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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,
and Cross Appellant

v.

ALLAN M. ELSTER,

Respondent/Appellant
and Cross Appellee.

_____/

Supreme Court No. ~~92,968~~

The Florida Bar File
No. 97-50,830(17D)

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

On Appeal from A Report of Referee

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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 contrary to the facts known to The Florida Bar, and as it also fails to include 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, respondent/appellant shall be referred to as "respondent" or "Elster." References to the transcript of the proceedings before the referee shall be as follows: Tr. Vol. ___, p.___, l. ____.

B. STATEMENT OF THE FACTS

On or about June 20, 1996 [Tr. Vol. 1, p. 23, l. 7], Antonio Sabatier retained respondent to represent himself and his daughter, Joani Sabatier, before the United States Immigration Court. [Tr. Vol. 1, pp 96-97] Mr. Sabatier and his daughter were Cuban immigrants who had entered the United States through Nicaragua. [Tr. Vol. 1, p. 94, l. 12-13.] They entered through the airport, without

visas, and thereby immediately were placed in "exclusion proceedings" under applicable immigration law. Thereafter, they were taken to the Krome Detention Center in South Dade County and "paroled out" into the general population. [Tr.Vol. 1, p. 164, l. 2-5] During the course of their entry procedure, the Sabatiers truthfully acknowledged their immigration from Cuba and willingly submitted to inspection by the U.S. Immigration and Naturalization Service. [Tr. Vol. 1, p. 168, l. 4-11] Based on the circumstances of their entry into the United States and their subsequent inspection, admission and parole, Mr. Sabatier and his daughter were eligible for United States residency (after a year and a day) under the United States Cuban Adjustment Act. [Tr. Vol. 1 p. 167, l. 2-16, Vol. 2, pp. 50-51] At or near the time of their parole from the Krome Detention Center, Mr. and Ms. Sabatier were given a date on which they were to appear before an immigration judge for a master calendar hearing. [Tr. Vol. 1, p. 163, l. 6-12] It was for this appearance, and to obtain the aforementioned remedy, that Mr. Sabatier retained respondent on June 20, 1996. [Tr. Vol. 1, pp. 96-97, l. 25 and 1]

On that date, respondent went to the Sabatier home, together with an informal interpreter. Respondent does not speak Spanish and the Sabatiers do not speak English. [Tr. Vol. 1, p. 23, l. 4-20] In addition to Mr. and Ms. Sabatier, respondent and his interpreter were also joined by Antonio Inguanzo, who is Mr. Sabatier's

cousin. Mr. Inguanzo was present during the entire interview and heard all that was said between the parties. [Tr. Vol. 1, p. 31, l. 9-18; pp. 147-148, l. 19-21 and 11-14] During the course of that meeting, respondent agreed to represent the Sabatiers throughout the pendency of their immigration case. He agreed to do so for a total fee of $800, half of which was to be paid in advance, with the balance to be paid upon the completion of the case. [Tr. Vol. 1, pp. 97-98, l. 22-25 and 1-22; pp. 127-128, l. 12-25 and 1-22; pp. 149-150, l. 5-25 and 1-2] Pursuant to this agreement, Mr. Sabatier gave respondent $400 in cash on June 20, 1996. Respondent gave Mr. Sabatier a signed receipt for $800, marked "paid in full." [Tr. Vol. 1, p. 47, l. 4-18; pp. 99 -100, l. 9-25, 1-2; p. 128, l. 15-18; p. 149, l. 9-22] Immediately following his initial consultation with the Sabatiers, respondent totally abandoned them and their cause of action [Tr. Vol. 1, p.105, l. 19-20] After that initial meeting, neither Mr. Sabatier nor his daughter ever saw or heard from respondent again. He did not file an appearance on their behalf, he did not appear for their immigration hearing on August 6, 1996, and he failed and refused to return their numerous telephone calls and pager messages. [Tr. Vol. 1, p. 55, l. 2-8; pp. 101-105; pp.129-130; pp. 157-160] When Mr. and Ms. Sabatier realized that they had been abandoned by respondent, they retained Christina Diaz Gonzalez, Esq., as successor counsel. [Tr. Vol. 1, p. 102, l. 9-10] Ms. Gonzalez also made many attempts to contact respondent by telephone and pager. Respondent

did not return Ms. Gonzalez's calls. [Tr. Vol. 1, p. 102, l. 16-24; pp. 160, l. 12-20] Despite the lack of work accomplished on behalf of the Sabatiers, respondent retained the full legal fee he collected from them. [Tr. Vol. 1, p. 72, l. 9-11] Based on the work accomplished on behalf of these clients, respondent's legal fee was clearly excessive. [Tr. Vol. 2, p. 55, l. 18-22, p. 57, l. 5-7]

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 bar failed to meet its burden of proof, he asserts that the referee erred in rejecting respondent's own, unsupported testimony as proof of the issues at bar, and he seems to allege that the referee and indeed this Court do not have jurisdiction over this matter, which he characterizes as a "fee dispute . . . not sufficient to warrant disciplinary action under the circumstances of this case," (citation omitted).

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 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.

The bar's cross petition for review seeks review of the referee's recommended sanction of a 60 day suspension. Based on the referee's well supported findings of incompetence, lack of diligence, abandonment of clients, failure to communicate with

clients, and charging a clearly excessive legal fee, respondent should receive a rehabilitative suspension of *not less than* 91 days.

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 AS TO COUNT I OF THE FLORIDA BAR'S COMPLAINT

In his findings of fact relating to the first count of The Florida Bar's complaint, the referee found that respondent "effectively abandoned" Antonio and Joani Sabatier after his initial consultation with them. Specifically, he found that respondent failed to file an appearance on behalf of Antonio and Joani Sabatier, that he failed to appear at their hearing in United States Immigration court, and that "he failed to accomplish any meaningful work on their behalf." Further, the referee found that respondent never informed his clients that he intended to stop representing them. As to this final point, the referee expressly noted that he "specifically rejects Respondent's defense that his assistant and interpreter, Enrique Santiago, spoke to either Antonio or Joani Sabatier and advised them that Respondent would not appear in Court on their behalf unless he recovered the remainder of his fee."

The referee is completely correct as to all of the aforementioned findings, for which there is ample record support. Antonio Sabatier testified repeatedly that respondent took a fee from him and never appeared again, despite his many efforts to communicate with respondent after he failed to appear in immigration court. Joani

Sabatier's testimony mirrored that of her father. Antonio Inguanzo, Mr. Sabatier's cousin who was present during the meeting with respondent, also testified. His recollection of the discussion and fee agreement was equally clear and unequivocal. Finally, the referee heard the testimony of successor counsel Christina Diaz Gonzalez. While Ms. Gonzalez was not present on the single occasion when respondent and Mr. Sabatier met, she advised the referee that Mr. Sabatier approached her a number of times for help in reaching respondent. When respondent did not return her calls or pages either, and the date of the rescheduled master calendar hearing approached, Ms. Gonzalez consented to Mr. Sabatier's request that she undertake his representation, as well as that of his daughter, in their immigration case. Ms. Gonzalez also testified that, upon accepting the Sabatiers' representation and appearing on their behalf in immigration court, she learned from the trial judge that respondent had never even entered an appearance in the matter.

While respondent challenges the sufficiency of the evidence upon which the referee based his findings, he offers no record evidence in support of his challenge. Instead, he seems to argue that because ***he*** testified that his representation was not to begin until and unless his fee was paid in full, all of the aforementioned findings should fail. It should be noted that respondent alone testified to this theory of defense. He offered no corroborating testimony, could introduce no documentary

evidence of any kind (such as a fee agreement, a file note, any confirming correspondence, or a request for payment directed to the Sabatiers)[1] , and had given the Sabatiers a receipt for the ***full fee***. This receipt was signed by him, and clearly marked "Paid in full."[2] See Bar Trial Composite Exhibit 3. Respondent's argument on this point is tantamount to stating that, while there is ample evidence to support a finding of misconduct on his part, his unsupported and widely contradicted testimony (as to his fee agreement with his clients) should have been sufficient to defeat such well supported evidence. Respondent all but states that in his brief:

> As to the latter, Respondent submits that the Referee erred in rejecting Respondent's testimony or defense on this critical issue (Finding of Fact #9). Unless the referee did not find Respondent's testimony credible on this issue, which is not specifically stated in his Report, then this testimony should have been accepted.

Respondent's initial brief, p. 16.

Respondent's argument is misplaced as the referee ***did*** specifically state, on page 3, item 9 in his report, that he "specifically rejects" respondent's testimony ***and*** his defense on this issue. Simply and plainly stated, the referee took pains to expressly

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[1]Indeed, respondent testified that no such evidence existed. [Tr. Vol. 1, pp. 47-48]

[2]The Sabatiers testified that this receipt was an error. It is noteworthy that their position in this matter would have been significantly enhanced had they chosen not to volunteer this fact. Accordingly, this assertion, against interest, speaks volumes for the Sabatiers' veracity.

and clearly state, in his report, that he did not believe that respondent advised the Sabatiers, either personally or through his friend and/or interpreter, that he would not appear in immigration court on their behalf until and unless he received the balance of his fee from them. The record support for this finding is abundant. Mr. Sabatier, Ms. Sabatier, and Mr. Inguanzo all testified to the same recollection: respondent accepted the Sabatiers case for a fee of $800, half to be paid at the outset, the balance to be paid when the case was complete. Mr. Sabatier's clear and unequivocal testimony on this point appears in Tr. Vol. 1, pp. 97-99, Ms. Sabatier's corroboration of her father's testimony appears in Tr. Vol. 1, pp. 132-138, and Mr. Inguanzo's comments on this point appear in Tr. Vol. 1, pp. 148-151. Respondent seeks to diminish the impact of this overwhelming evidence by interjecting the matter of ***The Florida Bar v. Quick,*** 279 So.2d 4 (Fla. 1973), and misstating its holding. This argument is a red herring which is best tossed back into the pool.

Based on the foregoing, it is clear that the referee found respondent's testimony on this subject to be without merit. However, it should also be noted that respondent's argument on this point would fail, even had the referee found respondent's testimony on this subject to be credible. For guidance on this issue, we look to the Court's comments in ***The Florida Bar v. King***, 664 So.2d 925 (Fla. 1995). In that case, an attorney was suspended for three years for failing to provide his client

with competent, diligent representation, and for failing to communicate with his client. In defense of his actions, the attorney argued that unless it was proven that he had been paid for his contemplated services, he had no obligation to the client (for whom he had provided some service), as no attorney-client relationship existed. The Court rejected King's argument, stating as follows:

> We need not resolve any factual disputes over when King and Baldwin met and whether Baldwin paid a cash retainer. The record shows that King took action on behalf of Baldwin and his company and King identified them as his clients.
>
> A fee is not necessary to form an attorney-client relationship. ***Dean v. Dean,*** 607 So.2d 494, 500 (Fla. 4th DCA 1992) (also explaining that payment of fee is not required to create attorney-client privilege), review dismissed, 618 So.2d 208 (Fla. 1993). If a fee were required to establish an attorney-client relationship, a lawyer could never perform pro bono work for a client.
>
> Courts have also recognized that while lawyers are entitled to charge for their services, they cannot simply abandon a case once they have provided services without compensation (citations omitted).

King, at 927.

The same measure may be applied to the case at bar. Regardless of whether respondent was fully (or adequately)[3] paid for his services, he had an absolute duty to

[3] Respondent raised the point, in his own testimony and during cross-examination of the bar's expert witness, that his fee in the Sabatier case was below average and significantly less

competently and diligently represent the Sabatiers: to appear at their immigration hearing, to respond to their telephone calls and pages, and to zealously advance their case - - to completion. The referee, who heard all of the evidence and was in a position to evaluate the demeanor and credibility of all of the witnesses, found that respondent did none of these things. Respondent challenged this finding with ***The Florida Bar v. Rayman,*** 238 So.2d 594 (Fla. 1970), suggesting (it seems) 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:

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than that of the expert (who is a board certified immigration lawyer).

> . . . 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 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. 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.

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

THE REFEREE COMMITTED NO ERROR IN MAKING FINDINGS OF FACT AS TO COUNT II OF THE FLORIDA BAR'S COMPLAINT

In his findings of fact relating to the second count of The Florida Bar's complaint, the referee found that respondent had failed to communicate with his clients and failed to respond to their efforts at communication with him. Specifically, the referee noted that: (1) respondent "failed to return any of the Sabatiers' telephone calls and beeper pages" (2) that by September 11, 1996, "the Sabatiers realized that they had been effectively abandoned by Respondent;" and (3) that respondent failed to return the "telephone calls and beeper pages" placed by the Sabatiers' successor counsel, Christina Diaz Gonzalez.

In challenging these findings, respondent's argument is decidedly problematic. Rather than arguing the sufficiency of the evidence before the referee, respondent appears to argue the potential for mistake and/or absolute impossibility: the Sabatiers *may* have been mistakenly attempting to reach him using his interpreter's contact information, and/or it was impossible for him to communicate with them because of the language barrier between them. Both of these arguments are overwhelmingly unpersuasive for a variety of reasons. First, respondent's suggestion that the testimony "did not specify whether [the Sabatiers and their successor counsel] were calling the

Respondent or his interpreter" is both mischaracterized and misplaced. The testimony at issue was presented during the course of a trial. Respondent, through counsel, cross-examined every witness whom the bar called to testify. If there was an ambiguity in his understanding of the testimony offered, respondent was free to explore such ambiguity during the course of cross-examination. It is disingenuous and disrespectful of this Court's time and attention to allege such a transparent "ambiguity," for the first time, on appeal. Further, each witness (with the exception of the bar's expert) testified as to attempted, but unsuccessful communications with respondent utilizing the telephone numbers set forth on his business card. Where those telephone numbers rang, and who or what (if anyone or anything) answered those lines is inconsequential to these proceedings. The referee's findings are well supported by the testimony offered: that the Sabatiers and Ms. Gonzalez repeatedly attempted communication with respondent, and that their calls and pages were not answered by him or by anyone on his behalf. Respondent also argued that he was "incapable" of communicating with the Sabatiers, due to their inability to speak English and his inability to speak Spanish. Therefore, respondent reasons, he should not be disciplined for failure to communicate with them as such actual communication is impossible. Again, this argument is wholly unpersuasive. Respondent would have this Court accept that he was able to initially meet the Sabatiers, obtain actual

authority to undertake their representation, discuss their case and explain their potential remedies to them, reach a fee agreement and collect a legal fee from them - - all through the use of an interpreter, but he was nevertheless "incapable of communicating with the Sabatiers" - - in the same fashion. This is folly. Once respondent accepted the representation and the fee, his duty to the Sabatiers became absolute. If he held his interpreter out to these clients as his "assistant" or his agent (by virtue of introduction to them and/or interpretation services and/or a business card provided to them), their communications to the interpreter must be construed as communications to respondent himself. Finally, respondent's assertion that he told the interpreter to advise the Sabatiers that he would not appear on their behalf without first receiving full payment of his fee, was soundly rejected, in explicit terms, by the referee in his report.

Accordingly, as respondent produced no evidence in support of his position with regard to the referee's findings on the communications violations, the referee's findings of fact must be undisturbed. 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.

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

THE REFEREE COMMITTED NO ERROR IN MAKING FINDINGS OF FACT AS TO COUNT III OF THE FLORIDA BAR'S COMPLAINT

In his findings of fact relating to the third count of The Florida Bar's complaint, the referee found that respondent collected a clearly excessive legal fee for the work he actually accomplished on behalf of Antonio and Joani Sabatier. Respondent alleges that the referee erred, in making such a finding, because of a lack of "clear and convincing evidence." In support of his argument, respondent states that he provided "legal consultation and research on behalf of the Sabatiers," and argues that such was sufficient to earn the fee charged. Respondent provided no evidence at trial to support his argument. The Florida Bar, however did introduce trial evidence which sharply contradicts respondent's argument on this point. Such evidence was presented in the form of the testimony of Jeffery Devore, Esq., the bar certified immigration attorney who served as The Florida Bar's expert witness. During the course of both direct and cross examination, Mr. Devore testified that: (1) all of the work respondent actually performed was performed incompetently [Tr. Vol. 2, p. 23, l. 14-15]; (2) some of the work respondent actually performed was "not relevant to the issue at hand" [Tr. Vol. 2, p. 43, l. 14-15]; and (3) "even taking into account what he's done," respondent's

admittedly small fee in the Sabatier matter was excessive. [Tr. Vol. 2, p. 57, l. 5-7] Respondent called no expert witness on the issue of fees, but rested on his unsupported assertions as to same. If the testimony of the bar's expert is not enough to provide sound footing for the referee's finding on the issue of fees, this Court may look nearly anywhere in the record for corroboration of the bar expert's opinion. The record is replete with "clear and convincing"evidence to support the referee's finding of fact.

The first offering of such evidence came in the form of Antonio Sabatier's testimony. He told the referee that he gave respondent $400, and got nothing in return. Indeed, he testified as follows: "He never represented me. I had to hire another lawyer." [Tr. Vol. 1, p. 105, l. 19-20] Next, Joani Sabatier testified as follows, under direct examination:

MS. HOFFMANN: What did they ask you to do in terms of fees?

MS. SABATIER: That we would pay four hundred dollars first and when the trial ended that we would give him the remaining four hundred dollars.

MS. HOFFMANN: Did you agree to that?

MS. SABATIER: Yes, because we didn't know any other attorney and we needed someone to help us.

MS. HOFFMANN: Did you see your father pay Mr. Elster?

MS. SABATIER: Yes.

MS. HOFFMANN: What did you see him give him?

MS. SABATIER: Four hundred dollars cash.

MS. HOFFMANN: On the day, on that day, did you or did your father tell Mr. Elster about the hearing date?

MS. SABATIER: We left it at that we were going to meet each other the day of the hearing in court.

MS. HOFFMANN: Besides agreeing to represent you at the hearing, did Mr. Elster give you or your father any legal advice?

MS. SABATIER: No.

MS. HOFFMANN: After that day in your home, did you ever hear from Mr. Elster again?

MS. SABATIER: No.

MS. HOFFMANN: Did he attend your hearing?

MS. SABATIER: No.

MS. HOFFMANN: Did he ever talk to you before the hearing and ask you for money?

MS. SABATIER: No.

MS. HOFFMANN: Did Mr. Santiago ever call you and have a telephone conversation with you and ask you for more money?

MS. SABATIER: No.

Tr. Vol. 1, pp. 128-129.

Thereafter, Mr. Inguanzo took the stand and informed the referee that his recollection of the facts was the same. Tr. Vol. 1, pp. 152-154. Finally, Ms. Gonzalez testified. While she was not privy to the fee discussions, her testimony (that no notice of appearance or other document had been filed in the case) clearly demonstrated that respondent had done no relevant work for the fee he received. Tr. Vol. 1, pp. 160-161. Very simply, nowhere in the record is there any evidence to support, by clear and convincing evidence, that respondent did anything at all for the Sabatiers after he relieved them of their funds and then disappeared, like a bandit into the night, on June 20, 1996. Absent such evidence, the referee's finding must stand inviolate.

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 COMPLAINT, RESPONDENT SHOULD BE SANCTIONED WITH A REHABILITATIVE SUSPENSION OF NOT LESS THAN 91 DAYS.

Respondent's vague and generalized 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, their cousin, their successor counsel and the bar's expert, in addition to the documentary evidence introduced through these witnesses at trial.

Given the magnitude of the findings of fact and determination of guilt, the referee's recommended sanction of a 60 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 stringent 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, 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 60 day, nonrehabilitative suspension is "off the mark." The insufficiency of this recommended suspension can best be illustrated by measuring respondent's misconduct against that of other respondents who were sanctioned to a suspension by this Court, which for purposes of this argument 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 the suspension of one year

was substantially more stringent than that recommended by the referee herein, 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 immediately following the initial conference, without giving them notice or providing them an avenue of communication. Ultimately, respondent in the instant case failed to refund any portion of the unearned fee, electing instead to insolently attempt to exonerate his breach of ethics by rationalizing his failure to appear in Immigration Court as the just result of the Sabatiers' failure to pay the balance of his fee.

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 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.

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.

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 that case nevertheless warranted a suspension substantially in excess of that which was recommended by the referee herein. 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 at bar. Indeed, the referee found a litany of aggravating factors, and respondent has a prior

disciplinary history, including a suspension. This Court imposed a four month suspension in ***The Florida Bar v. Grant***, 514 So.2d 1075 (Fla. 1987) for simple neglect , where respondent had but two prior public reprimands. In the case at bar, respondent's prior discipline is considerably weightier. In ***The Florida Bar v. Daniel,*** 641 So.2d 1331 (Fla. 1994), this Court imposed a 91 day rehabilitative suspension where respondent was guilty of neglect and had, as respondent does, a previous disciplinary suspension.

Another means by which to measure the severity of the sanction to be imposed can be accomplished by examining other cases wherein the same 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. Collier***, 385 So.2d 95 (Fla. 1980), a disciplinary proceeding wherein the respondent was, inter alia, found to be extremely dilatory in the administration of an estate. For that infraction, which is but ***a slender portion*** of the infractions for which the respondent in instant case has been found guilty, respondent Collier received a 60 day suspension - - together with 2 years of probation. As stated elsewhere in this argument, this Court has broad discretion in considering the sanction to be imposed in the case at bar, as opposed to the somewhat higher degree of sanctity afforded to a referee's findings of fact. ***The Florida Bar v. Lawless***, 640 So. 2d 1098, 1100 (Fla. 1994). In exercising such

discretion, the Court should be cognizant of its holdings in prior cases where conduct less sinister than abandonment has resulted in suspensions well in excess of 60 days. One such case is ***The Florida Bar v. Glick,*** 397 So. 2d 1140 (Fla. 1981), wherein the respondent was found to have been incompetent to handle a certain legal matter. He was also found guilty of neglect and of causing damage to his client. Based on these findings, the Court imposed a rehabilitative suspension of 91 days. In another such case, ***The Florida Bar v. Witt***, 626 So. 2d 1358 (Fla. 1993), a respondent was found guilty of a series of rule violations including incompetence, neglect, communications violations, excessive legal fees, providing financial assistance to a client, and conduct involving fraud, deceit and/or misrepresentation. Mr. Witt was suspended for 91 days.

Still other cases where a rehabilitative sanction was imposed for misconduct analogous to, or less egregious than, respondent's, besides ***The Florida Bar v. Winderman***, 614 So.2d 484 (Fla. 1993) [One year suspension was deemed appropriate for incompetence, failure to keep clients informed, failure to protect clients' interests, and misrepresentation] include: ***The Florida Bar v. Bazley***, 597 So. 2d 796 (Fla. 1992) [Eight month suspension for incompetence, neglect, lack of communication, improper withdrawal and misrepresentation]; ***The Florida Bar v. Wilder***, 543 So. 2d 222 (Fla. 1989) [Six month suspension and restitution for neglect and misrepresentation]; ***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].

Given respondent's reprehensible abandonment of his clients immediately after he had stripped them of all of the legal fees he could get from them at the time, coupled with the aggravating circumstances and other matters and findings reflected in the report of referee, respondent should be sanctioned with a rehabilitative suspension of ***not less than*** than 91 days. Under the standard enunciated by this Court in ***Pahules***, and as a result of the genuine belief and concern of The Florida Bar that respondent should be compelled to demonstrate his rehabilitation prior to resuming the practice of law, respondent must not receive a suspension of less than 91 days.

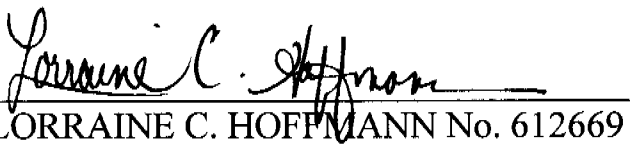
CONCLUSION

As set forth in the report of referee, respondent provided his clients, Antonio and Joani Sabatier, with incompetent representation. He failed to diligently represent them, and he failed to communicate with them. He charged them an excessive legal fee and he abandoned them and their cause 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. Had Mr. Sabatier not had a second job cleaning offices in a building which included the office of Ms. Diaz, his rights and those of his daughter may have been compromised, diminished, or lost.

Respondent's conduct in this matter should shock the conscience and trouble the soul of ethical lawyers everywhere. It is not deserving of a short term suspension and automatic reinstatement. Under the clear mandate of ***Pahules*** and its progeny, respondent should receive a rehabilitative suspension, and be compelled to prove his fitness to practice law before he is again allowed the privilege of announcing himself as a member in good standing of The Florida Bar.

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, 780 NW LeJeune Road, Suite 418, Miami, FL 33126 and to Billy J. Hendrix, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 23 day of July, 1999.

LORRAINE CHRISTINE HOFFMANN