097
FILED
DEBBIE CAUSSEAUX
OCT 12 1999
11-5
CLERK, SUPREME COURT
By ____________

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant

Supreme Court Case
No. 93,090; 93,091; 93,092

vs.

ALLAN M. ELSTER,

Respondent
____________________________/

The Florida Bar Case
No. 97-50,721 (17D)
97-50,814 (17D)
97-51,095 (17D)

BRIEF OF APPELLANT/RESPONDENT

Allan M. Elster, Attorney
3899 N.W. 7th Street
Suite 218
Miami, FL 33126
Florida Bar No. 0022562

TABLE OF CONTENTS

Page

Table of Citations iii

Statement of the Case 1

Statement of the Facts 2

Summary of Argument 12

Argument 20

Issues for Review

I. THE ZAVALA CASE, FLORIDA BAR FILE NO. 97-50,721 (17D) SUPREME COURT CASE NO. 93,092

A. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT I, II AND III OF THE ZAVALA COMPLAINT WITH RESPECT TO RESPONDENT'S BUSINESS CARD. 20

B. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT V OF THE ZAVALA COMPLAINT

1. Abandonment of Zavala? 25

II. THE VARGAS CASE, FLORIDA BAR FILE NO. 97-50,814 SUPREME COURT CASE NO. 93,091

A. WHETHER THE REFEREE ERRED IN MAKING A SPECIFIC FINDING OF FACT AS TO ALL COUNTS OF THE VARGAS COMPLAINT (findings of facts #35)

1. Vargas' Retention of Respondent. The Agreement between attorney and client 28

Page

B. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT I AND II OF THE VARGAS COMPLAINT

1. Legal work and advice to Vargas: Was it proper representation of a client? Was the fee excessive? 36

C. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT III OF THE VARGAS COMPLAINT

1. Communication between attorney and client: does it include the family? 38

III. THE DUVAL CASE, FLORIDA BAR FILE NO. 97-51,095 (17D) SUPREME COURT CASE NO. 93,090

A. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT I, II, III, IV AND V OF THE DUVAL COMPLAINT.

1. Count I, II and III of the Duval Complaint: was competent legal advice and work given and performed and did Respondent communicate with the client? 39

2. Count IV of the Duval Complaint: the money order. 47

3. Count V of the Duval Complaint: record bar address, was the client properly informed? 48

IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES 49

CONCLUSION 49

CERTIFICATE 50

TABLE OF CITATIONS

Cases Page

The Florida Bar vs. Budish, 421 So.2d 501 13,22

The Florida Bar vs. Fetterman, 439 So.2d 835 (Fla. 1983) 13,22,24

The Florida Bar vs. Fredericks, 730 So.2d 1249, 1251 (Fla. 1999) . . 15,16,18,29,45

The Florida Bar vs. Garland, 651 So.2d 1182, 1184 (Fla. 1995) 34,47

The Florida Bar vs. Hayden, 583 So.2d 1016, 1017 (Fla. 1991) 18,19,35,46

The Florida Bar vs. Lange, 711 So.2d 518 (Fla.. 1998 22

The Florida Bar vs. Littman, 612 So.2d 582 (Fla. 1983) 12,21

The Florida Bar vs. Marable, 645 So.2d 438 (Fla. 1994) 12,13,22

The Florida Bar vs. Quick, 279 So.2d 4, 8 (Fla. 1983) 15,27

The Florida Bar vs. Rayman, 238 So. 2d 594, 597 (Fla. 1970) . 14,15,16,18,25,39,45

The Florida Bar vs. Thomas, 582 So.2d 1177, 1178 (Fla. 1991) 35

RULES REGULATING FLA. BAR

Rule 1-3.3 48

Rule 3-7.7 1

Rule 4-1.1 45,47

Rule 4-1.3 47
Rule 4-1.4(a) 14,25,26,38,46
Rule 4-1.4(b) 14,25,26,38,46
Rule 4-1.5(a) 37,47
Rule 4-1.15(a) 47,48
Rule 4-1.15(c) 47,48
Rule 4-8.4(c) 45

STATUTES

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L.
No. 104-132, 110 Sol. 1214, 1277 (AEDPA). 5,6
INA Sec. 203(b)(2), 8 U.S.C. 1153(b)(2) 45,46
INA Sec. 212(c), 8 U.S.C. #1182(c) 6,32,33,34
INA Sec. 440(d) (AEDPA) 6,32

STATEMENT OF THE CASE

Based upon Complaints filed by the Florida Bar in three cases, they were assigned to a Referee for hearing. The three cases were consolidated for trial which were held on February 16, February 17, March 3, April 12, and May 3, 1999.

The Referee's Report in these three cases was issued on June 4, 1999. Therein, the Referee made certain findings of fact and recommendations. The Referee concluded that the Respondent had engaged in certain misconduct and recommended that Respondent be suspended from the practice of law for eighteen months.

Pursuant to Rule 3-7.7 of the Rules of Discipline of the Florida Bar, a Petition for Review was timely filed with this Court. This Brief is filed with this Court pursuant to Rule 3-7.7 and the applicable Rules of Appellate Procedure. For purposes of clarity, consistency and continuity herein and throughout this proceeding, Respondent/Appellant shall be referred to as Respondent. References to the transcript of the proceedings before the Referee shall be as follows: Tr. Vol. ______, p. _____.

STATEMENT OF THE FACTS

THE ZAVALA CASE

Florida Bar File No. 97-50,721 (17D)

Supreme Court Case No. 93,092

Domingo Georgina Zavala, a native and citizen of Honduras, was issued an Order to Show Cause and Notice of Hearing by the United States Immigration and Nationality Service (hereinafter "Service") on April 30, 1993 [Tr. Vol. I. p. 111, 112].

A hearing was scheduled before an immigration judge on October 22, 1993, where at, Zavala failed to appear and the immigration judge ordered her deported in abstentia [Tr. Vol. I. p. 112].

Zavala was taken into custody by the Service on March 21, 1996 and transferred to the Krome Detention Center in Miami, Florida (hereinafter "Krome") (findings of facts #5).

Respondent was recommended to Zavala by another detainee at Krome, and initially visited Zavala at Krome on March 21, 1996 (findings of facts #6, #7).

At that initial meeting, Respondent gave Zavala his business card, Exhibit A attached to the Zavala Complaint (findings of facts #9) [Tr. Vol. I, p. 112 and 115].

Zavala retained Respondent to file a Motion to Reopen the immigration case and stay her deportation, based on her assertion that she did not receive notice of the deportation hearing on October 22, 1993 [findings of facts #23].

Respondent, on April 4, 1996, filed a Motion to Reopen and Stay of Deportation (findings of facts #23). A subsequent Motion for Rehearing was filed on April 9, 1996, based on the denial of the initial motion (findings of facts #24, #25).

This motion for rehearing was denied on April 12, 1996 and an emergency appeal was filed on April 16, 1999 (findings of facts #26, #27). The appeal was filed with the Board of Immigration Appeals and after due consideration, was denied on October 21, 1996 (Tr. Vol. I, p. 130-132, 139]

Respondent, during the pendency of these legal proceedings, visited Zavala at Krome and kept her informed of the status of her case. The record at Krome showed over 15 such visits (Tr. Vol. I, p. 139, 140] [Defendant's Exhibit I).

After the appeal was dismissed, Zavala, on November 11, 1996, was deported (findings of facts #30).

The only witness that testified to the events that transpired leading up to Zavala's deportation was the Respondent. Zavala nor any family member testified, and the only witness called by the Florida Bar was an expert witness and the

immigration judge who ruled on the motions filed by the Respondent. Other than these witnesses, the only other evidence introduced at the hearing on Zavala's case was the pleadings filed by the Respondent, the immigration decisions, and a record kept at Krome of the number of visits Respondent had with Zavala, totaling fifteen (15) or more (Tr. Vol. I, p. 139, 140] [Defendant's Exhibit I).

THE VARGAS CASE

Florida Bar File No. 97-50,814 (17D)

Supreme Court Case No. 93,091

Modesto Vargas (hereinafter "Vargas"), a native and citizen of Nicaragua, entered the United States in 1963 as a permanent resident (findings of facts #32).

On December 5, 1995, Vargas pled guilty to traffic cocaine and trafficking cocaine (findings of facts #37). Vargas was subsequently deported by an immigration judge for this conviction and his conviction was, at the time Respondent met Vargas, on appeal to the Board of Immigration Appeals. This appeal had been filed by Vargas's former immigration attorney [Tr. Vol. I, p. 17].

Two witnesses testified as to the retention by the Respondent to represent Vargas. Those witnesses being the Respondent and Vargas's sister. The only other witness called in this case was the Florida Bar's expert witness on the competency of Respondent's legal work. Vargas did not testify.

Respondent testified that he had been retained by Vargas at Krome Detention Center where Vargas was in custody by the Immigration Service Center. According to the Respondent, Vargas, at the time he was retained on June 5, 1996, was ineligible for any relief from deportation due to the passage by Congress in April of 1996 of the Anti-terrorism and Effective Death Penalty Act of 1996, Pub.

L. No. 104-132, 110 Stat. 1214 ("AEDPA"). Prior to the passage of this Act, Vargas, as a drug offender, would have been eligible for relief from deportation under Section 212(c) of the Act, 8 U.S.C. #1182(c), but Section 440(d) of the AEDPA amended Section 212(c) to eliminate drug offenders from relief from deportation as an aggravated felon [Tr. Vol. I, p. 38, 39].

Respondent testified that he had been retained by Vargas to monitor any change in the immigration laws, specifically the passage by Congress of new amendments to the immigration laws that would eliminate the harsh consequences of Section 440(d) of the AEDPA with respect to Vargas's case [Tr. Vol. I, p. 38, 39].

Respondent further testified that he visited Vargas on numerous occasions at Krome, keeping Vargas advised of the bills that were before Congress proposing changes in the AEDPA [Tr. Vol. I, p. 59]. The Krome records indicate over fifteen such visits [Tr. Vol. I, p. 197].

Respondent testified that he was not retained to file an appeal of Vargas's deportation order since (1) an appeal was pending, being filed by his former immigration attorney, and (2) any new appeal would be frivolous based on the current status of the law [Tr. Vol. II, p. 212].

Respondent also testified that Vargas had informed him that if there was not

any significant change in the law by November of 1996, he wanted to be deported [Tr. Vol. I, p. 41-43].

The only other factual witness was Vargas's sister, Ada Maria Vargas, who testified of her attempts to contact the Respondent. Ms. Vargas, on cross examination, did admit that the family was awaiting a change in the law and its effect on her brother's deportation [Tr. Vol. I, p. 55, 66, 69, 70].

THE DUVAL CASE

Florida Bar File No. 97-51,095 (17D)

Supreme Court Case No. 93,090

Yanipue Duval was recommended to the Respondent by her brother, Ernest Duval, whom the Respondent had represented in a labor law matter [Tr. Vol. I, p. 87]. Ms. Duval, who testified along with the Respondent and his witness, Fabert Etienne, is a foreign medical doctor who practiced medicine in Haiti [Tr. Vol. I, p. 88-91]. Her brother, Ernest Duval, a U. S. citizen, had filed an application with the Immigration Service to adjust her status to permanent resident. The petition, called a 1-130, had been filed prior to Ms. Duval's retention of the Respondent [Tr. Vol. I, p. 87-88].

Ms. Duval went to the Respondent's office in Boynton Beach, Florida, because she had not received a decision on her brother's application with the INS which had been pending for some time [Tr. Vol. II, p. 5, 6].

The initial meeting took place on January 26, 1996 and present was Faubert Etienne, a creole interpreter for the Respondent [Tr. Vol. I, p. 87, 88]. Ms. Duval met again with the Respondent and Faubert Etienne on January 31, 1996 (findings of facts #62 and #63).

Three witnesses testified as to the events that occurred at these two initial

meetings, Ms. Duval testified that at these meetings Respondent told her that he could obtain her residency status in three months [Tr. Vol. I, p. 75-77, 93, 95].

Duval also testified that she gave the Respondent a money order in the amount of $130.00 made payable to the Immigration and Naturalization Service (hereinafter INS) [Tr. Vol. I, p. 78]. Duval testified that she was unable to locate the Respondent after he left the Boynton Beach office. Duval stated that she finally got Respondent's new phone number from a friend and called the Respondent at his new office where they had a short conversation, with the Respondent promising to call her back. Ms. Duval, right after that conversation, filed a complaint with the Florida Bar [Tr. Vol. I, p. 78-80].

The Respondent testified that at his initial meetings with Ms. Duval, Faubert Etienne, his creole interpreter, was present [Tr. Vol. II, p. 5]. Respondent testified that he informed Ms. Duval at these meetings that her brother's petition to the INS would take a long time before a visa would be available [Tr. Vol. II, p. 5, 6]. Respondent testified that he advised Duval that she could obtain lawful permanent residency through employment, but that she had to get a job offer from a teaching facility or medical institution, preferably one that needed a creole speaking person who had the medical qualifications that she had [Tr. Vol. I p. 88-91].

Respondent testified that Ms. Duval, after being given that advice, returned to his office on numerous occasions, sometimes with a friend who was a client, and complained that she was unable to get a job offer [Tr. Vol. I, p. 99). Respondent testified that he did not recall Duval giving him a money order for $130.00 made payable to INS at any of his meetings with Ms. Duval [Tr. Vol. II p. 14]. Respondent testified that he did not request such a money order from Duval, as one was not needed at this time [Tr. Vol. II p. 14]. Respondent testified that if such a money order was given, it would have been placed in Duval's file which was taken by his landlord and destroyed when he was evicted at his 1876 N. University Drive office in Plantation, Florida [Tr. Vol. I p. 96].

Respondent also testified that he did not advise Duval that she could obtain her residency status within three months, as such was impossible [Tr. Vol. II p. 19]. Respondent testified that he advised Duval that it would take one to two years to get permanent residency, but first, she had to get that job offer and file for labor certification with the Department of Labor [Tr. Vol. II p. 7].

Respondent finally testified that Duval was aware of his new office in Plantation, Florida and telephoned him at that address [Tr. Vol. II p. 18]. It was right after he received a phone call from her at his new address that the complaint was filed with the Florida Bar [Tr. Vol. I p. 101-105].

Faubert Etienne testified that he was present during all meetings that the Respondent had with Ms. Duval [Tr. Vol. III p. 11].

Etienne testified that Respondent never told Duval she could get her permanent residency within three months [Tr. Vol. III p. 8, 9]. Etienne further testified that Duval had been informed that she had to get a job offer [Tr. Vol. III p. 7, 8, 10]. Etienne testified that the Respondent never requested from Duval a money order for $130.00 and he never saw or was aware that Duval gave such a money order to the office [Tr. Vol. III p. 10, 11]. Etienne also testified that Duval called him at home on numerous occasions regarding her immigration case [Tr. Vol. III p. 12-18]. Etienne testified that Duval was in constant contact with him and was aware of Respondent's new office and phone number [Tr. Vol. III p. 45-47].

The only other witness to testify in the Duval complaint was the Florida Bar's expert witness, Defoe, who testified that visa approval for Duval's brother's petition would take ten to twelve years. Defoe also testified that he would have advised Duval to get a job offer in order to obtain permanent residency through employment. Defoe also testified that it would take three years to get residency after getting a job offer [Tr Vol. II p. 48, 56, 132).

SUMMARY OF THE ARGUMENT

THE ZAVALA CASE

Florida Bar File #97-50-50,721 (17D)

Supreme Court Case No. 93,092

The Zavala Complaint consisted of five (5) counts of alleged misconduct by the Respondent. The Referee found in his Report no unethical conduct by the Respondent with respect to the legal work performed (pg. 6, ftn. 1). The Referee found as to this legal work that while it possibly constituted malpractice, 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. 1983).

The Referee did find attorney misconduct with respect to the dissemination to Zavala of his business card and his failure to communicate with her. This finding was made without the benefit of Zavala's testimony or that of any other fact witness.

The factual findings by the Referee as to Counts I, II and III of the Complaint with respect to Respondent's business card are therefore clearly erroneous or lacking in evidentiary support. The Florida Bar v Marable, 645 So. 2d 438 (Fla. 1994).

The legal conclusions drawn by the Referee with respect to dissemination by Respondent of his business card to Zavala, having no factual foundation, are also clearly erroneous or lacking in evidentiary support. Marable at 442.

Unlike in The Florida Bar v. Budish, 421 So. 2d 501, there is no evidence that any client, including Zavala, was mislead by any false or misleading advertisement in Respondent's business card.

As to the use of the word "Associates" in the business card, the criteria is as set forth by this Court, in The Florida Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983). That criteria being where there is no evidence that the public was actually deceived or misled, the inquiry must concern, "...whether or not a particular trade name is to be deemed inherently misleading will depend upon the facts and circumstances of each case...",, Fetterman at 838.

Under the particular facts and circumstances of this case, there was nothing inherently misleading about the usage by Respondent of "Immigration Verification Associates." Zavala was aware that the Respondent was accountable for the legal work performed on her behalf, since she retained Respondent at Krome and Respondent communicated with her on all legal matter regarding her case.

The absence, therefore, of another attorney in Respondent's firm under the facts and circumstances of this does not under the teachings of Fetterman, cause

this trade name to be inherently misleading.

As to Court V of the Zavala Complaint, the Referee found that "After June 6, 1996, Respondent abandoned Zavala and failed to communicate with her despite her frequent attempts to communicate with him." findings of facts "#29.

In his recommendation as to guilt, the Referee found that Respondent violated R. Regulating Fla. Bar 4-1.4(a) and 4-1.4(b), by failing to communicate, "with his client for the last five months that she was in the country."

This finding that Respondent failed in his duty to communicate with his client and the Referee's recommendation as to guilt on this are not supported by clear and convincing evidence Florida Bar v. Rayman, 238 So. 2d 594,597 (Fla. 1970).

Zavala did not testify, and Respondent's testimony, supported by records from Krome was that he communicated and consulted with Zavala on a constant basis.

THE VARGAS CASE

Florida Bar File No. 97-50,814 (17D)

Supreme Court Case No. 93,091

The Florida Bar's burden in this case as in every case is to prove impropriety by "clear and convincing" evidence against a member of the bar, where in his testimony under oath he has .... denied the wrongful act. The Florida Bar v. Rayman, 238 So. 2d 594,597 (Fla. 1997), restated by this Court in The Florida Bar v. Fredericks) 730 So. 2d 1249,1251 (Fla. 1999).

This standard of proof is required, rather than the mere preponderance of the evidence sufficient for a civil action because:

> "....disciplinary actions, while not fully criminal in character, are penal proceedings, the results of which may permanently cripple an attorney's reputation and standing in the community,"...
>
> The Florida Bar v Quick, 279 So. 2d, 4,8 (Fla. 1983).

Never was such a principal of evidence violated as in this case.

Two fact witnesses' testified in the Vargas matter. One was the Respondent and the other Vargas's sister.

Respondent testified he was retained to monitor the law as to any changes that would give Vargas relief from deportation, and to consult with Vargas on a constant basis reporting to him as to any pending bills in Congress and favorable court decisions (Tr. Vol. II, p. 212, 213].

The only other fact witness, Vargas' sister, was not privy to the agreement between Vargas and the Respondent.

Yet notwithstanding the testimony by the Respondent, the Referee rejected his testimony, "that he was retained to monitor changes in the immigration law which would have permitted Vargas to challenge his deportation" (findings of facts #35).

This finding and the conclusions of misconduct that directly flow from this finding is and are in direct contravention of the teachings by this Court in Rayman and Fredericks.

Thus the Referee's findings that the Respondent failed and refused to take any action on Vargas's behalf (findings of facts #42); (2) no work was accomplished by Respondent (findings of facts # (3); Respondent charged a prohibitive and excessive fee (findings of fact #45; (4). Respondent abandoned Vargas (findings of facts #53), have virtually no support in the record.

As to the alleged failure to communicate with Vargas's sister, the client was Modesto Vargas. Respondent had no obligation to consult with Vargas's sister, and, in fact, under the confidentiality of the relationship between an attorney and client, could not divulge the advise given to his client, to the family.

THE DUVAL CASE
Florida Bar File No. 97-51,095 (17D)
Supreme Court Case No. 93,090

Three fact witnesses testified in this case, the complainant, Respondent and his witness to all of the events that transpired, Faubert Etienne.

There were two crucial meetings between Respondent and Duval, and the Referee found Faubert Etienne to be present at both, the January 26th and the January 31, 1996 meetings (findings of fact #62 and #63).

At these meetings critical statements were allegedly made by the Respondent, along with an alleged money order being given to Respondent. There is a conflict in testimony between Respondent and Duval as to what was said and done. Faubert Etienne corroborated the testimony of the Respondent.

Yet in his report, the Referee totally ignores this crucial testimony of Etienne, and thus fails to resolve this conflict in testimony or to make credibility findings.

In failing to resolve this conflict in testimony and to make credibility findings, the Referee ignores the teachings by this Court in Florida Bar v. Rayman, 238 So. 2d 594,597 (Fla. 1970), cited by the Court in The Florida Bar v. Fredericks, 731 So. 2d 1249,1251, and, of course, Florida Bar v. Hayden 583 So.

2d 1016,1017 (Fla. 1991) (stating that where testimony conflicts, Referee is charged with responsibility of assessing credibility based on demeanor and other factors).

ARGUMENT

THE ZAVALA CASE
Florida Bar File No 97-50, 727 (17D)
Supreme Court Case No. 93,092

WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT I, II AND III OF THE ZAVALA COMPLAINT WITH RESPECT TO RESPONDENT'S BUSINESS CARD.

The Respondent was referred to an Honduran native, Dominga Zavala Hernandez (hereinafter Zavala at Krome Detention Center in Miami (hereinafter Krome) (Tr. Vol. I. p.111). Zavala had already been ordered deported to Honduras on October 1993, because she failed to appear at a deportation hearing (Tr. Vol I, p.112).

At the time of Respondent's initial meeting with Zavala, Respondent's gave her a business card bearing a trade name of "Immigration Verification Associates" (Tr. Vol.I, p. 112-115). At the time, Respondent distributed the business card to Zavala, he was a sole practitioner and had no corporation (Tr. Vol. I, p. 115). Respondent had intended to incorporate the trade name but had not done so, (Tr. Vol. I, p. 115).

The cards had been printed up with the anticipation of incorporating the trade

name, and, therefore, incorrectly named Enrique Santiago as President (Tr. Vol. I, p. 115, 116).

The Respondent after being retained by Zavala, filed a motion to reopen her case, and a motion for rehearing after the original motion was denied (findings of fact #23, 24, 25). Respondent also filed an appeal as to the denial of these motions, (findings of facts #27).

The competency of the pleadings filed by the Respondent was the subject of testimony from the expert witnesses called by The Florida Bar, one being the Immigration Judge that denied the motion.

The Referee found no unethical conduct with respect to the legal work performed (page 6, ftn 1) of the Referee's Report), stating that there is a fine line between attorney malpractice and unethical conduct which the "Respondent's conduct did not cross...," referencing The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1983).

The Referee did find attorney misconduct with respect to the dissemination to Zavala of his business card with the use of trade name of "Immigration Verification Associates" and the use of the words "Enrique Santiago, President". The Referee made certain adverse findings with respect to the usage of this trade

name, and the use of the words "Enrique Santiago as set forth in findings of fact #8, #9, #10, #11, and #12 as to Count I of the Complaint and findings of fact #17 and #18 as to Count II of the Complaint.

These adverse factual findings of fact were made without the benefit of any evidence or testimony from Zavala or any member of the public, and are, therefore, clearly erroneous or lacking in evidentiary support. The Florida Bar v. Marable, 645 So. 2d 438 (Fla. 1994).

The leading case on the usage of a trade name by an attorney is The Florida Bar v. Fetterman, 439 So. 2d. 835 (Fla. 1983).

Therein this Court opined that since the Florida Bar Code of Professional Responsibility does not strictly prohibit practices under a trade name, the first inquiry is whether there is any evidence "...that the public was actually deceived or misled..." Id at 838. See also The Florida Bar v. Budish, 421 So. 2d 501 and The Florida Bar v. Lange, 711 So. 2d 518 (Fla. 1998)

Absent any such evidence, the inquiry then shifts to whether the use of the trade name is "inherently misleading ... will depend upon the particular facts and circumstances of each case..." ld. at 838.

One test, as set forth in Fetterman. is whether the trade name is used by the

Respondent in conjunction with his own name. This is required so that the public will be made aware of who is accountable for the firm's actions.

The evidence in this case is clear that the Respondent's name was used in conjunction with the trade name.

Zavala retained the Respondent, whom she met at Krome to represent her, not Immigration Verification Associates. (Tr. Vol. I, p 112,114). The card had Respondent's name on it. (Tr. Vol. I, p. 113).

Thus the public, in this case, Zavala, was aware of who was to be held accountable for the firm or trade name's actions. Further evidence of this fact is the receipts for fees paid that bore the Respondent's name, not the trade name (Tr. Vol. I, p. 120-124) (Exhibit 10). Also the motions filed in Zavala's case bore the Respondent's name, not the trade name (Tr. Vol. I, p. 125) (Exhibit 11), even though they were on the trade name's letterhead (Tr. Vol. I, p. 126).

The next issue is whether the use of the word "Associates" constitutes in and of itself a violation of Florida Bar Code of Professional Responsibility, in that under the facts of this case, it constitutes a material misrepresentation as to the number of lawyer-employees employed by Respondent's firm.

It is true that, at the time, the business card containing the trade name and

the use of the word "Associates" was disseminated to Zavala, Respondent employed no attorney in his firm (Tr. Vol. I, p 127).

Here again the issue seems to turn on whether, "the general public is sufficiently apprised of (Respondent's) position of responsibility with respect to the firm's obligations and duties to its client" Fetterman at 839. Respondent has demonstrated that to be so with respect to his representation of Zavala. Then since, as the Fetterman Court has opined, that the usage of the word "Associates," "simply means that respondent employs other lawyers to assist him in the practice of law" Id. at 839, the absence of any attorneys in the firm is not per se a violation of the Florida Bar Code of Professional Responsibility, such as to warrant a finding of attorney misconduct and disciplinary sanctions imposed.

At the most, as set forth in Fetterman, injunctive relief against the use of the word "Associates" should have been ordered, precluding Respondent from using that word if he does not employ other attorneys in his firm.

Therefore, in conclusion on this issue, the dissemination of Respondent's business card to Zavala, even with the incorrect information on it including the word "incorporated" and the use of "Enrique Santiago" as "President," was not so inherently misleading under the facts and circumstances of this case, as to warrant

the adverse findings and the conclusion as to guilt of attorney misconduct, found and recommended by the Referee.

A. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT V OF THE ZAVALA COMPLAINT.

1. Abandonment of Zavala?

As to Count V of the Zavala Complaint, the Referee found that "After June 6, 1996, Respondent abandoned Zavala and failed to communicate with her despite her frequent attempts to communicate with him (findings of facts #29)

In his recommendation as to guilt, the Referee found that the Respondent violated R. Regulating Fla. Bar 4-1.4 (a) and 4-1.4 (b), by failing to communicate, "with his client for the last five months that she was in this country."

The findings and recommendations of guilt are not supported by any evidence, not just clear and convincing evidence. The Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970.)

As stated herein Zavala did not testify. The Respondent testified that he visited Zavala at Krome, after March 21, 1996 when he was retained, on a constant basis. (Tr Vol. I, p. 136), and these visits are confirmed by the client visitation sheets which were produced by the Florida Bar, (Tr Vol. I, p. 136-139).

The last visitation sheet for Zavala is June 6, 1996 (Tr Vol. I, p. 139)

Krome officials failed to honor a subpoena to produce additional visitation sheets for Zavala (Tr Vol. I, p. 137)

The appeal regarding the denial of the motion to reopen was decided by the Board of Immigration Appeals on October 21, 1996 (Tr Vol.I, p. 13). Respondent testified that he saw Zavala between June of 1996, the last date of the client visitation sheets produced by the Florida Bar, and on October 21, 1996. (Tr Vol. I, p. 139, 140, 143) (Defendant's Exhibit 1).

After the appeal was denied, Respondent consulted with Zavala regarding going to federal court to stop the deportation (Tr Vol. II, p. 40).

A warrant for Zavala's deportation was issued on October 30, 1996. (Tr Vol. I, p. 133). On November 11, 1996 Zavala was deported (findings of fact #3).

The above testimony was not rebutted or contradicted by any witness or other evidence.

The findings of fact and conclusions that the Referee drew from these findings in Par. E (Recommendations at to Guilt), finding that Respondent violated R. Regulating Fla. Bar 4-1.4(a) and 4-1.4(b), are totally without any factual foundation.

The Florida Bar has thus failed to prove a violation the above regulations by clear and convincing evidence. The Florida Bar v. Quick, 279 So. 2d 4, (Fla. 1973).

In conclusion, the Florida Bar's complaint in the Zavala case should be dismissed.

THE VARGAS CASE
Florida Bar File No. 97-60,814
Supreme Court Case No. 93, 091

B. WHETHER THE REFEREE ERRED IN MAKING A SPECIFIC FINDING OF FACT AS TO ALL COUNTS OF THE VARGAS COMPLAINT. (findings of facts #35).

1. Vargas's Retention of Respondent! The Agreement between Attorney and Client:

The Referee at the outset of his findings of fact on the Vargas Complaint, made a specific findings as to all counts of the complaint. This finding and the conclusion that were based on this finding, were the basis of his finding that Respondent violated the rules regulating the Florida Bar, with respect to his representation of Modesto Vargas (herein after Vargas).

The Referee thus found in Findings #35, that:

> "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." (Emphasis supplied)

Three witnesses testified in the Vargas case. Only two were fact witnesses, to wit: the Respondent and Vargas's sister, Ada Maria Vargas. These two fact witnesses along with some documents introduced into evidence, consisted the totality of the evidence that the Referee could have drawn on to make the above

findings of fact. The expert witness, Jeffrey Devore was not privy to the contact entered into between Vargas and the Respondent, as to what legal work was to be performed. Neither was Vargas's sister. Yet we will not ignore her testimony, for while partially hearsay, the Referee is not bound by the technical rules of evidence and is authorized to consider any evidence deemed relevant in resolving the factual question. The Florida Bar v. Fredericks, 731 So. 2d 1249, (Fla. 1999).

Let us first examine the sister's testimony, for it is the only evidence which could have contradicted Respondent's version of what agreement was entered into between himself and Vargas.

She testified that after her brother had been transferred to Krome (an INS Detention Center), he decided to hire a new attorney, because he was dissatisfied with his former immigration attorney. (Tr Vol. I, p.28).

In initial conversations with the Respondent, Ms. Vargas testified that she was told by him that there was supposed to be some changes in the law to benefit her brother (Tr Vol. I, p. 33).

Ms. Vargas further testified that Respondent told her that her brother was going to be out by Christmas (Tr Vol. I, p. 33).

On direct examination in answer to a question by Bar counsel, the following

took place:

Ques: "Was there every any discussion with you and your brother about an agreement to monitor the law?"

Ans: "Not, that I know" (Tr Vol. I, p. 42, 43).

On cross examination, Ms. Vargas confirmed that she had stated in a letter to the Florida Bar on June 3rd, 1997 that:

> "When we hired Mr. Elster, he told me that he was going to get my brother's freedom. He told me that he had a very good chance to win this case, that we have to wait for the new law to change." (Tr Vol. I, p. 55) (Emphasis supplied) (Elster Exhibit 8,9).

Mr. Vargas admitted that her brother had told her that statement, not the Respondent (Tr Vol. I, p. 55, 57).

On redirect, Ms. Vargas gave the following answer to a question by Bar Counsel:

Ques: "What was your understanding of what Mr. Elster was to do for your brother!

Ans: "I understood that there was going to be a change in some laws, that everybody was waiting for those changes, so we were waiting to see what was going to happen." (Tr Vol. I, p. 66).

On re-cross examination, this takes place:

Ques: "As long as your lawyer was telling your brother that there is a chance that there would be a change in the law, then your brother is willing to wait in jail, is that a fair statement?"

Ans: No. Because I remember now that he says that the law was going to be changing by September.

Ques: Okay

Ans: So, after that time, my brother was going to decide if the change and we have a case, let's go for the case. If not, he was going to go.

Ques: So if the law didn't change in his favor by September, then by October he was willing

Ans: To leave the country.
(Tr Vol. I, p. 69, 70).

This testimony by Ms. Vargas corroborates Respondent contention and his testimony that he was retained by Vargas to monitor any changes in the law.

Respondent testified at great length as to his retention by Vargas and their agreement for him to monitor and advise Vargas on any changes in the immigration laws that would prevent his deportation.

Respondent testified that he met Vargas at Krome Detention Center in June or July in 1996 (Tr Vol. I, p. 10). Vargas advised him of his conviction for trafficking in cocaine in December of 1996, which is an aggravated felony (Tr Vol. I, p.15, 16).

Vargas told the Respondent that he had hired Ann Bitterman, an immigration attorney, to represent him when he was released from criminal custody and taken to Krome (Tr Vol. I, p. 16, 17). She had represented him at the immigration proceedings at Krome (Tr. Vol. I, p. 17). Vargas gave the Respondent a copy of the transcript of the hearing and her appeal on his behalf (Tr Vol. I, p. 17).

Vargas was not happy with her performance in Immigration Court. He gave Respondent a copy of the brief she had filed on appeal. Ms. Bitterman had appealed the Immigration Judge's denial to him of 212(c) relief. (Tr Vol. I, p. 17, 18). The Immigration Judge had ordered Vargas deported (Tr. Vol. I, p. 19). The entire immigration file including transcripts, pleadings and the brief were turned over to the Respondent (Tr. Vol. I, p. 24 - 25) (Bar Composite Exhibit 1).

Respondent then described the legal work that Vargas wanted him to do. Vargas had been found statutorily ineligible for 212(c) relief. This type of relief was available for criminal aliens including aggravated felons convicted of trafficking in cocaine. The Immigration Judge had ruled that Vargas was ineligible for this relief because Congress had passed section #440(d) of the AEDPA, enacted on April 24, 1996. This section eliminated all relief for almost all criminal aliens. Vargas wanted Respondent to research and to monitor the law, as to whether or not

he could ever get 212(c) relief, or whether or not Congress would pass a new statute regarding this matter (Tr Vol. I, p. 38, 39).

The Respondent and Vargas discussed a time limit. Vargas did not want to be deported because he had a wife and family in this country (Tr Vol. I, p.39). After explaining the present state of the law, Vargas told the Respondent that if there was no significant change in the law by October or November he was going to withdraw the appeal that Miss Bitterman had filed, and be deported (Tr Vol. I, p. 41, 42, 43).

Respondent also agreed, not only to monitor the law, but if a decision that was favorable was decided, Respondent was to move to reopen the case, at no additional fee (Tr Vol. I, p. 44, 45). Congress was, at that time, considering further changes in the immigration laws, which were enacted on September 24, 1996 (Tr Vol. I, p.42, 48).

In conversations with Ms. Vargas regarding her brother's case, Respondent told her there should be a change in the law by Christmas. Respondent did not tell her Vargas would be home by Christmas (Tr Vol. I, p.57, 71).

Respondent testified that after he was retained, he visited Vargas on almost a daily basis (Tr Vol. I, p. 59). In addition to legal research on this issue,

Respondent on a constant basis discussed changes in the law with other attorneys, immigration judges, and also discussed pending bills before Congress regarding changes that were to be made in the new immigration reform act (Tr Vol. I, p. 71, 72).

There also were some pending bills to reinstate 212(c) in its original form, which would give aggravated felons relief from deportation (Tr Vol. I, p.72, 213). Unfortunately, for Vargas, 212(c) was restored, but not for aggravated felons, in September of 1996 (Tr. Vol. 1 p.213).

Respondent did not file any pleadings in the case including a notice of appearance because Vargas had an appeal lawyer who was appealing his case (Tr Vol. I, p. 49). There would have been no reason to file an appearance unless a favorable decision came out (Tr Vol. I, p. 73).

After Vargas was transferred from Krome to Manatee County, he waived his appeal rights, after being advised by respondent that he was not eligible for any relief under the new law passed in September, was deported, and told Respondent he was going to do so (Tr Vol. I, p.72, 77, 78, 79, 81), (Tr Vol. I, p. 220, 222, 223).

As far as communication with Ms. Vargas, Respondent responded to her

calls and beeper page on most occasions (Tr Vol. I, p.74, 75).

With respect to Vargas, the visitation records from Krome indicated over sixteen visits between July 11, 1996 and August 13, 1996. (Tr Vol. I, p.197).

This testimony by the Respondent as argued is corroborated by the testimony of Vargas's sister as set forth herein, where she admitted on cross-examination, on several occasions, that her brother was waiting for the law to change (Tr Vol. I, p. 55, 66, 69, 70), which indicates that there was an agreement with Respondent to monitor changes in the law.

Further contrary to the finding by the Referee, the evidence is conclusive that Respondent was not retained to file an appeal. Therefore, the evidence is not in conflict on this crucial finding by the Referee, not requiring a credibility resolution. And even if the Referee had specifically discredited the Respondents' testimony on this issue, which he did not do, based on demeanor and other factor, set forth above is clear and convincing evidence that such a judgement would have been incorrect Florida Bar v. Thomas, 582 So. 2d 1177, 1178 (Fla. 1991), Florida Bar v. Hayden, 583 So. 2d 1016, 1017 (Fla. 1991),

Having established that the Referee's finding #35 is patently incorrect we turn to the next issue.

C. WHETHER THE REFEREE ERRED IN MAKING FINDING OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT I AND COUNT II OF THE VARGAS COMPLAINT.

Legal Work and Advise to Vargas: Was it proper representation of a Client? Was the Fee Excessive?

In Count I of the Complaint the Referee states that "Respondent should have known that Vargas was ineligible for a "waiver of deportation" (findings of facts #40).

Based on the unrebutted testimony of Respondent on this issue, as to the state of the law when Respondent was retained, that finding is also patently incorrect.

The Referee in Count II of the Complaint, found that Respondent charged a clearly excessive fee (as Respondent did little or no work in the case (findings of facts #43, #44 and #45)).

As to the legal work performed, Respondent testified that the twenty-five hundred dollar fee was earned by his constant visits with Vargas, lasting fifteen minutes to a half hour and the many hours spent in the law library checking recent decisions (Tr Vol. II, p. 224, 225).

Respondent also had discussions and conferences with other immigration attorneys, immigration judges, and other knowledgeable persons as to any changes in the law (Tr Vol. II, p. 225, 226).

On this issue of an excessive fee, this Court in The Florida Bar v. Garland, 651 So. 2d 1182, 1184 (Fla. 1995) held that in order for an attorney to be found guilty of charging a clearly excessive fee under Rule 4-1.5 (a) (1):

> "...after review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear over-reaching or an unconsciousable demand by the attorney."

The expert witness called by The Florida Bar could only testify from the documents in the file which consisted of former counsel's brief on appeal, and pleadings from the immigration court (Tr Vol. II, p. 25-27).

The only question asked regarding the fee charged to Vargas, was there any evidence in the file that Elster earned any legal fee and his answer was:

"Not from the documents I saw, no." (Tr Vol. II, p. 28).

Based upon the file alone, the expert witness could not possibly give an opinion as to whether the fee charged was "clear over-reaching or an unconscionable demand by the attorney." This expert was not called upon to testify regarding the testimony of the Respondent, as to the legal work he performed outside of the file.

Therefore, there is not clear and convincing evidence in this case that the fee charged to Vargas was excessive.

D. WHETHER THE REFEREE ERRED IN MAKING FINDING OF FACT AND RECOMMENDATIONS AS TO GUILT AS TO COUNT III OF THE VARGAS COMPLAINT?

1. Communication between Attorney and Client. Does it include the family?

The record evidence, consisting of Respondent's testimony and the client visitation sheets, clearly demonstrates that Respondent did not violate R. Regulating Fla. Bar 4-1.4(a) and 4-1.4(b). Respondent from the totality of the evidence, kept Vargas informed about the status of the law as it applies to his case, and kept him informed so that he could make appropriate decisions.

The complaint here seems to be that of the sister, as to Respondent returning all of her beeps, and that was the finding of the Referee, (findings of facts #54).

The Respondent testified that he returned her calls and beeper pages on most occasions (Tr Vol. I, p. 74-75). Ms. Vargas testified that Respondent did return some of her pager calls (Tr Vol. I, p. 41, 42), and she was able to directly call him, (Tr Vol. I, p. 43). Respondent's obligation under R. Regulating Fla Bar 4-1.4(a) and 4-1.4(b) is to the client, and he communicated with him on a constant basis. While Respondent had several phone conversations with Ms. Vargas, it was not his job to advise the sister what he was doing, (Tr Vol. II, p.205). Respondent, therefore, fulfilled his obligation to his client under the aforementioned Florida Bar Regulation.

III. THE DUVAL CASE

Florida Bar File No. 97-51, 095 (17D)]
Supreme Court Case No. 93,090

E. WHETHER THE REFEREE ERRED IN MAKING FINDINGS OF FACT AND RECOMMENDATION AS TO GUILT AS TO COUNT I, II, III, IV, AND V OF THE DUVAL COMPLAINT.

Count I, II and III of the Duval Complaint: Was competent legal advise and work given and did Respondent communicate with the Client.

As a prelude to the argument, in essence this case boils down to whether there was clear and convincing evidence to sustain a charge of attorney misconduct, where the attorney has denied the misconduct under oath, and where the evidence flows from the testimony of the complaining witness only, contradicted by two fact witnesses. The Florida Bar v Rayman, 238 So. 2d 594, 597 (Fla. 1970).

Herein the complaining witness Yanique Duval, testified that she was a practicing physician in Haiti for five years (Tr Vol. I, p. 73).

When she arrived in the United States, her brother filed a petition for her as a relative (Tr Vol. I, p. 74).

Duval was referred to the Respondent by her brother, and went to his office in January of 1996. Duval testified that she told Respondent, she had received approval on her brother's petition and he stated he could get her status adjusted in three months to lawful permanent resident (Tr Vol. I, p. 75-77, 93, 95)

Duval testified she gave Respondent a money order for $130.00 to get her work permit. (Tr Vol. I, p. 76).

There was no discussion, according to Duval of getting a job offer from a university, or to teach, or work in a hospital (Tr Vol. I, p. 76, 90, 102, 103). The only discussion was the approval of the relative petition (Tr Vo. I, p. 76, 77).

Duval testified that she gave Respondent the money order plus $500 fee and she left and never heard from him (Tr Vol. I, p. 78).

She testified that she called the Respondent and he never returned her calls. That she went to his address and could not locate him (Tr Vol. I, p. 78-80).

Duval stated that she finally talked to Respondent in January, but she had already decided to file a complaint with the Florida Bar (Tr Vol. I, p. 80).

On cross-examination, Duval admitted that at the first visit to Respondent's office, she did not see him, but saw a consultant, Faubert, (Tr Vol. I, p. 86). She also testified she only saw Respondent once, on January 31, 1996 and never saw him again. (Tr Vol. I, p. 88).

As stated, two fact witnesses contradicted Duval's testimony.

The Respondent testified that Duval had been referred to him by her brother, Earnest Duval, whom he had represented in a labor case [Tr. Vol. 1, p. 87] [Tr. Vol. II, p. 4, 5].

Present at the first conference was the Respondent, Faubert Etienne, Ms. Duval, and possibly another lady [Tr. Vol. II, p. 5].

Duval told Respondent that her brother had filed a 1-130 with the INS as a citizen [Tr. Vol I, p. 87] [Tr. Vol. II, p. 5, 6].

Ms. Duval had received no response to her brother's petition and Respondent informed her that the relative petition filed by her brother was fourth preference, and the waiting time for a visa was eight to ten years [Tr. Vol. II, p. 5, 6].

Respondent advised Duval that a better alternative, since she was a physician in Haiti, was to get an employer to file a petition with the Department of Labor for a labor certification [Tr. Vol. I, p. 88-91], [Tr. Vol II, p. 6-8].

Duval was also advised by the Respondent that he would research whether she could avoid the labor certification procedure, as being a person of exceptional ability [Tr. Vol. I, p. 88-91], [Tr. vol. II, p. 10].

Respondent did the research and advised Duval that she did not fall under the first preference of exceptional ability, and would have to go through the labor certification process with a sponsoring employer [Tr. Vol. I, p. 92, 93], [Tr. Vol. II, p. 10-12].

Respondent had three or four more meetings with Duval [Tr. Vol. II, p. 12].

The fee that was charged to Ms. Duval was one thousand dollars, with a

$500.00 down payment. This involved working with Ms. Duval to get an employer sponsor, meeting with the employer, preparing and filing the request for a labor certification with the Department of Labor, getting a decision from them, and then going through the process of adjusting her status [Tr. Vol. I, p. 94]. This fee was well below the minimum, and was based on doing a favor for her brother [Tr. Vol. I, p. 94, 95].

Duval also, during one of her visits to the office, dropped off a money order payable to the Immigration Service for one hundred thirty dollars [Tr. Vol. I, p. 95, 96], [Tr. Vol II, p. 13]. The Respondent testified that the money order was not given to him, and would have been placed in her file. The money order wasn't requested because she couldn't adjust her status for years [Tr. Vol I, p. 96 & 98], [Tr. Vol II, p. 13, 14].

The file was destroyed by the landlord at the Mercedes Building when Respondent was evicted [Tr. Vol. I, p. 96].

After the initial visits, Respondent met with Duval on several occasions where she would inform him that she was having trouble getting an employer in the medical field to sponsor her [Tr. Vol. I, p. 99], [Tr. Vol. II, p. 16, 17].

The last contact Respondent had with Duval was one week before she filed the Bar complaint, when she called him at his Mercedes office [Tr. Vol. I, p. 105],

[Tr. Vol. II, p. 17, 18]. Respondent asked Duval on the telephone if she was able to get an employer sponsor and she said no. Respondent said to her he had to go to a hearing, but that he would call her back to make an appointment [Tr. Vol. II, p. 18].

Respondent, right after that call, got the Bar complaint and did not communicate with her after that [Tr. Vol. I, p. 101, 105], [Tr. Vol II, p. 18].

Respondent testified that he never told Duval she could get her residency in three months [Tr. Vol. II, p. 19]. Respondent also testified that the legal work performed for Duval, including legal research and consultation meeting, took over five hours [Tr. Vol. II, p. 21, 22].

The only other fact witness to testify was Faubert Etienne. Etienne knew the Respondent when he worked for a union, and worked for Respondent as a creole interpreter at the Boynton office for two to three years [Tr. Vol. III, p. 4, 5, 6].

Duval was referred to the Boynton office by her brother, and Etienne was present at the first office interview [Tr. Vol. III, p. 6, 7]. At this first interview, Respondent advised Duval to get an employer sponsor in the medical field in order for her to get her residency [Tr. Vol. III, p. 7, 8, 10]. Respondent advised Duval that it would take several years in order for her to get her residency [Tr. Vol. III, p. 7]. There was never any discussion during these meetings about Duval getting

her permanent resident status in three months [Tr. Vol. III, p. 8, 9, 29, 32]. Duval was told it would take eight to ten years to get her residency [Tr. Vol. III, p. 9, 10, 31].

The Respondent did not ask for a filing fee at the first meeting [Tr. Vol. III, p. 10, 11]. The filing fees are posted in the reception room [Tr. Vol. III, p. 11].

There were at least four meetings with Duval [Tr. Vol. III, p. 11]. Etienne testified that at the second meeting and at every other meeting after that, Duval would ask him questions and also the Respondent, who would always advise Duval, "it is important for you to get a sponsor" [Tr. Vol. III, p. 11, 12, 32]. Ms. Duval's problem was that she could not get a job offer [Tr. Vol. III, p. 12].

In addition to the meetings in the office, Duval would call Etienne at home on numerous occasions and also called Etienne at the office, advising him that she could not get a sponsor [Tr. Vol. III, p. 12, 13, 14]. Etienne's beeper number was on the office's business cards and Duval would call him on his beeper and on his cellular phone [Tr. Vol. III, p. 13, 14].

When the Boynton Beach office was closed, Duval was advised of this fact; had Etienne's and the Respondent's beeper numbers and Respondent returned Duval's calls [Tr. Vol. III, p. 45-47].

The Referee found, in his recommendations as to guilt, that Respondent

failed to provide competent representation and advice to Duval, in violation of Rule Regulation Fla. Bar 4-1-1 and made false representations to Duval, in violation of Rule Regulations Fla. Bar 4-8.4(c).

Those recommendations were based on his findings of fact as to Count I of the Complaint, that Respondent informed Duval she could obtain permanent residency status within three months (finding of Fact #64, 71) and that her immigration request was incorrectly based on INA Section 203(b)(2) or 8 U.S.C. 1153(b)(2). (Finding of Fact # 65, 70).

As to Duval's obtaining her residency in three months, as she testified, two fact witnesses, including the Respondent, have denied this occurred. Therefore, there is insufficient evidence that is clear and convincing to sustain a charge of attorney misconduct, as to this alleged piece of advice, where the Respondent has denied, under oath, that he made this statement that Duval could get her residency in three months, which testimony is corroborated by the testimony of another fact witness, Etienne.

Under the teachings of The Florida Bar v. Rayman, 238 So. 2d 594, 597 (Fla. 1970), cited in The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), the testimony of Duval on this issue, without corroboration, should be rejected.

Further, if the Referee made a credibility resolution as to the testimony of

these witnesses, he did not announce in his report that he had made such a determination. In fact, he does not even refer to the testimony of Etienne in his report.

Even if he had discredited Respondent and Etienne, the Referee did not fulfil his responsibility of assessing credibility on demeanor and other factors. The Florida Bar v. Hayden, 583 So. 2d 1016, 1017 (Fla. 1991).

As to Findings # 65 and #70, it is clear from the testimony of both Respondent and Etienne, that Duval was advised to get an employer sponsor. This establishes, by clear and convincing evidence, that Respondent, after doing research, and he so testified, advised Duval that she could not get preferential treatment under INA Section 203(b)(2) and would have to obtain a labor certification through an employer sponsor.

As to Count II and III of the Complaint, again, the clear and convincing evidence from the fact witnesses, as opposed to the uncorroborated testimony of Duval, is that Respondent did not violate Rule Regulation Fla. Bar 4-1.4(a) and 4-1.4(b), by not maintaining communication with her. The testimony is to the opposite, i.e. that there was always a line of communication open to Duval, either directly to the Respondent or to his interpreter, Etienne.

Finally, there is ample testimony that Respondent performed meaningful

work on Duval's behalf. He met with her, gave her advice and confirmed that advice through legal research. The fact that a client cannot achieve her goal, i.e. legal residency because of her inability to obtain an employer sponsor, does not render that advice, and work that he accomplished on her behalf, in violation of Rule Regulation Fla. Bar 4-1.1 and 4-1.3.

Finally, the finding by the Referee that Respondent charged an excessive fee for the work accomplished under rule 4-1.5(a) is not supported by clear and convincing evidence under the criteria set forth by this Court in The Florida Bar v. Garland, 651 So. 2d 1182, 1188 (Fla. 1995)

2. Count IV of the Duval Complaint: The Money Order

The Referee found that the loss of the one hundred thirty dollar money order violated Rule Regulation Fla Bar 4-1.15(a) and 4-1.15(c).

The Respondent testified that he did not recall Duval giving him the money order, but that if she did, it was destroyed by his landlord at the Mercedes Building [Tr. Vol. III, p. 13].

In addition to this testimony, introduced into evidence was the money order itself, altered to be made payable to Enrique Santiago [Tr. Vol III, p. 14]. Santiago was not authorized to receive such a money order payable to herself [Tr. Vol. III, p. 15].

Therefore the evidence on this issue boils down to the following: (1) the Respondent does not recall getting such a money order and never asked for it [Tr. Vol. II, p. 14], as corroborated by the testimony of Etienne [Tr. Vol. III, p. 10, 11], and (2) the money order was altered and cashed by Santiago [Tr. Vol. III, p. 14, 15].

Since the Respondent never received the money order for purposes of holding it in trust, Rule 4-1.15(a) and 4-1.15(c) could not be violated.

3. Count V of Duval Complaint: Record bar address - was the client properly informed?

The Referee found that Respondent violated Rule Regulation Fla. Bar 1-3.3 by failing to designate same with the Florida Bar. This finding is in direct conflict with the finding #86, Duval testimony and that of Respondent. Finding #86 states that Duval was given, by the Florida Bar, his record bar address of 1876 N. University Drive, Suite 101, Plantation, Florida, the Mercedes Building address.

Duval testified that she was able to reach Respondent at that address by telephone [Tr. Vol. I, p. 80]. She filed her Bar complaint within one week of that telephone call [Tr. Vol. I, p. 99, 101, 105].

This finding, therefore, must also be rejected as being not supported by clear and convincing evidence.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES

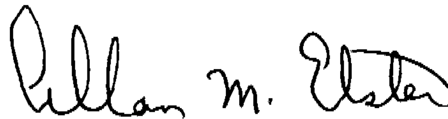
The Referee recommended that Respondent be suspended from the practice of law for a period of eighteen (18) months.

Based on the arguments contained herein and the lack of "clear and convincing evidence" that the Respondent engaged in any misconduct in violation of any Florida Bar Rule, the disciplinary measure imposed is inappropriate.

CONCLUSION

Respondent submits that based upon all of the arguments herein, the Referee's Report shall be overruled by this Court.

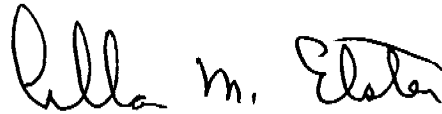
Respectfully submitted,



Allan M. Elster, Attorney
Florida Bar No.: 002562

CERTIFICATION OF SERVICE

The undersigned HEREBY CERTIFY that on the 11 day of October, 1999, a true and correct copy of the foregoing was forwarded by First Class United States mail to: Lorraine Christine Hoffmann, 5900 North Andrews Avenue, Suite 835, Ft. Lauderdale, FL 33309.



Allan M. Elster, Attorney
3899 N.W. 7th Street
Suite 218
Miami, FL 33126
Florida Bar No. 0022562