IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ALLAN M. ELSTER,

Respondent.

Supreme Court Case Nos. 93,090, 93,091 and 93,092

The Florida Bar File Nos. 97-50,095(17D), 97-50,814(17D) and 97-50,721(17D)

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS-APPEAL

On Appeal from A Report of Referee

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TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS

CASES

RULES REGULATING THE FLORIDA BAR

RULES OF APPELLATE PROCEDURE

UNITED STATES IMMIGRATION AND NATURALIZATION ACT

CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this court's Administrative Order In Re: Brief Filed in the Supreme Court of Florida, undersigned counsel for the bar hereby certifies that this brief is produced in a font that is 14 point proportionately spaced Times New Roman type.

THE FLORIDA BAR'S SUPPLEMENT TO RESPONDENT'S STATEMENT OF THE CASE AND OF THE FACTS

A. STATEMENT OF THE CASE

Respondent's statement of the case is incomplete in that he failed to note that The Florida Bar timely filed a petition for cross-appeal. As his statement of the facts is also incomplete and lacking in consistent references to the appropriate volumes and pages of the record and/or transcript (as mandated by R. Regulating Fla. Bar 3-7.7(f) and Fla. R. App. P. 9.210(b)(3)), The Florida Bar is compelled to include this supplement to respondent's statement of the case and of the facts. For purposes of clarity, consistency and continuity herein and throughout this proceeding, and because the court reporter failed to designate the record in the customary manner of sequential volume and page numbers, The Florida Bar has created the following index of the 7 bound volumes produced and filed in this cause:

Volume 1 Transcript of proceedings from February 16-17, 1999, 9:30 am, marked "Vol. I," with numbered pages 1-199

Volume 2 Transcript of proceedings from February 16-17, 1999, 9:30 am, marked "Vol. II," with numbered pages 200-232

Volume 3 Transcript of proceedings from February 16-17, 1999, 9:30 am, with numbered pages 1-170

Volume 4 Transcript of proceedings from March 3, 1999 and April 12, 1999, 1:30 pm, with numbered pages 1-196

Volume 5 Transcript of proceedings from April 12, 1999, 1:30 pm, with numbered pages 1-78

Volume 6 Transcript of proceedings from April 12, 1999, 1:35 pm, with numbered pages 1-49

Volume 7 Transcript of proceedings from May 3, 1999, 2:10 - 4:20 pm, with numbered pages 1-99.

References to the transcript of the proceedings before the referee shall be as follows, utilizing the foregoing index: Tr. Vol. ___, p.___, l. ____. Respondent/appellant shall be referred to as "respondent" or "Elster."

B. STATEMENT OF THE FACTS

1. The Complaint of Dominga Zavala against Alan M. Elster Florida Bar File No. 97-50,721(17D), Florida Supreme Court Case No. 93,092

Dominga Georgina Zavala (hereinafter "Zavala") was a native and citizen of Honduras, residing in the United States [Tr. Vol. 1, pp 111-112]. On or about April 30, 1993, an Order to Show Cause and Notice of Hearing was issued by the United States Immigration Court, compelling Zavala's attendance in Immigration Court [Tr. Vol. 3, p. 109, l. 15-19]. Said order was served upon Zavala, at the address she left on file with immigration authorities [Tr. Vol. 3, p. 112, l. 6-17]. On the appointed date, Zavala failed to appear at the hearing in Immigration Court, and the

Immigration Judge found her deportable in absentia [Tr. Vol. 4, p. 32, l. 16-23]. When she was located, Zavala was detained by the U.S. Immigration and Naturalization Service (hereinafter "INS"), was taken into custody and was ultimately transferred to the Krome Detention Center (hereinafter "Krome") [Tr. Vol. 1, pp 111-112]. While she was at Krome, another detainee "recommended" respondent's services to Zavala [Tr. Vol. 1, p. 118, l. 5-23]. Based on this recommendation, which the unnamed detainee also communicated to respondent, respondent first visited Zavala at Krome on or about March 21, 1996 [Tr. Vol. 1, p. 138, l. 6-7].

During the course of his initial meeting with Zavala and before she agreed to retain him, respondent gave Zavala his business card. Respondent's purpose in giving Zavala his business card was to secure employment by her [Tr. Vol. 1, pp 112-117]. A true copy of the subject business card is part of the record, as it was attached to The Florida Bar's complaint and marked as **Exhibit A.** Respondent's business card advertised his law practice as "IMMIGRATION VERIFICATION ASSOCIATES." At the time that he disseminated this business card to Zavala, respondent's office was not a legal clinic, he had no associates and there was no other attorney working in his firm [Tr. Vol. 1, pp 115-117, pp 127-128]. In truth and in fact, respondent had been a sole practitioner since 1979 [Tr. Vol. 1, p. 117, l. 19-20]. Respondent's business card also contained the words "ENRIQUE SANTIAGO President." At the time that

he disseminated his business card to Zavala, Immigration Verification Associates had not been incorporated. It never was incorporated and is not incorporated to this day. In truth and in fact, Enrique Santiago was not the "president" of any entity known (legally or otherwise) as Immigration Verification Association; he was respondent's occasional, informal Spanish-language interpreter [Tr. Vol. 1, pp 115-117].

On or about March 25, 1996, respondent collected a partial fee of $750.00 from Zavala for legal representation. Shortly thereafter, respondent collected the balance of his fee in the amount of $1,200.00, from Zavala [Tr. Vol. 1, pp 120-124 and The Florida Bar's Trial Exhibit No. 10]. Zavala hired respondent to file and represent her in an appeal of the deportation order previously entered against her [Tr. Vol. 1, p. 119, l. 21-22; Tr. Vol. 4, p. 33, l. 2-5].

Upon the commencement of his representation of Zavala, respondent filed, on or about April 4, 1996, a Motion to Reopen and Stay of Deportation [Tr. Vol. 3, p. 112, l.18; p. 113, l. 38]. This motion was handwritten by respondent, on letterhead which bore the words "Immigration Verification Associates; Allan M. Elster, Attorney" [Tr. Vol. 1, p. 126, l. 7, and The Florida Bar's Trial Exhibit 11]. This motion was dismissed the next day by U.S. Immigration Judge Rex J. Ford, who found the motion to be incompetently prepared, legally insufficient and lacking an application for relief [Tr. Vol. 3, pp 113-121, p. 141, l. 7-18].

On or about April 9, 1996, respondent filed another handwritten pleading entitled "Motion for Re-Hearing of Denial of Motion to Re-Open and for Stay of Deportation." On or about April 12, 1996, respondent's motion was denied [Tr. Vol. 1, p. 129, l. 13]. On April 16, 1996, respondent filed an emergency, handwritten appeal on behalf of Zavala; it too was dismissed or denied [Tr. Vol. 1, p. 130, l. 14-21]. Thereafter, respondent did nothing further on Zavala's behalf [Tr. Vol. 1, p. 131, l. 4; p. 132, l. 18-20]. A deportation warrant was issued for Zavala on October 30, 1996 and she was deported on November 11, 1996 [Tr. Vol. 1, pp 133-34 and The Florida Bar's Trial Exhibit 12]. Respondent refunded no legal fees to Zavala [Tr. Vol. 1, p. 134, l. 14-15].

2. *The Complaint of Modesto Vargas against Alan M. Elster*
Florida Bar File No. 97-50,814(17D)
Supreme Court of Florida Case No. 93,091

Respondent was retained on or about July 12, 1996 to represent Modesto Jose Vargas (hereinafter "Vargas") in an immigration matter. Vargas is a native and citizen of Nicaragua who entered the United States in 1963 as a permanent resident [Tr. Vol. 1, p. 179, l. 3-8]. In or about December 1995, Vargas pled guilty and was convicted of trafficking in cocaine in Dade County, Florida. He was sentenced to and served 364 days in jail for his criminal offenses. As Vargas was not a citizen of the United States, he was subject to deportation under The United States Immigration and

Naturalization Act, Sections 241(a)(2)(A)(iii) and 241 (A)(2)(B)(I) due to his conviction on two felony counts involving a controlled substance [Tr. Vol. 1, pp 182-183] . After his conviction, the Immigration Service did institute deportation proceedings to return Vargas to Nicaragua [Tr. Vol. 4, p. 26, l. 1-5]. Prior to respondent's involvement in the matter, Vargas had retained counsel and a deportation order had been entered. Respondent was retained to appeal that deportation order and to obtain respondent's temporary release from Krome via a bond [Tr. Vol. 4, p. 26, l. 9-15]. From the outset, but prior to respondent's involvement in the matter, Vargas and his family understood the sizeable immigration obstacle posed by Vargas' drug conviction, and all were resigned to the last resort of voluntary departure if deportation proved inevitable [Tr. Vol. 4, p. 31, l. 7-19, p. 32, l. 10-13]. It was inevitable; pursuant to applicable law, as an aggravated felon, there was no means by which Vargas could avoid deportation or voluntary departure from the United States [Tr. Vol. 4, p. 26-27]. Notwithstanding this fact, respondent told the Vargas family, repeatedly, that Vargas had a good chance of defeating deportation, and that he would be home "by Christmas" [Tr. Vol. 3, p. 30, l. 4-5; p. 32, l. 8-13; p. 33, l. 15-16; p. 33, l. 24-25; p. 67, l. 6; p. 71, l. 17-18; Vol. 4, p. 69, l. 12-19]. Based on these representations, the Vargas family borrowed money and hired respondent, paying him $2500 in legal fees. Respondent signed receipts for these payments, which he

accepted in cash - - and in the form of a check which he cashed the day he picked it from the Vargas family home [Tr. Vol. 4, pp 35-36]. After accepting a total fee of $2,500 from the Vargas family, respondent failed and refused to take any significant action on Vargas' behalf. He filed no notice of appearance, no notice of appeal, and no motion for a bond. He did no relevant research. Respondent's office file on Vargas' case reveals absolutely no work accomplished by respondent on Vargas' behalf at any time during the representation [Tr. Vol. 4, pp 27-28].

In or about October 1996, Vargas was transferred from the Krome Detention Center in Miami to the Manatee County Jail, and then to a Panama City facility to await deportation [Tr. Vol. 3, p. 43, l. 16-21]. After Vargas was moved to Manatee county, both Vargas and his family had great difficulty contacting respondent. During this time period, both Vargas and his family left numerous messages on respondent's answering machine attempting to ascertain the status of Vargas' case. Respondent failed and refused to return most of these calls. When he did return a call, respondent simply assured the Vargas family that he was working on the case [Tr. Vol. 3, pp 41-44]. Ada Maria Vargas, Modesto Vargas' sister, also attempted to reach respondent on his pager. Ms. Vargas "beeped" respondent two to three times a day for weeks. Respondent consistently failed and refused to respond to Ms. Vargas' attempts to contact him on behalf of her brother. After weeks of being unable to contact

respondent in any way or by any means, and after respondent failed to take any action on the case, Vargas and his family believed that respondent had simply disappeared and abandoned them and their case. Ms. Vargas and her brother filed a complaint with The Florida Bar, alleging that respondent had engaged in "fraud" [Tr. Vol. 4, p. 47, l. 7]. Mr. Vargas filed his appeal for voluntary departure from the United States, writing that his attorney, whom he called "a crook," took his money and documents and disappeared [Tr. Vol. 3, p. 51, l. 5-12].

3. The Complaint of Yanique Duval against Alan M. Elster
Florida Bar File No. 97-51,095(17D)
Supreme Court Case No. 93,090

In late January of 1996, Dr. Yanique Duval (hereinafter "Duval") went to respondent's office in Boynton Beach to inquire about representation on an immigration matter. Duval is a foreign medical doctor who practiced medicine in Haiti [Tr. Vol. 3, p. 73-75]. Pursuant to applicable law, Duval was, at that time, prohibited from practicing medicine in the United States [Tr. Vol. 3, p. 98, l. 15-16]. She wished to obtain lawful immigration status in the United States [Tr. Vol. 3, p. 75]. During the course of her initial meeting in respondent's office, on or about January 26, 1996, Duval met with Faubert Etienne, a non-lawyer acquaintance of respondent's. She explained to Mr. Etienne that she wanted to become a permanent resident of the United States [Tr. Vol. 3, p. 86, l. 10-17]. On or about January 31, 1996 Duval

returned to respondent's office and met with respondent personally [Tr. Vol. 3, p. 75, l. 11-14]. At the January 31, 1996 meeting in respondent's office, respondent informed Duval that he would obtain permanent residency status for her within three (3) months [Tr. Vol. 3, p. 75, l. 16-22; p. 76, l. 7-11; p. 93, l. 12-14]. In his written statements to The Florida Bar, respondent said that he informed Duval, at his initial meeting with her, that because she was a foreign medical school graduate, her immigration request would be controlled by the requirements of the Immigration and Naturalization Act (hereinafter "INA"), Section 203(b)(2)or 8 U.S.C. 1153(b)(2), both of which apply to members of a profession who hold advanced degrees, and to aliens with exceptional abilities. Respondent also advised The Florida Bar, in his written statements in response to Duval's complaint, that during his January 31, 1996 meeting with her, he informed Duval that under the INA, she could be granted permanent resident status by obtaining a job offer from a teaching facility or medical institution [Tr. Vol. 1, pp 89-92]. At all times, respondent assured Duval that her immigration process would take approximately three (3) months [Tr. Vol. 3, p. 75, l. 16-22; p. 76, l. 7-11; p. 93, l. 12-14].

The immigration law upon which respondent relied, in his written response to The Florida Bar, provides for preferential treatment of distinguished professors, doctors and scientists. The aforementioned section of the INA does not include

persons in Duval's less accomplished situation and circumstances [Tr. Vol. 3, p. 91, l. 13-22]. Had he been a competent immigration practitioner, respondent would have known that he could not, under any process or application of law, obtain permanent residency status for Duval within three (3) months. Further, he would have instructed respondent to immediately secure appropriate employment [Tr. Vol. 4, p. 134, l. 8-9; p. 135, 1.18 p. 136], which he did not do [Tr. Vol. 3, p. 91-92]. Finally, had he intended to pursue Duval's immigration case via her employment status, he should have collected no legal fee from Duval until she had secured the necessary employment [Tr. Vol. 4, p. 136, l. 9-15]. Notwithstanding the foregoing, during the course of her January 31, 1996 meeting with respondent, respondent requested and Duval paid him a partial fee of $500, in cash. It was expressly agreed that Duval would pay respondent an additional $500, in full and final payment for legal fees, after the case was concluded and Duval's immigration status was adjusted [Tr. Vol. 3, pp 76-77]. During the course of her January 31, 1996 meeting with respondent, Duval also gave respondent, at his express request, a money order in the amount of $130.00, made payable to the Immigration and Naturalization Service (hereafter "INS"). This money order was entrusted to respondent for the express and exclusive purpose of paying the INS costs in Duval's case [Tr. Vol. 3, pp 82-83]. Respondent failed to tender the money order to the INS on Duval's behalf. Respondent failed to

return the money order to Duval. Respondent is unable to produce or account for Duval's money order [Tr. Vol. 1, pp 95-96].

After the January 31, 1996 meeting at which he received his $500 initial fee from Duval, respondent did no work, of any kind, on Duval's behalf [Tr. Vol. 3, p. 106, l. 7]. After January 31, 1996, respondent did not communicate with Duval nor did he respond to her attempts to communicate with him. Between January 31, 1996 and January 1997, Duval made repeated attempts to contact respondent to learn the status of her case. For this one year period and for all time thereafter, respondent abandoned Duval. He moved his office and disconnected his telephone, without notice to her, and he failed and refused to accept or return her telephone calls or otherwise communicate with her [Tr. Vol. 3, pp 78-82]. When Duval was unable to reach respondent by telephone she went to the office in which she had first met him in Boynton Beach, Florida. The office had been closed down. Duval called The Florida Bar to find out where to find respondent. She was given respondent's record bar address of 1876 N. University Dr., Suite 101, Plantation, FL 33322-4130. Duval went to the aforementioned University Drive address only to find that respondent's office at that location had also been closed. At no time had respondent ever informed Duval of any change of address, telephone number and/or location. When respondent reported a new record bar address to The Florida Bar, after he relocated from the

aforementioned University Drive address, he provided only a post office box number. At that point, Duval had no means by which to communicate with respondent and filed a complaint with The Florida Bar [Tr. Vol. 3, pp 78-83].

SUMMARY OF THE ARGUMENT

Based on his summary of the argument, respondent has sought appellate review in this cause on three grounds: he asserts that The Florida Bar failed to meet its burden of proof, he asserts that the referee erred in rejecting the unsupported testimony of respondent himself as well as that of his sole witness, as proof of the issues at bar, and he alleges error on the basis of his misstatements of the referee's findings of fact.

While respondent has stated his position, he has completely failed to provide this Court with legal, evidentiary or record support for same. Absent such support for the alleged error below, respondent's vague and generalized argument must fail. The Report of the Referee filed in this action is (but for its recommendation as to sanction) complete, accurate and correct. It is well supported by the facts and by the evidence, which prove the misconduct charged by The Florida Bar and found by the referee, by clear and convincing evidence.

In the case before the Court, respondent undertook the representation of three immigration clients: all of them were vulnerable, all of them were trusting, and all of them were defrauded by respondent and the non-lawyer "associates" whose names

decorated and embellished his fraudulent business card. For one of these clients (Dominga Zavala), respondent filed a few handwritten motions which were legally insufficient, incompetently prepared, and swiftly denied. Thereafter, respondent abandoned his client and did not even know when she had been deported. For another client (Modesto Vargas), respondent accepted a case and promised a remedy that was impossible as a matter of law. Respondent entered no appearance, filed neither motion nor appeal, and sought no bond. Rather, he "monitored the law," used his client as an unpaid interpreter at the Krome Detention Center, and promised his client's family that he would be home "for Christmas." After respondent abandoned him, the client sought, via his own written plea, voluntary departure from the United States. Respondent also abandoned the third client, Yanique Duval, a medical doctor from Haiti. After he promised Dr. Duval adjusted immigration status within "three months," respondent also abandoned her and her cause of action. His only efforts on her behalf consisted of the single meeting during which he collected a legal fee and a cost money order from her. Respondent cannot account for the whereabouts of the money order, and testifies that he owes its value to Dr. Duval. He also agrees that he collected $1,950 from Ms. Zavala, $2,500 from Mr. Vargas, and $500 (plus the money order) from Dr. Duval. For this $4,950 received (non-inclusive of the $130 money order made payable to INS), respondent did no competent work and actually harmed

his clients. He did this knowingly, intentionally, and willfully. He also lied to them, refused to communicate with them, and ultimately abandoned them.

The bar's cross petition for review seeks reconsideration of the referee's recommended sanction of a 180 day suspension from the practice of law. Based on the referee's well supported findings of incompetence, lack of diligence, failure to communicate with clients, collection of clearly excessive legal fees, conduct involving fraud, deceit and misrepresentation, failure to protect client property and funds, failure to maintain a current or adequate record bar address, use of false or misleading communications about his legal services, use of prohibited advertising name, advertisement and practice under a prohibited trade name, false representation of law firm, use of business card and letterhead which misrepresented his practice, and abandonment of clients, respondent should be disbarred.

ARGUMENT IN ANSWER TO RESPONDENT'S INITIAL BRIEF

I. (Answer to Respondent's First Issue for Review)

THE REFEREE COMMITTED NO ERROR IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT AS TO COUNT I, II AND III OF THE ZAVALA COMPLAINT WITH RESPECT TO RESPONDENT'S BUSINESS CARD.

In his findings of fact relating to the first three counts of The Florida Bar's complaint in the Zavala matter, the referee determined that respondent knowingly and intentionally used a business card which contained material misrepresentations of fact, that such misrepresentations were actually misleading to the public and to Ms. Zavala, and that respondent engaged in such misconduct in order to gain Ms. Zavala as a client and realize personal financial gain through the collection of the legal fees she would pay him. In his initial brief, respondent admits (and provides trial transcript references for such admissions) that: (1) he gave Ms. Zavala his business card at the time of his "initial meeting" with her; (2) the business card bore the trade name of "Immigration Verification Associates;" (3) he was a sole practitioner at the time. Notwithstanding the foregoing, he argues that the referee's findings are erroneous. As support for this position, respondent relies on ***The Florida Bar v. Fetterman,*** 439 So. 2d 835 (Fla. 1983). However, ***Fetterman*** is inapposite to respondent's argument, as set forth in his brief. In fact, it wholly supports both the findings of the referee and the

position advanced by The Florida Bar. In ***Fetterman***, the respondent used the phrase "The Law Team of Fetterman and Associates " to identify his law practice in advertisements as well as on his firm's letterhead. At the time that he initiated the use of this trade name, Mr. Fetterman had a number of associate attorneys in his firm. He conceded that, as time went by, he sometimes had a lesser number than before, but he always had at least one associate in his law practice. In considering whether the use of this trade name was ethical under the applicable rules, this Court independently examined the two parts of the compound term. In so doing, the Court determined that the words "Law Team" suggest "the assemblage of a number of professionals under a single heading." As Fetterman used that term along with his own name, the Court held that such usage was not "inherently misleading" as the public was aware that Fetterman himself was accountable for the firm's actions. Similarly, the Court examined the term "associates," and held that:

> An associate is a salaried lawyer-employee who is not a partner of the firm. All other non-lawyer employees are to be considered simply employees and not associates. This category of employees includes paralegals, secretaries, non-lawyer clerks, office managers and the like. When the word associates is employed on firm letterhead or in commercial advertisement, such term refers to lawyers working in the firm who are employees of the firm and not partners.

Fetterman, at 6-7.

As Fetterman always had at *least* one associate, his use of the trade name was found to be accurate and not misleading. In the instant case, respondent testified that he was always a sole practitioner, and had been since 1979. He also testified that the "associates" he listed on his business card ("Enrique Santiago, President [and] Howard C. Harrison, Jr., Consultant") were nonlawyers with whom he "intended to incorporate" - - apparently notwithstanding the clear prohibitions set forth by R. Regulating Fla. Bar 4-5.4 (Professional Independence of a Lawyer). Further, respondent stated, in the first paragraph of his argument on this point, that he was referred to Zavala while she was at the Krome Detention Center, and that he gave her the subject advertisement/business card *before* she hired and paid him. Finally, respondent testified that he knew the business card contained erroneous information when he gave it to Zavala, but he gave it to her nonetheless because he had "paid for the cards" and wanted to use them. If respondent's explanatory statements were truthful, it would be hard to explain why, on the actual business card he gave to Zavala during his first meeting with her (a copy of which is attached to The Florida Bar's complaint as Exhibit A), respondent crossed out and corrected an incorrect telephone number, but *not* the other, substantive and clearly misleading information. Finally, the use of the phrase "Immigration Verification," as part of respondent's firm name, is also troubling. Nothing in respondent's practice relates to "verification" of

immigration status or standing. This concern becomes amplified in light of the testimony elicited at trial relating to the language contained in the sign which appears in respondent's rented office space in a beeper establishment. A photograph of that sign is in evidence as Florida Bar Exhibit 16. The sign is in Spanish. On that public advertisement, which identifies respondent's office to the public that would seek him and his services, his law firm is identified as "National Immigration Consultants, Incorporated." At the bottom of the sign is the following phrase, as translated by the official Spanish language translator who testified at trial: "The immigration office makes our services official, or certifies our services."

Accordingly, and based on this Court's holding in ***Fetterman***, the record is replete with vigorous support for the referee's findings of fact as to Counts I, II and III in The Florida Bar's complaint in the Zavala matter. Without a doubt, the use of the names "Immigration Verification Associates" and "National Immigration Consultants, Incorporated" were grossly and intentionally misleading. Without a doubt, Ms. Zavala (to whom respondent was curiously "referred" and who received and reviewed respondent's business card before hiring and paying him) was grossly and intentionally misled - - as to respondent's law practice, capabilities and resources. Indeed, Ms. Zavala found the business card to be so offensive that she attached a copy of it to the complaint she filed with The Florida Bar just prior to her deportation. And

without a doubt, respondent engaged in the foregoing misconduct for the sole and exclusive purpose of enriching his own pocket. And enrich it he did, collecting $2,500 in fees for limited legal work characterized by both the bar's expert witness and the immigration judge as incompetent. While the referee did not agree with the expert witness and the trial judge on this characterization of respondent's work on Ms. Zavala's behalf, neither did he find "no unethical conduct" in the general and redeeming manner which respondent boldly and falsely states in his brief. To the contrary, the referee stated as follows:

> The legal work performed by Respondent for Zavala was unprofessional, legally inadequate and possibly constituted malpractice. However, the referee does not believe the substandard legal work constituted unethical conduct. As the Florida Supreme Court has recognized, there is a fine line between attorney malpractice and unethical conduct. ***The Florida Bar v. Littman***, 612 So.2d 582 (Fla. 1993). This limited aspect of respondent's conduct did not cross the line.

Report of Referee, p. 6, footnote 1.

Respectfully, The Florida Bar disagrees with the referee's application of ***Littman*** in the instant matter, and urges the Court to follow the guidance offered by Jeffrey Devore, Esq., the bar's immigration practice expert witness at trial, and The Honorable Rex Ford, who testified pursuant to subpoena and was the immigration judge before whom respondent represented Ms. Zavala.

II. (Answer to Respondent's Second Issue for Review)

THE REFEREE COMMITTED NO ERROR IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT AS TO COUNT V OF THE ZAVALA COMPLAINT.

Respondent alleges that the referee erred in finding that respondent abandoned Ms. Zavala after June 6, 1996 because Ms. Zavala herself was not present at trial and did not so testify. By advancing such an argument, respondent assumes the role of the clever thief who endeavors to bring blame and suspicion upon his victim. Clearly, Ms. Zavala did not appear to testify because she was deported to Honduras in November of 1996, while she was represented by respondent.

Notwithstanding Ms. Zavala's absence and inability to testify against the lawyer whose victim she became, the referee's finding of abandonment is well supported by the record. The Florida Bar obtained and produced to respondent (who introduced into evidence) the Krome Detention Center call slips which evidence every one of respondent's visits with his clients at that facility [Tr. Vol. 1, p. 136, l. 24; p. 137, l. 4]. The slips relating to Zavala begin in March of 1996, when respondent was hired by Zavala, and end on June 6, 1996. Thereafter, respondent was able to produce no tangible evidence, of any kind, to support his bare assertion that he continued to

communicate with Zavala, up to the date of her deportation five months later, in November of 1996.

In light of the evidence before the referee in the form of actual records created and maintained in the ordinary course of business by the federal authorities at the Krome Detention Center, and in the absence of contradictory evidence in any form, the referee's findings on this issue are well supported. As this Court held in ***The Florida Bar v. Marable,*** 645 So.2d 438 (Fla. 1994):

> A referee's finding of fact should be upheld unless clearly erroneous or lacking in evidentiary support (citation omitted). Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee's findings of fact should be upheld if they are supported by competent, substantial evidence (citation omitted). On review, this Court neither reweighs the evidence in the record nor substitutes its judgement for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings (citation omitted).

Marable, at 442.

Clearly, the documents maintained by the United States Government, in the ordinary course of business, constitute competent, substantial evidence. Accordingly, and especially where such evidence stands completely unchallenged by the defense, the referee's findings on this issue must not be disturbed.

III. (Answer to Respondent's Third Issue for Review)

THE REFEREE COMMITTED NO ERROR IN PARAGRAPH 35 OF HIS REPORT OF REFEREE, WHEREIN HE EXPRESSLY REJECTED RESPONDENT'S CONTENTION REGARDING THE PURPOSE OF THE MODESTO VARGAS REPRESENTATION.

In paragraph 35 of his report, the referee made the following specific finding of fact:

> Respondent was hired to appeal the deportation order against Vargas on or about June 5, 1996. The Referee rejects Respondent's contention that he was retained to monitor changes in the immigration law which would have permitted Vargas to challenge his deportation.

Report of Referee, p. 7

Respondent argues that the referee is incorrect and seeks to prove the error by urging the Court on a roller coaster ride through the trial testimony. Interested only in the highs and lows of direct and cross examination which address the point he seeks to make, respondent lurches wildly past the large body of clarifying and explanatory testimony which levels the ride. From the outset, he dismissed the testimony of the bar's immigration expert Jeffrey Devore, Esq. as irrelevant, stating that "he was not privy to the contract entered into between Vargas and respondent." Similarly, he

endeavors to discount the testimony of Ada Marie Vargas, his client's sister and confidant, insisting that she too, was not present when he and his client entered into their agreement. By so doing, respondent again seeks to reap a grossly unfair advantage from his clients' enforced absence from the trial and indeed, the country.[1]

Of course, the referee is correct. The record is replete with evidence which forcefully, persuasively and conclusively establishes that respondent was hired and paid a fee of borrowed funds on the strength of his promise to save Modesto Vargas, a convicted felon but also a husband and father of American citizens, from deportation. Sadly and cruelly, respondent knew from the outset, even as he drove to the family home to collect his fee check and flew within minutes thereafter to the desperate sister's bank to cash it, that his promise was impossible to keep. He knew from the beginning that as a convicted aggravated felon, Vargas had ***no*** chance of escaping deportation.

The largest body of persuasive evidence comes from Modesto Vargas himself, and his sister Ada Marie Vargas. Vargas was prevented from testifying telephonically at trial, but his sister refused to be silenced by distance. Traveling from Chicago to offer testimony in this cause, Ms. Vargas stated as follows:

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[1] It should be noted that The Florida Bar was prepared, on the date of trial, to call Modesto Vargas to testify telephonically from Nicaragua. Respondent successfully blocked such testimony via his objection to same [Tr. Vol. 3, pp 30-31].

MS. HOFFMANN: What happened next? Did Mr. Elster call you?

MS. VARGAS: Yes, he did. He called me at work and he says that he talked to my brother, and I said okay, do you think we have a case here. Like I told him, I have talked to many lawyers and always the problem is so many things, and at the end, I don't have any result. I just want an honest procedure. I want somebody to tell me the truth. *If we do have a case, we go on. If not, he will sign his deportation and leave by his own* (emphasis provided).

MS. HOFFMANN: Was that something your brother had decided on?

MS. VARGAS: We decided everything because we discussed everything.

MS. HOFFMANN: Were you aware at that point that there could be a problem securing your brother's release?

MS. VARGAS: At that moment, no. I guess if he was willing to sign his deportation, was better for everybody. So because for us it was a very, very big problem. We were not in a very good position with money at the time, so for us to hire a new lawyer was something that we have to borrow the money.

MS. HOFFMANN: And during that conversation that you had with Mr. Elster, did you discuss

your brother's chances of prevailing? Please describe that conversation.

MS. VARGAS: Yes. He says we do have a very strong case. He says we are willing to win. We are willing to make a fight here. *I told him, if I do have a fight here, let's go and do it. If not, let's get it over with. That what the decision that my family, my brother and I made* (Emphasis added).

* * *

MS. HOFFMANN: Do you know whether your brother expected to be released based on what Mr. Elster was saying to him?

MS. VARGAS: He was hoping. He had a very high hope of being released.

MS. HOFFMANN: What was that based on?

MS. VARGAS: Based on what he says to him.

MS. HOFFMANN: And were any promises made to you or to your brother about release?

MS. VARGAS: Yes. The day he went to the bank that I use to work to cash the first check I gave him, we were going up to the fifth floor where was my office, and he says to me, Miss Vargas, don't worry. Your brother is going to be out by Christmas. Just tell that to your mother. Same thing he told my mother when he went there to pick up the rest of the money.

Tr. Vol. 3, pp 31-34.

Further, on direct examination, Ms. Vargas stated that respondent was hired to write an appeal [Tr. Vol. 3, p. 59, l. 21].

Vargas' own statement on the issue was also presented, in the form of a letter he wrote from the Manatee County Jail, where he was being held on behalf of INS. In seeking, on his own behalf, the opportunity of a voluntary departure, Vargas wrote:

> After dismissing my trial attorney, I went and hired a new attorney ***for the appeal*** but this one turned out to be a crook. He took the twenty-five hundred dollars that he charged me ***for the appeal*** and all my legal documents and disappeared (Emphasis added).

Tr. Vol. 4, p. 73, l. 9-13.

Further, The Florida Bar called an expert in immigration practice. Clearly, Mr. Devore's testimony was relevant and probative in that he examined all of the relevant files, including the bar's files and the sworn statements of Mr. Vargas himself. Based on this review, Mr. Devore testified that although Vargas' deportation was inevitable, a bond was possible, and a supplemental brief may have been advised [Tr. Vol. 4, pp 26-32.]. He also testified, both on direct examination [Tr. Vol 4, p. 28, l. 19] and on cross examination [Tr. Vol. 4, p. 74, l. 9-17], that he saw no evidence of any work done by respondent to earn any portion of his $2500 fee.

Despite all of his arguments to the contrary, respondent's argument is an extraordinarily weak one. Even if the Court were to accept his representation that he

was hired to monitor the law, respondent himself testified that his theory of an imminent change in the law was based on a minority opinion in a closed case [Tr. Vol. 1, p. 56-57].

Based on the foregoing, the referee's findings are supported by competent, substantial evidence. No evidence to the contrary has been advanced, but for that which the referee expressly rejected. Accordingly, the referee's findings must not be disturbed.

IV. (Answer to Respondent's Fourth Issue for Review)

THE REFEREE COMMITTED NO ERROR IN HIS DETERMINATIONS AS TO COUNT I AND II OF THE VARGAS COMPLAINT.

Respondent challenges the referee's findings that respondent charged Vargas a clearly excessive fee, and that he should have known that Vargas was ineligible for a waiver of deportation. He bases this challenge solely on the strength of his own testimony, which he tells the Court is "unrebutted." As The Florida Bar produced significant evidence which was contrary to respondent's testimony, his statement on this point is mistaken. On the issue of respondent's knowledge of the state of the law at the commencement of the Vargas representation, the referee heard contradictory testimony from the bar's expert Jeffrey Devore, Esq. as well as from respondent

himself. Mr. Devore's testimony clearly established that as a matter of the law Mr. Vargas, as a convicted aggravated felon, was statutorily ineligible for a waiver of deportation [Tr. Vol. 4, p. 31, l. 19-24; p. 80, l. 10-12 and 22-23; p. 82, l. 3-21]. Respondent himself testified on this issue as well, conceding that he knew that Vargas was deportable, and based on the state of the law even on the date of trial, remained deportable - - as there was ***no*** change in the applicable law [Tr. Vol. 1, p. 45, l. 9 - p. 55, l. 9].

The issue of fee was similarly treated by respondent who urges the Court to accept his testimony over that of all of the other witnesses. Respondent bases his entitlement to the fee on his "constant visits" to Vargas, as well as on his "conferences" with "other immigration attorneys, immigration judges and other knowledgeable persons." Curiously, his record citation to his supporting evidence is undiscoverable, as there is no page 225 in any of the transcript volumes filed in this cause. Respondent did testify, in Volume 1, at page 72, that he spoke with "other attorneys and judges" about "pending bills before Congress," but he did not state with specificity any discussion of the Vargas case. Respondent also testified that he entered no appearance and filed no pleading on Vargas' behalf. With regard to his "constant" visits with Vargas at Krome, Ms. Vargas testified that most of those "visits" were for the purpose of using Vargas as an unpaid interpreter for Spanish

speaking clients and potential clients [Tr. Vol. 3, pp 39-40; p. 67, l. 14-22]. Respondent himself admitted that he obtained a few clients through the kindness of Vargas' free service to him [Tr. Vol. 1, p. 58-60]. Further, respondent's testimony that he earned his fee was vigorously contested by the bar's expert [who testified that he saw no evidence of an earned fee, Tr. Vol. 4, p. 28, l. 9] as well as by Ms. Vargas [who concurred, Tr. Vol. 3, p. 47, l. 18] and Vargas himself [who called respondent a "crook," Tr. Vol. 4, p. 73, l. 9-13].

Again, as respondent's testimony ***was*** rebutted, the referee was charged with assessing the credibility of the witnesses. In finding as he did, he clearly rejected respondent's testimony as lacking in credibility. As this Court stated in ***The Florida Bar v. Thomas,*** 582 So. 2d 1177 (Fla. 1991), "[t]he referee is in a unique position to assess the credibility of witnesses, and his judgement regarding credibility should not be overturned absent clear and convincing evidence that his judgement is incorrect." ***Thomas***, at 1178.

V. (Answer to Respondent's Fifth Issue for Review)

THE REFEREE COMMITTED NO ERROR IN HIS DETERMINATION THAT RESPONDENT FAILED TO ADEQUATELY COMMUNICATE WITH VARGAS.

Respondent takes issue with the referee's finding that he failed to keep Vargas informed of the status of his case, and failed to respond to his inquiries and those of his family. He alleges that he did keep Vargas informed and had no duty to respond to the communication requests of Vargas' sister. Again, respondent urges this Court to accept his testimony over that of the other testifying witnesses. In his brief, respondent asserts that he communicated with Vargas on a "constant" basis and returned Ms. Vargas' "calls and beeper pages on most occasions." That testimony is contradicted by Vargas' own charge that respondent "disappeared"[Tr. Vol. 4, p. 73, l. 9-13], and Ms. Vargas' testimony that respondent's telephone was disconnected and that he failed and refused to return the calls she placed on behalf of her incarcerated brother [Tr. Vol. 3, pp 42-44]. Again, the referee took this contradictory testimony into consideration and reached a determination as to credibility. Again, as this Court held in ***The Florida Bar v. Hayden***, 583 So. 2d 1016, where testimony conflicts, the referee is charged with assessing credibility based on demeanor and other factors. ***Hayden,*** at 1017. Pursuant to the teachings of ***The Florida Bar v. Thomas,*** *supra*,

the referee's judgement on this subject should not be overturned absent clear and convincing evidence that his judgement is incorrect. As respondent has not met this burden of proof, the referee's finding must stand inviolate.

VI. (Answer to Respondent's Sixth Issue for Review)

THE REFEREE COMMITTED NO ERROR IN HIS DETERMINATIONS AS TO COUNTS I THROUGH V OF THE DUVAL COMPLAINT.

Respondent challenges all of the referee's findings relating to the Duval complaint, alleging that the subject findings are not supported by clear and convincing evidence of sufficient weight to defeat respondent's own testimony and that of his sole witness, Faubert Etienne. Relying on the Court's holding in ***The Florida Bar v. Rayman***, 238 So.2d 594 (Fla. 1970), respondent argues that the referee placed too much weight on unsupported testimony, thereby making flawed findings of fact. This argument is swiftly dismissed by a review of the Court's handling of this issue in ***The Florida Bar v. Fredericks,*** 731 So.2d 1249 (Fla. 1999). In that case, the Court suspended the respondent for six months for making misrepresentations to the client about a non-existent lawsuit, for his lack of diligence in advancing the suit and for failing to communicate with the client. On appeal, and relying on ***Rayman,*** Fredericks argued that the referee erred in finding against him on the basis of testimony which was "evasive, inconclusive and constantly impeached and, therefore, incapable of

providing the necessary quantum of proof to convict him." The Court rejected Fredericks' argument and found the referee's findings of fact to be supported by competent substantial evidence, stating that:

> . . . while Fredericks argues that Winston's testimony was evasive, inconclusive, and inconsistent, he does not specifically point out any important deficiencies in the testimony. Further, a review of Winston's testimony reveals no major inconsistencies. . . Thus, ***Junkin*** and ***Rayman*** are inapplicable, and Fredericks' challenge to the referee's findings essentially boils down to an argument that the referee should not have credited Winston's testimony over Fredericks' own testimony to the contrary. However, "[t]he referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect." ***The Florida Bar v. Thomas***, 582 So.2d 1177, 1178 (Fla. 1991); see also ***The Florida Bar v. Hayden***, 583 So.2d 1016, 1017 (Fla. 1991)(stating that when testimony conflicts, referee is charged with the responsibility of assessing credibility based on demeanor and other factors.) Here, we find no such evidence and therefore defer to the referee's assessment of the credibility of the witnesses.

Fredericks, at 1251.

In the case at bar, the referee's findings are supported by competent, substantial evidence offered by Dr. Duval and the bar's expert, Jeffrey Devore, Esq. Clearly, by virtue of his findings, the referee rejected respondent's testimony as well as that of his

sole witness Mr. Etienne, who didn't know his business address [Tr. Vol. 6, p. 18, l. 23], whose testimony contradicted respondent's in terms of his availability to testify, who pays no income tax for his Haitian business [Tr. Vol. 6, p. 20, l. 12] and who admitted to a least one criminal conviction [Tr. Vol. 6, p. 21, l. 19-23]. Accordingly, the referee's findings are supported by competent, substantial evidence. As no evidence, save that which was rejected by the referee, was advanced, the referee's findings must not be overturned.

ARGUMENT ON THE FLORIDA BAR'S CROSS-APPEAL

GIVEN THE REFEREE'S WELL SUPPORTED FINDINGS OF FACT AS TO EACH COUNT OF THE FLORIDA BAR'S COMPLAINTS, RESPONDENT SHOULD BE DISBARRED.

Respondent's argument notwithstanding, the referee's findings of fact and of guilt, as set forth in the report of referee, are well supported by record evidence. The clear and convincing evidence consists of the testimony of the respondent himself as well as that of his clients, one client's sister, a sitting immigration judge, an official court translator and The Florida Bar's immigration expert -- in addition to the documentary evidence introduced through these witnesses at trial.

Given the magnitude of the referee's findings of fact and determinations of guilt, the referee's recommended sanction of a 180 day suspension is insufficient to meet the requirements of attorney discipline under ***The Florida Bar v. Pahules***, 233 So. 2d 130 (Fla. 1970). In ***Pahules,*** the Court stated that in order for attorney discipline to be effective it must be sufficiently harsh to protect the public from unethical conduct ***and*** have a deterrent effect, while still being fair to the respondent. While The Florida Bar concurs with each and every one of the referee's findings of fact (but for the small matter of the referee's application of ***The Florida Bar v. Littman*** to respondent's "legally inadequate" work in the Zavala matter), it does not

agree with his recommended disciplinary sanction. And, while this Court has long held that the referee's findings of fact shall be upheld absent a showing that they are clearly erroneous or bereft of evidentiary support, such is not the case with regard to a referee's recommendation as to sanction. Indeed, the Court recently reiterated this difference in ***The Florida Bar v. Fredericks,*** 731 So. 2d 1249:

> In contrast with a review of the referee's findings of fact, which should be upheld if supported by competent substantial evidence, this Court has broader scope of review regarding discipline because it bears the ultimate responsibility of ordering the appropriate sanction; however, a referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark." ***The Florida Bar v. Vining***, 707 So.2d 670, 673 (Fla. 1998).

In the case at bar, the recommended sanction of a 180 day suspension is "off the mark." The insufficiency of this recommended suspension can best be illustrated by measuring respondent's misconduct in the instant case against that of other respondents who were sanctioned by suspension, by this Court. For purposes of this argument these cases will be referred to as "measuring-stick decisions." In ***The Florida Bar v. Patterson***, 530 So. 2d 285 (Fla.1988), this Court found that the respondent's faulty representation of his client, neglect of legal matters, failure to communicate with his clients, failure to refund unearned legal fees in a timely manner and abandonment of his clients constituted misconduct warranting a one year suspension from the practice

of law. It is worthy of note that while Patterson's suspension of one year is twice what the referee recommended for respondent in the instant case, the respondent in ***Patterson*** (who abandoned his clients, leaving the state without notice) was accused of merely refunding the unearned fee in an untimely manner. In the instant case, in addition to neglect and abandonment of his clients, respondent elected to totally abandon them almost immediately following his collection of a legal fee from them, without giving them notice, providing them an avenue of communication, or refunding any of the unearned fees. Instead, respondent elected to insolently attempt to exonerate his breach of ethics by rationalizing his failure to each of these three vulnerable individuals, over a period of years.

In ***The Florida Bar v. Morrison***, 669 So.2d 1040 (Fla.1996), the Court held that misconduct consisting of failure to act with diligence and promptness in representing a client, failure to keep a client reasonably informed regarding the status of a matter, and failure to comply with requests for information also warranted a one year suspension from the practice of law. In reaching its decision, the Court stated that "[t]he failure of an attorney to pursue representation on behalf of a client resulting in prejudice to a client's rights *is an intolerable breach of trust,*"(emphasis added). ***Morrison,*** at 1041.

It is worthy of note that in ***Morrison***, this Court found conduct appreciably less reprehensible than the complete abandonment of clients faced with serious immigration problems (as committed by the respondent in instant case) sufficiently egregious to warrant a one year suspension from the practice of law. The Court's stern and forceful tone in dealing with respondent Morrison's misconduct endures as an unmistakable clarion of its rancor and resentment for such breaches of ethics. In another "measuring-stick decision," this Court held, in ***The Florida Bar v. Winderman***, 614 So.2d 484 (Fla. 1993) that a one year suspension, followed by a one year term of probation was an appropriate sanction for the attorney's misconduct in failing to keep his clients reasonably informed of the progress of the action and in failing to do several additional functions, all of which cumulatively are not nearly as egregious in nature as the abandonment of clients demonstrated in the instant case..

In ***The Florida Bar v. Schilling***, 486 So. 2d 551 (Fla.1986) this Court approved a report and recommendation of the referee which called for a public reprimand and a six month suspension for the respondent's neglect of responsibilities in two matters for which he had undertaken representation. In reaching its decision, this Court expressed its indignation with the respondent for his misconduct, stating:

> Confidence in, and proper utilization of, the legal system is adversely affected when a lawyer fails to diligently pursue a legal matter entrusted to that lawyer's care. A

> failure to do so is a direct violation of the oath a lawyer takes upon ...admission to the bar.

Schilling, at 552.

And, while the suspension in ***Schilling*** was more strident than that recommended in the instant case, respondent's misconduct is far more egregious.

In ***The Florida Bar v. Brakefield,*** 679 So.2d 766 (Fla. 1996) the Supreme Court held that a six month suspension from the practice of law was warranted for failure to clarify the status of representation, failure to attend depositions and hearings, failure to keep clients reasonably informed, and failure to act with reasonable diligence and promptness. Once again conduct that, though reprehensible by any interpretation, did not sink to the level of complete abandonment of immigrant clients teetering helplessly on the precipice of immigration court proceedings which they did not understand, yet resulting in the same term of suspension as has been recommended in the case at bar. A similar result was reached in ***The Florida Bar v. MacPherson***, 534 So.2d 1156 (Fla. 1988). In that case, this Court punished the lawyer (who had abandoned his practice and thereby injured his clients) with a six month suspension. This sanction was imposed even though respondent demonstrated no dishonest or selfish motive in his conduct, had no disciplinary record, and presented evidence of personal and emotional problems, as well as remorse. None of those mitigating

circumstances apply in the case before the Court. Indeed, the referee found a litany of aggravating factors, and respondent has a significant prior disciplinary history, including a one suspension and a second, pending recommendation for another, involving misconduct of the same or a similar kind. This Court has long held that cumulative misconduct, particularly that of a similar variety, should result in a harsher disciplinary result. In ***The Florida Bar v. Cox,*** 718 So. 2d. 788 (Fla. 1988), the Court repeated this precept:

> What in our view justifies disbarment is that Cox has previously been disciplined for dishonesty and misrepresentation to his law firm and his clients. ***Florida Bar v. Cox***, 655 So. 2d 1122(Fla. 1995). Disbarment is appropriate where, as here, there is a pattern of misconduct and history of discipline.

Cox, at 793.

The Court reached this same conclusion in ***The Florida Bar v. Orta***, 689 So.2d 270 (Fla. 1997), ***The Florida Bar v. McAtee***, 674 So.2d 743 (Fla. 1996), ***The Florida Bar v. Inglis***, 660 So.2d 697 (Fla. 1995), and ***The Florida Bar v. Williams,*** 604 So.2d 447 (Fla. 1992).

Another means by which to measure the severity of the sanction to be imposed is by examining other cases wherein the same or similar discipline as has been recommended in this case was actually imposed. Such an inside-out kind of

examination may be had by reviewing ***The Florida Bar v. Bazley***, 597 So. 2d 796 (Fla. 1992) [Eight month suspension for incompetence, neglect, lack of communication, improper withdrawal and misrepresentation] and ***The Florida Bar v. Wilder***, 543 So. 2d 222 (Fla. 1989) [Six month suspension and restitution for neglect and misrepresentation]. In each of these two cases, the misconduct was far narrower than was respondent's, and therefore deserving of less discipline than he receives. In two cases more similar but still less egregious than the instant one, the respondents received significantly greater disciplines than what has been recommended for respondent: ***The Florida Bar v. Netzer***, 462 So. 2d 1103 (Fla. 1985) [One year suspension for neglect and misrepresentation]; and ***The Florida Bar v. Orman***, 409 So. 2d 1023 (Fla. 1982) [18 month suspension for neglect, misrepresentation, failure to refund fees and trust account violations].

Respondent's misconduct in this case is better evaluated in light of the Court's holdings in ***The Florida Bar v. Mitchell***, 385 So.2d 96 (Fla. 1980), and its progeny. In ***Mitchell***, this Court disbarred an attorney who had "repeatedly failed to adhere to the responsibilities of an attorney." In ***The Florida Bar v. Bartlett***, 509 So. 2d 287 (Fla.1987), the Court held that "[r]epeated instances of similar misconduct should be treated cumulatively so that a lawyer's disciplinary history can be considered as grounds for more serious punishment than his present misconduct, considered in

isolation, might seem to warrant." ***Bartlett***, at 288. And finally, in ***The Florida Bar v. Horowitz***, 697 So. 2d 78 (Fla. 1997), the Court held that "[w]here the composite conduct of a lawyer is gross, disbarment is warranted." The Court also noted that Horowitz' pattern of wrongdoing and his prior disciplinary history required his disbarment." ***Horowitz***, at 83.

Such is the case before the Court today. Respondent's treatment of these three complaining clients was reprehensible. He lied to them to get their cases and their fees, promised them remedies that did not exist in a time frame that was impossible to achieve, and failed to provide them with competent or "legally sufficient" representation. He willfully distributed false business cards to them, failed to communicate with them, and then abandoned them almost immediately after he had stripped them of all of the legal fees he could get from them at the time. When they tried to reach him, they could not because he failed to return their calls, had disconnected his phone and moved without notice to them. These factors, coupled with the aggravating circumstances, prior discipline and all other matters and findings reflected in the report of referee, compel respondent's disbarment. Under the standard enunciated by this Court in ***Pahules***, no other discipline is appropriate.

CONCLUSION

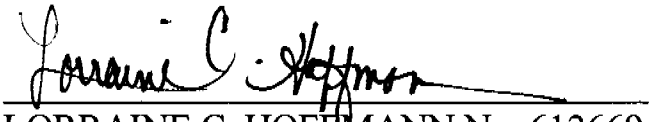
As set forth in the report of referee, respondent provided his clients Modesto Vargas and Yanique Duval with incompetent representation. He provided Yanique Duval with legally insufficient representation. In addition, he failed to diligently represent them, and he failed to communicate with them. He lied to them verbally and via his business card and firm name. He lost one of their cost deposits, or allowed it to be fraudulently altered and cashed by one of his non-lawyer "associates." He lost one or more of their files to the landlord who evicted him from his law office. He failed to protect these clients' property and the clients themselves. He charged them clearly excessive legal fees and then he abandoned them and their causes of action.

While this misconduct is egregious under any circumstance, it becomes evil when it is perpetrated upon poor immigrants who are displaced and disenfranchised. Such persons are the most vulnerable among us, and the neediest in terms of the protections which American law and The Rules Regulating The Florida Bar are designed to provide. Ms. Zavala was deported, though she may have had a viable defense. Mr. Vargas sought and obtained his own voluntary departure from the United States after months of needless incarceration and $2,500 in wasted (and borrowed) legal fees. Dr. Duval remains in the United States, wiser for having obtained

competent counsel after respondent abandoned her, and poorer for heaving met respondent at all.

Respondent's conduct in this matter should shock the conscience and trouble the soul of ethical lawyers everywhere. Viewed as a continuance of his conduct in his prior disciplinary case (which is currently pending before this Court), respondent's conduct is deserving of disbarment. Under the clear mandate of ***Pahules*** and its progeny, he should lose his privilege to practice law in this state for a minimum of five years. This sanction, strident as it is, is less punishing than the harm respondent visited upon the three clients whose complaints brought this matter before This Honorable Court.

Respectfully submitted,



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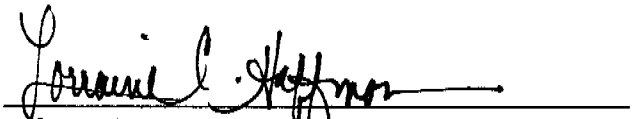
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief of The Florida Bar and Initial Brief on The Florida Bar's Cross-Appeal have been furnished by regular U.S. mail to Allan M. Elster, Appellant, 3899 NW 7th Street, Suite 218, Miami, FL 33126 and to Billy J. Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this _____ day of November, 1999.



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