IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, **CASE No.: 93,165**

Complainant,

vs.

DANIEL PETER FEINBERG,

Respondent.

_____/

REPLY BRIEF OF

RESPONDENT

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Daniel Peter Feinberg, will be referred to as "Respondent".

"Tr" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No.: 93,165 held on May 10, 1999 and May 27, 1999.

The Report of Referee dated June 21, 1999 will be referred to as "ROR".

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R.Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No.: 93,165.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

"Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF FACTS

The Respondent was an Assistant State Attorney working in the felony division of the Charlotte County State Attorney's Office when he was approached by the Defendant's (Alto Blanding, Jr.) counsel, Paul Sullivan, Esquire in December of 1996 in reference to the Defendant providing substantial assistance to law enforcement. (Tr. P38) Mr. Blanding, the Defendant, had been arrested on two separate cocaine related charges and according to Sullivan, these cases appeared to be quite strong in favor of the State. According to Sullivan, it appeared that the only way that Mr. Blanding could avoid prison, short of an acquittal, was to cooperate with the State Attorney's Office. (Tr. P78) in December of 1996(Tr. P10) a meeting was setup involving Sullivan, Respondent, and Blanding, to proffer Blanding's testimony.(Tr. P80) At the conclusion of the meeting no agreement was reached. (Tr. P81) In the interim, Blanding was picked up and arrested on a violation of the Department of Corrections early release program. This arrest carried a "no bond" provision and Blanding remained in jail as a result. Because of the incarceration of Blanding, Sullivan was receiving numerous inquiries from the Defendant and Defendant's family, so Sullivan attempted to work out what can only be referred to as a "deal" for the Defendant. (Tr. P82). The Respondent referred Sullivan to law enforcement, specifically officers Tony Padula and Rick Goff. Neither Padula or Goff indicated that they were interested in working a deal because of truthfulness concerns

involving Blanding. (Tr. P83) On March 27, 1997, (Tr. P21) Blanding pled "straight up" to the charges with the case being continued for a sentencing hearing. Tr. P84). The sentencing had been scheduled for May 6th, 1997. Sometime in April of 1997, law enforcement, specifically, Det. Dale Ritchhart, had received phone calls from Blanding and his family, i.e., requesting a meeting with law enforcement. (Tr. P186) Ritchhart and other representatives from law enforcement (excluding Respondent) met with Blanding on April 25,1997 (Tr. P186), without Sullivan being present. Blanding convinced law enforcement he could be of some help, and indicated to law enforcement that he was "getting rid of his attorney", Paul Sullivan (Tr. P187). On May 5th, 1997, the day before Blanding was to be sentenced, a meeting took place at the Charlotte County Jail in which law enforcement, Blanding, and the Respondent were present, however Sullivan was not present, nor made aware of this meeting. (Tr. P190) Witnesses to this event said regarding Sullivan, at this meeting in the jail stated the following: Blanding said, he was "getting rid" of his attorney, (Tr. 187 L. 17), "he did not any longer have any counsel"(Tr. 188 L 24), "he was not represented by counsel", (Tr. 188 L.25), "Mr. Sullivan was no longer his attorney"(Tr.190 L19). Specifically, according to the testimony of the Respondent, the conversation of May 5, 1997 was:

> "...I recall him saying he is not my attorney. I'm not 100% sure of what he said with regarding he is fired or he's gonna fire. I know my mind set going

out of the meeting is that Sullivan is not going to represent Blanding anymore, and he is not representing Blanding in that meeting. That I know is my mind set." (Tr. P47 L18-24)

Respondent also advised Blanding that an attorney would be provided for him if he wished. He did not want a lawyer (Tr.P215)

At this meeting on May 5, 1997, an agreement for substantial assistance, was formed between law enforcement, the Office of the State Attorney, and Alto Blanding, Jr., the Defendant. On May 20th, 1997, another meeting occurred, wherein the Respondent, law enforcement, and Alto Blanding, Jr., was present in which a stipulation for substantial assistance was formalized in writing. Paul Sullivan was neither present nor notified of this meeting by the Respondent. According to several witnesses called by the Respondent, Alto Blanding expressed concern over having his attorney, Sullivan, notified of this substantial assistance agreement, and specifically requested that Sullivan not be told. The concern by Blanding was allegedly the fact that "Sullivan knows people in the drug community, and that the word would get back to people within the drug community, people involved in drug activity that he was working as an informant through Mr. Sullivan. (Tr. P69 L10-23) On May 5th, 1997, Paul Sullivan went to the Charlotte County Jail to meet with his client, Blanding, regarding the scheduled sentencing the next day. This meeting occurred after the meeting with Blanding, Respondent, and law

enforcement. Sullivan began a discussion with Blanding about the upcoming sentencing hearing) including the possibility of having to do prison time, at some point during this discussion, Blanding advised Sullivan that he wasn't going to prison, that he had worked out a "deal". (Tr. P89) Sullivan expressed his surprise and Blanding detailed what had transpired regarding the deal for substantial assistance, specifically, Blanding getting out of jail and ultimately being sentenced to house arrest in exchange for setting up some sort of large narcotics deal with law enforcement. (Tr. P90). According to Blanding, as testified to by Sullivan, part of the deal with the State Attorney's Office, was that Sullivan was not to be informed of this agreement, and that if Sullivan was informed, then his plea deal would be "null and void". (Tr. P91). There is no competent evidence to suggest that the Respondent or law enforcement ever made such a statement. (Tr.P148) The next day, May 6, 1997, Sullivan appears at the sentencing hearing on behalf of Blanding. The Respondent approaches Sullivan and a discussion about Blanding posting bond is initiated by the Respondent (Tr. P93 L1). Respondent advises Sullivan that he had not prepared the necessary paperwork for sentencing Blanding, and was going to request a continuance. (Tr. P93) The Respondent makes no mention of having met with Blanding or reaching any agreement with Blanding to provide substantial assistance. Neither does Sullivan tell Respondent he knows everything about the meeting Respondent, et.al, had with Blanding. Although Sullivan opposes the Motion for Continuance, the Motion is

granted and the case is continued (Tr. P95 L3).

The Respondent during his testimony admits that Sullivan asked him directly only on one occasion if he had met with his client and the Respondent, having indeed met with Blanding previously without Sullivan's knowledge, responded to Sullivan's inquiry by stating "...no, I had not or I had not". (Tr. P31 L22)

The Respondent testified to the following conversation on the May 5, 1997 meeting with Blanding at the jail (Tr. P40 L20-23):

> "...The first thing that I addressed to Mr. Blanding was Mr. Sullivan had represented him, and did he want Mr. Sullivan at this meeting. His response was no."

The Respondent also offered to have Blanding represented by court appointed counsel and Blanding declined. This fact is verified by other witnesses to the May 5th, 1997 meeting.

Respondent testified, after encountering Sullivan at the May 6th, 1997 sentencing hearing, he found it "surprising" that Sullivan was still representing Blanding. (Tr. P42 L17). Also, on May 6th, in court, Sullivan did not advise Respondent he was aware of the May 5th meeting between Respondent and his client. (Tr. P42 L24) After the May 6th, 1997 court appearance the Respondent went back to his office to discuss this matter with his supervisor Assistant State Attorney C.L. Fordham. The Respondent testified about

this meeting as follows:

> "... The first thing I did was to advise my immediate supervisor of what transpired during the May 6th hearing. He was already advised about the meeting on May 5th We discussed the issue. And the reason I can recall that it because the - Mr. Sullivan appearing on May 6th and appearing as Mr. Blanding's attorney in court was surprising, remarkable to me. If he appeared, I had expected that his client would announce to the Court that "I had fired him. He's not my attorney" That didn't happen. So we discussed that. And the next thing that we did, we decided that the matters which had been discussed with Mr. Blanding were not directly related to the pending case, and his providing substantial assistance was separate from his cases, and we continued with our intent to attempt to have Mr. Blanding released..."

Supervisor C.L. Fordham was involved at every stage of this process as witnessed by Respondent and Investigator Padula. (Tr.P218)(Tr.P43)

Between May 5 and May 20,1997, Respondent made no effort to advise Sullivan of any contact or substantial assistance agreement with Blanding. Part of Respondent's rationale for not informing Sullivan of the meetings with Blanding was that Sullivan was involved in illegal narcotics activity (Tr. P70)(Tr.P216)(Tr.P 217) although Sullivan

received copies of letters the Respondent sent to Parole Commission. (Tr.P44)

On May 20th, 1997, the Respondent, and Renee Butler, a notary, (Tr.P230) met with Blanding and a stipulation was entered into for substantial assistance, which was a follow up of the May 5,1997 meeting. (Respondent's Exhibit #3). Again, he was asked if Sullivan was his lawyer, he said, no. Then he was asked if he wanted a lawyer and if he did one would be provided. This is verified by all witnesses. (Tr.P232)

Because of problems in securing bond for Blanding due to the controlled release violation hold, a second conversation between Sullivan and Respondent occurred. According to Sullivan, the Respondent again denied any deal or having any contact with Blanding. (Tr. P99) Sullivan recalls a total of three separate denials by the Respondent. (Tr. P99 L11) Respondent recalls only one denial which was by telephone.

Finally, according to Sullivan, he couldn't stand it any longer. (Tr. 103 L14) Although he never disclosed to Respondent that he knew everything that had occurred. At the end of a Court appearance in front of the Honorable Daryl Casanueva, Sullivan asked for an in chamber meeting with the Judge, himself, and the Respondent. Sullivan advised Judge Casanueva of the situation, and Respondent advises the Judge, according to Sullivan, that he has, " .. done nothing to interfere in the attorney-client relationship between Mr. Sullivan and his client." At that point, according to Sullivan, Judge Casanueva advised the parties to work out their differences. (Tr. P105 L4) Sullivan never

disclosed to Judge Casanueva or Respondent that he knew everything from May 5th forward because Blanding had told him so. According to Sullivan, the next day, the Respondent and Sullivan agreed to a quasi-mediation session with a local attorney Thomas Marryott. According to Marryott, in the course of this meeting Paul Sullivan had related to Marryott that he thought the Respondent had talked to one of his clients, and confronted the Respondent directly. Sullivan never disclosed to Marryott that he knew all about the May 5th meeting between Respondent, et.al. and Blanding. According to Marryott, the Respondent's response was, "Well, you know, Paul, once in awhile as attorneys we have to lie to one another." (Tr. P169 L16-25) Within five minutes of making this statement he advised Marryott that he mis-spoke when he said, "lie to each other". (Tr. P173 L18) The Respondent also advised Marryott that he felt that he was not getting any guidance about this matter from his office. (Tr. P174 L2) According to Marryott the Respondent appeared remorseful about this situation. (Tr. P175 Ll I). Paul Sullivan filed with the court a Motion to Withdraw from Blanding's case on June 30th, 1997 (Resp. Ex. #1). It is not clear as to when this Motion was heard or granted.

Ultimately, Alto Blanding was sentenced by Judge Casanueva to two years of House Arrest, followed by three years probation. This sentence was substantially less than the possible habitual prison sentence the Defendant was 1ooking at initially. The State Attorney stood at sentencing and made no recommendation and the Defendant was

sentenced by Judge Casanueva on July 21, 1997. (Tr. P109, L5)

The Respondent wrote a letter to the Florida Bar describing his conduct and asking for an ethical opinion on June 27, 1997.

After this date, attorney Sullivan filed his grievance with the Florida Bar which has led ultimately to the referee's involvement.

Over the past three years, during the pendency of this case Sullivan and Feinberg continued to try cases with each other without any problems. (Tr.P175)

SUMMARY OF ARGUMENT

The Referee handled all matters and consequences dealing with alleged violations of Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) by Respondent. The Referee considered the seriousness of Respondent's misconduct, the record herein, the relevant case law, aggravating and mitigating factors, the Florida Standards for Imposing Lawyer Sanctions and the sincerity and demeanor of the Complainant, Respondent and all other witnesses.

The Referee's Report should be affirmed and the discipline as recommended should be applied.

ARGUMENT

ISSUE I: The Referee handled all matters and consequences dealing with alleged violations of Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) by Respondent.

Rule 3-7.7(c)(5), Procedures before Supreme Court of Florida of the Rules of Discipline of the Florida Bar, require the following:

> *"Burden*. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a Referee sought to be reviewed is erroneous, unlawful, or unjustified."

This court held in The Florida Bar v. Niles, 644 So.2d 504, that in a Referee trial of prosecution for professional misconduct, The Florida Bar has the burden of proving its accusations by clear and convincing evidence. The Court further held that the Supreme Court's review of the Referee's findings of fact in prosecution for professional misconduct is not in the nature of a trial de novo; the responsibility for finding facts and resolving conflicts in evidence is placed with the Referee. And this Court determined that findings of fact in prosecution for professional misconduct should not be overturned unless clearly erroneous or lacking in evidentiary support. In reviewing a Referee's recommendation for discipline, in Niles this Court stated that the scope of review is broader than that afforded to findings of fact; however, such recommendation is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence.

The Florida Bar has not met any or all of these requirements and the Referee's report should stand as filed.

The Honorable Charles E. Williams appointed by this Court held hearings in this matter on May 10, 1999 and May 27, 1999. He heard twenty-eight (28) witnesses, including the Complainant and Respondent. This constituted four hundred sixty-five (465) pages of record plus all documents submitted.

The Referee is uniquely qualified to have heard this case. Prior to taking the bench, he was an assistant public defender for over ten (10) years and a private defense lawyer for approximately four (4) years. During these hearing days, he had the opportunity to evaluate the demeanor of the Respondent and the sincerity of the numerous character witnesses who have testified on his behalf.

The Florida Bar, as they did in the Referee hearing, asks this Court to, as the Referee states, give the Respondent the professional death penalty. Surely their recommendation would end Respondent's career.

The Respondent accepts in it totality the Report and recommendations of the Referee.

As to whether the Respondent is guilty or not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) was handled very judiciously by the Referee. The Referee noted that the findings made as to Count I and Count II would apply to these counts. The

Referee noted that if this Court finds Respondent guilty of any or all of these remaining counts, the Referee's recommendation as to punishment would not change.

ISSUE II: The Referee considered the seriousness of Respondent's misconduct, the record herein, the relevant case law, aggravating and mitigating factors, the Florida Standards for Imposing Lawyer Sanctions and the sincerity and demeanor of the Complainant, Respondent and all other witnesses.

The Florida Bar offers the following cases for their position. The severity of misconduct and circumstances in each case is extraordinarily greater than that of Respondent and yet the Florida Bar seeks to impose the death penalty upon this young man's career. In Suarez v. State, 481 So.2d 1201 (Fla. 1985), this Court held among other things in affirming guilt of a criminal defendant that the prosecuting attorney's violation of disciplinary rules by interviewing the Defendant without notifying defense counsel did not require suppression of the Defendant's statements. The Florida Bar puts forth this case to condemn Respondent because of the statement that it is a violation of disciplinary rule prohibiting communication on the subject of representation with party known to be represented by different lawyer even though lawyer requests or acquiesces to interview.

Suarez while being pursued after a convenience store robbery killed a Deputy Sheriff. He was convicted of first degree murder.

The Defendant wanted to talk to the authorities to clear himself. He waived his Miranda rights. He specifically stated he wanted to talk without his attorney. The assistant prosecutor attorney did little except listen to the Defendant and take notes.

The Respondent in this case before the Court:

1. Asked Blanding if Sullivan was still his lawyer, quite different than the prosecuting attorney in Suarez.
2. On both occasions after asking Blanding if Sullivan was still his attorney, to which Blanding responded "no" on both May 5th and May 20th, Respondent asked Blanding if he wished an attorney to be appointed for him. On both occasions Blanding responded "no".
3. In the instant case, Blanding stated unequivocally that he had fired his attorney on both the May 5th and May 20th occasion. This was supported by his mother's statement affirming this as well. (Tr. p.215)(Tr. p.232) This is extraordinarily different than the facts of the Suarez case.

In The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997), Hmielewski hid medical records and then represented that Mayo Clinic could not produce them and was sentenced to a three (3) year suspension for making deliberate misrepresentations

regarding the location of the records.

Hmielewski acted on his own with no supervision, Respondent consulted and was supervised every step of the way. Hmielewski cost Mayo Clinic $26,189.00, Respondent cost no one anything and the Defendant was not injured. In Hmielewski, Mayo did not know there was a misrepresentation and in Respondent's case, Sullivan knew almost immediately that Respondent had met with his client and concealed this from Respondent. Hmielewski tried to trick Mayo Clinic to his client's benefit. Respondent had no such trickery planned. In Hmielewski, there is no evidence of his remorse because of his conduct. Respondent's remorse was evident and unrefuted.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), the hearing officer recommended suspension for one year for Broida. Broida raised and filed frivolous claims and counter claims against various Plaintiffs. Broida noticed depositions of non-parties and did not follow the proper procedures, he provided insufficient notice for all hearings, he continuously misrepresented facts to the Court, he personally attacked the integrity of multiple lawyers and judges with whom he had come into contact with and he unnecessarily delayed the court actions and proceedings by filing frivolous pleadings. This repeated conduct is distinguishable in that Respondent's conduct is singular and isolated.

A Referees findings are presumed to be correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987).

This Court affirmed the hearing officers report in spite of Broida's continuing pattern and course of conduct in engaging in ex parte communications with the Courts. Respondent was involved in a single isolated incident. The testimony from the numerous witnesses on his behalf was that he was always truthful before and continues to be for the past two years since this incident. All of these facts are unrefuted.

In The Florida Bar v. Rood, 569 So.2d 750 (Fla. 1990), Rood received a one year suspension for concealing the existence of his expert's memorandum from the opposing party. Rood answered interrogatories with falsehood regarding germane points to be filed with the Court. Rood misrepresented in drafting answers to the interrogatories which were to be filed in Court about material facts. Rood advised material witness to destroy evidence. The Defendant then sued Rood and got a judgment . The Florida Bar then sought his disbarment.

The Referee found (a) dishonest or selfish motive (b) a pattern of misconduct (c) was not remorseful for his conduct (d) substantial experience in law practice (e) causing his clients to commit perjury. Among the mitigating factors was the passage of time after the incident with no similar conduct. The Florida Bar sought disbarment. The hearing

officer recommended one year suspension and this Court affirmed.

The facts of Rood are easily distinguishable. The Respondent had no selfish or dishonest motive. The Respondent was relatively new in the practice of law. Respondent never encouraged anyone to commit perjury as did Rood.

However among the mitigating factors for Rood to receive a one year suspension was the passage of time from the incident. In the present case, Respondent has no incidents what so ever in two (2) years from this incident. He has actually tried other cases with Sullivan. Interestingly enough, Sullivan has not asked that he be removed from any of these cases and no incidents of any kind have been reported by anybody.

In The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994), this Court held that in reviewing a Referees recommendations for discipline, the scope of review is broader than that afforded to findings of fact because it is our responsibility to order the appropriate punishment. The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989). However, a Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Lipman, 497 So.2d 1165, 1168 (Fla. 1986); The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992). Niles (1) lied to prison officials and his client; (2) lied by denying receipt of a $5,000.00 fee and only after negotiations with the Assistant State Attorney did Niles deliver a $5,000.00 check to the County of Volusia and then that check was

returned for insufficient funds; (3) Niles failed to advise his client of the planned interview on a television program "A Current Affair" and thus obtained the interview of his client without her informed consent. In that interview, Niles' client was cast in an exploitative and negative manner.

Niles acquired a proprietary interest in his client's case by contracting with "A Current Affair" to receive a $5,000.00 fee in return for an interview with his client. Niles villainous conduct as recommended by the Referee was one year suspension. Such reprehensible conduct is easily distinguished from Respondent's isolated incident.

In The Florida Bar v. Colclough, 561So.2d 1147 (Fla. 1990), the Supreme Court imposed a six-month suspension rather than a one-year suspension recommended by the Referee due to an absence of a prior disciplinary record and numerous affidavits and letters attesting to this honesty and credibility. Many witnesses attested to Respondent's honesty, integrity and credibility as well in this case.

Mr. Colclough lied to two lawyers and a judge about a hearing that actually had not been held.

In The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), Shapiro received a 91 day suspension:

1. Shapiro communicated an offer of settlement directly to an adverse party knowing that this party was represented by counsel;

2. Shapiro was under the care of a psychiatrist and he was incapable of practicing law;

3. He placed trust funds belonging of his clients in his general account;

4. He paid salary to employees of his legal clinic based on how much money the legal clinic received in fees;

5. He elected a non-lawyer as secretary of his legal clinic under which he was practicing law under a trade name.

Respondent has been forthcoming and forth right about his conduct. He approached the Florida Bar in his letter of June 27, 1997 about his actions. He has been and remains active in his role without incident.

In The Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995), this court adopted the recommendations of the Referee for a thirty day suspension.

Although Ms. Burkich was evasive at the hearing and sought to minimize and avoid her lapses by blaming a non-lawyer and she refused to acknowledge responsibility for her conduct, she was found guilty of five (5) charges of misconduct including unlawfully obstructing another lawyers access to evidence she knew or should have known was relevant to the pending proceedings. She knowingly made a false statement of material fact to a third party and she was involved in dishonesty, fraud and deceit and misrepresentation. Since all of these things regarded her husband, she stood to gain

personally as she represented him in these law suits.

In The Florida Bar v. Nunes, 661 So.2d 1202 (Fla. 1995), a ten (10) day suspension and eighteen (18) months of supervised probation for knowingly communicating with a represented person without the consent of opposing counsel. This was recommended by the Referee and confirmed by this Court. Nunes accomplished this communication by copying a letter he wrote to opposing counsel to the opposing counsel's clients. He criticized opposing counsel's handling of the case and said he believed opposing counsel had breached ethical standards of the Florida Bar. The Referee stated he reviewed the Florida Standards for Imposing Lawyer Sanctions as well as applicable case law as did the Referee in this case. He also found three aggravating factors:

1. Submission of false evidence, false statements or other deceptive practices during the disciplinary proceedings;
2. Refusal to acknowledge wrongful nature of his conduct;
3. Substantial experience on the practice of law.

The Referee found no mitigating circumstances. In this case, the Referee found mitigating circumstances. Respondent was supervised and followed the advice of his superior. Numerous character witnesses stated that this was an unusual event. They testified as to his high character and truthfulness. The Referee found that the Respondent

was remorseful and that he had no selfish motive.

In The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997), Kravitz made false statements and submitted false documents to the Court. He lied about the names of the individuals being held in contempt by the Court and misrepresented the amounts of monies in his trust account. For all this, he received a thirty (30) days suspension. This Court said this was appropriate because of the fact that there has been no showing of the prior disciplinary infractions by Kravitz and by the fact that the Referee recommended probation.

There have been no other disciplinary infractions before this incident and none in over two (2) years since.

The Referee had the same recommendation of penalty that the Bar puts forward once again. The Referee considered all case law and standards including The Florida Bar v. Lord, 433 So.2d 983 (1983). First, judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public services of a qualified lawyer as a result of undue harshness in imposing penalty;

Second, the judgment must be fair to the attorney, being sufficient to punish the breach of ethics and at the same time encourage reformation and rehabilitation;

Third, the judgment must be severe enough to deter other who might be prone to like violations.

We agree with the Referee that the public does not need to be protected from the Respondent. The public would be denied the services of this lawyer, but for this incident, all witnesses say has done and is doing an excellent job. Further demonstration of that is that he has maintained this level of performance even with the spectre of this investigation hanging over him. Included in this performance have been other trials with Sullivan, the Complainant.

For over two (2) years Respondent has displayed reformation and rehabilitation. He has been remorseful from the beginning. He has been forth right as to his conduct. It is uncontroverted that his conduct was an aberration and would not occur again. The Referee felt strongly and with confidence about this fact.

Respondent agrees the monetary penalties are substantial. The most burdensome and damaging aspect of the punishment is the public reprimand and the letters of acknowledgment.

His law degree was difficult to achieve and only after tremendous effort financially was this accomplished. He is a career prosecutor. This incident for which he remains remorseful has severely damaged his standing in the community and legal profession. Personally, this cloud has hung over him and his family for over two years. Its toll is inestimable.

CONCLUSION

The Referee was uniquely qualified to hear this case. He considered all matters and consequences of the alleged violations. He considered the seriousness of Respondent's conduct, the record herein, the relevant case law, aggravating and mitigating factors, the Florida Standards for Imposing Lawyer Sanctions and the sincerity and demeanor of the Complainant, Respondent and all other witnesses. The Florida Bar has failed to prove that the Findings of Fact and the recommendation of discipline is clearly erroneous or not supported by the evidence. The Referee's report should stand as filed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of the Respondent's Reply Brief has been furnished by Airborne Express to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to Stephen Christopher Whalen, Esquire, Counsel for Petitioner, at The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 and a copy by regular U.S. Mail to John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, all this 11th day of October, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt.

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