uncontroverted testimony regarding the judges in the instant case. In The Florida Bar v. Raymar, supra, the Court held that the testimony of three judges in support of the attorney was "not controlling... but deserving of serious consideration." In the instant case the unrebutted testimony is even more compelling. In order to accept Winston's facts one must presuppose that Respondent sent him to a former judge in a well-respected law firm to discuss a lawsuit regarding a settlement that didn't exist. Either Respondent must have believed Judge Clark would ignore the violation when this was discovered or assume former Judge Clark would also join in this charade for no apparent benefit. Not only that but one must also reach the same conclusions regarding

Respondent's referral of Winston to current Judge Raiden. In Raymar, the Referee merely had to disregard the testimony of three judges regarding the attorney's honor to reach the Bar's conclusion. In the instant case the Referee must impugn the integrity of the two judges in order to do so.

ISSUE II

THE REFEREE'S FINDINGS OF FACT AS TO GUILT ARE ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

The bar has the burden of proof at a disciplinary hearing. The Florida Bar v. Hooper, supra, The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994), The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991), The Florida Bar v. Neu, supra, The Florida Bar v. Marable, supra.

The burden of proof is by clear and convincing evidence. The Florida Bar v. Niles, supra, The Florida Bar v. Hooper, supra, The Florida Bar v. Marable, supra, The Florida Bar v. New, supra, The Florida Bar v. Burke, supra.

A disciplinary proceeding against an attorney is not a criminal trial and question of proof necessary need not be beyond and to the exclusion of a reasonable doubt, but the quantum of proof is not satisfied by the civil standard of preponderance of the evidence. Rather, the proof should be shown with clear and convincing evidence free of substantial doubt or inconsistencies. The Florida Bar v. Raymar, 238 So.2d 594 (Fla. 1970).

The party challenging the proof has the burden of proving there is no evidence to support the conclusions or the record evidence clearly contradicts the analysis. The Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994), The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997).

The Florida Supreme Court's scope of review is broader for legal conclusions than for factual findings in disciplinary matters. The Florida Bar v. Boland, 702 So.2d 229 (Fla. 1997).

1. The Referee failed to find intent as to violation of Rule 4-8.4(c).

The Referee made a recommendation of guilt as to violation of Rule 4-8.4(c), conduct involving dishonesty, fraud, deceit or misrepresentation.

To establish that the attorney acted with dishonesty, misrepresentation, deceit or fraud the Bar must show the necessary element of intent. The Florida Bar v. Neu, supra, The Florida Bar v. Lanford, 691 So.2d 480 (Fla. 1997).

In The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991), the Court held that the attorney's negligent handling of the client's funds did not prove intent and therefore did not support a finding he intentionally misappropriated client's funds.

In the instant case it is difficult to discern what Respondent's possible motives could be. It appears the Bar's theory is that Respondent maintained a fraud for over a decade at no benefit to himself and did not charge Winston for representation he provided because he was waiting to collect from a settlement he knew never existed. If Respondent had been receiving monies from Winston over the ten year period under the guise of maintaining the lawsuit the Bar might have a viable theory, but the uncontested facts show quite the opposite. As the Court observed in The Florida Bar v. Daugherty, 541 So.2d 610 (Fla. 1989), "There is no

evidence that Respondent had any intention of misappropriating any of the money... His naive appearance before the Grievance Committee without counsel and without adequate preparation while assuming that such an appearance would clear him of wrongdoing is most convincing in that regard. His candor and demeanor during the hearing on this case shows that he realizes his errors, he admits them and he has taken corrective steps to comply with the rules in the future."

2. The Referee erred in recommending that Respondent be found guilty of violating Rules 4-1.3 and 4-1.4, which were not alleged in the complaint.

Civil courts have consistently held that an order which adjudicates issues not presented by the pleadings or litigated by the parties is a violation of the due process clause of the Fourteenth Amendment and voidable on appeal. Cortina v. Cortina, 98 So.2d 334 (Fla. 1957). Beyond that, lack of surprise alone cannot overcome the fundamental lack of due process. Lentz v. Lentz, 414 So.2d 292 (Fla. 2d DCA 1982).

Similarly, criminal courts have also been adamant that convicting a defendant of a crime with which he was not charged is a violation of the due process clause of the Fourteenth Amendment. Ray v. State, 403 So.2d 956 (Fla. 1981), State v. Gray, 435 So.2d 816 (Fla. 1983), Stirone v. United States, 361 U.S. 212, 80 S.Ct. 270, 4 L.#d.2d 252 (1960), Markham v. United States, 160 U.S. 391, 16 S.Ct. 288, 40 L.Ed. 441 (1895).

It seems rather incongruent that this Court has held that an attorney may be convicted of violating a rule for which he was not charged. The Florida Bar v. Stillman, supra, The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986), The Florida Bar v. DeSerio, supra, The Florida Bar v. Setien, 530 So.2d 298 (Fla. 1988), The Florida Bar v. Flinn, 575 So.2d 634 (Fla. 1991), The Florida Bar v. Vaughn, 608 So.2d 18 (Fla. 1992), The Florida Bar v. Nowacki, 697 So.2d 828 (Fla. 1997).

There is precedent from this Court subsequent to the Stillman decision which holds that due process precludes a finding of violation by an attorney in a disciplinary proceeding where the offense was not charged in the complaint. The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985).

Moreover, the United States Supreme Court, In the Matter of Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117, 88 S.Ct. 1222, rev. den. 391 U.S. 961, 20 L.Ed.2d 874, 88 S.Ct. 1833, held that the charges in Bar disciplinary proceedings must be known before the proceedings commence rather than being subject to amendment on the basis of the accused's testimony during the hearings.

Therefore, the recommendation of guilt as to Rules 4-1.3 and 4-1.4 are violations of Respondent's right to due process and cannot stand.

3. The Referee erred in relying upon Respondent's prior disciplinary record to recommend guilt in the instant case.

As previously discussed, the improper admission of prior bad acts is not harmless error, where the credibility of the parties is

crucial. Parks v. Zitnik, supra. A trial judge is presumed to rest his judgment on admissible evidence and to disregard inadmissible evidence. United States v. Masri, 547 F.2d 932 (5th Cir.), cert. denied, 434 U.S. 907, 98 S.Ct. 309, 54 L.Ed.2d 195 (1977). If the Referee had stated he based his findings only upon certain evidence and that he disregarded the challenged evidence, the error, if any, in the admission of such evidence could have been determined harmless. Capitoli v. State, 175 So.2d 210 (Fla. 2d DCA 1965). Given the fact the Referee specifically based his recommendation on the evidence and would have dismissed the charge but for this evidence, it requires reversal in this case.

4. The Referee erred in relying upon the circumstantial evidence of Respondent's failure to receive payment for representation of Winston in other matters as a recommendation of guilt.

As previously addressed, the much more logical and consistent explanation that Winston simply refused to pay despite numerous requests from Respondent's office constitutes a reasonable hypothesis of innocence not negated by circumstantial evidence of guilt. The Florida Bar v. Marable, supra.

Solely testimony of complaining witness, evasive and inconclusive, does not establish to any degree of certainty of the employment an exact amount of money received by him. State Ex. Rel. The Florida Bar v. Jenkins, supra. In Jenkins, the Court found that except for the accusers statements there was no evidence in the record that the money was not used for the purpose it was given, as in the instant case. Furthermore, in dismissing the

charge the Court noted that the ill will the complainant bore Respondent as well as the lapse of time in receiving the testimony.

ISSUE III

THE REFEREE'S DISCIPLINARY RECOMMENDATION IS ERRONEOUS, UNLAWFUL AND UNJUSTIFIED.

For the reasons previously addressed in Issues I and II the Referee's recommendation of 6 months suspension from the practice of law is clearly erroneous, unlawful and unjustified.

Respondent is not guilty of false statements, fraud and misrepresentation. At worst, Respondent is guilty of failing to adequately document his discussions and advice to Winston.

Bar counsel argues that Standard 7.2 - Suspension is an appropriate sanction in this case. Imposition of that sanction requires a finding of injury to the client. In the instant case Winston suffered no injury. There has been no showing he possessed a valid claim. The only evidence related to the viability of his claim is a letter from the Department of Labor stating that there was not a valid claim and his termination was due to a normal reduction in force. (R45--8-12)

There was testimony that the Respondent bought a 1939 Pontiac Coupe with plans of restoring the vehicle for profit, but that didn't work out. (R61--10-21) This was merely a bad investment which is unrelated to the issue of the wrongful termination claim. As Winston himself notes, "I've spent a lot of money, now looking back hindsight, kind of foolishly". (R61--25, R62--1)

In fact, the Referee made specific findings that Respondent performed legal services for Winston without renunciation and did

not recommend reimbursement of the alleged eleven hundred dollar retainer.

In the event the Court finds Respondent to be in violation of a rule the following Mitigating Circumstances should be considered pursuant to Fla. Standards for Imposing Lawyer Sanctions 9.32:

(b) absence of a dishonest or selfish motive. As previously discussed there is no reasonable explanations to Respondent's motives if the Court accepts the Referee's recommendation. Certainly there was no profit to Respondent throughout this ordeal. In fact, as the Referee noted, Respondent actually provided pro bono service to Winston.

(c) personal or emotional problems. Testimony revealed that at the time Respondent was dealing with Winston both of his parents were in poor health and his son was experiencing academic problems. (R58--23-25, R59--1-7)

(e) full and free disclosure to disciplinary board or cooperating attitude toward proceedings. Given a review of the transcripts in toto one can only conclude that Respondent was open and cooperative in his dealings with the Bar.

(f) inexperience in the practice of law. Respondent was admitted to the Florida Bar in 1979 (R77--7,8) and entered into his attorney-client relationship with Winston in early 1983. (R83--24, 25, R84--1) Additionally, Respondent had no experience in the area of unlawful termination cases. (R116--10-13)

(i) unreasonable delay in disciplinary proceedings provided that the Respondent did not substantially contribute to the delay

and provided further that the Respondent has demonstrated specific prejudice resulting from that delay. The attorney-client relationship between Respondent and Winston was initiated 15 years prior to the hearing. It is self evident from the transcripts that Respondent had a difficult time recalling the events, particularly the dates in question. Moreover, Respondent did not have his financial records from 1983. (R7--17-21)

Depending on the Court's view of the evidence, cases that the Court may consider factually similar include The Florida Bar v. Barcus, supra. In Barcus the attorney failed to move for rehearing or to set aside or vacate foreclosure. No evidence that the attorney was presented that attorney purposefully neglected client's case or tried to disadvantage them and the referee did not find that the clients had sustained any harm, resulting in a public reprimand.

In the Florida Bar v. Kaplan, 576 So.2d 1318 (Fla. 1991), where the attorney violated bar rules related to neglect, communication and improper withdrawal the Court held a public reprimand was appropriate, notwithstanding mitigating factors, in light of prior private reprimands.

Finally, in The Florida Bar v. Britton, 389 So.2d 637 (Fla. 1980), where the Court made a finding of dishonesty, fraud, deceit and misrepresentation, including knowingly making false statements of fact in representing the client, the Court felt the attorney's action warranted a public reprimand.

CONCLUSION

The Referee's conclusion that Respondent's failure to receive payment from Winston in exchange for representation on divorce/paternity/custody matters constituted a finding of guilt was an impermissible inference based upon the controlling caselaw regarding circumstantial evidence.

The other evidence upon which the Referee based his finding of guilt, Respondent's disciplinary history, was also an inappropriate consideration which presumptuously resulted in harmful error.

The Referee clearly indicated by the comments in his report that he found the testimony of Winston one to be less than clear and convincing evidence.

After removing from consideration as evidence the lack of payment and prior disciplinary history the Bar clearly fails to meet its burden of proof and Respondent must be acquitted of the alleged violation(s).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Assistant Staff Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314, and to John A. Boggs, The Florida Bar, 650 Apalachee Parkway, Tallahasssee, Florida 32399-2300, on this 6th day of July, 1998.

Respectfully submitted,

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