IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

DANIEL PETER FEINBERG,

Respondent.
_____/

Case No. 93,165
TFB No. 97-11,980(20D)

INITIAL BRIEF OF THE FLORIDA BAR

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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".

"TT" 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 THE FACTS

In 1996, the State of Florida charged Alto Blanding, Jr., (hereinafter "Blanding") with the sale and possession with intent to sell cocaine, State of Florida v. Alto Blanding, Jr. , Charlotte County Circuit Case #96-747CF-DCC and 96-748CF-DCC. Blanding's defense attorney in this matter was Paul Sullivan, Esq. (hereinafter "Sullivan"). At that time, Respondent, was an assistant state attorney in the State Attorney's Office for the Twentieth Judicial Circuit (hereinafter "State Attorney's Office").

In or about April 1997, Blanding contacted Dale Ritchart, a detective with the Charlotte County Sheriff's office who was assigned to a Drug Enforcement Agency (hereinafter "DEA") task force. Blanding offered to provide information concerning drug trafficking and to work as a confidential informant in exchange for pre-trial release. Blanding's communications with Mr. Ritchart took place without Mr. Sullivan's knowledge or consent.

On or about March 27, 1997, Blanding pled no contest to the charges against him and sentencing was set for May 6, 1997. Subsequent to this open plea, Ritchart contacted Respondent seeking assistance in obtaining Blanding's pre-trial release.

On May 5, 1997, the day before Blanding's scheduled sentencing hearing, Respondent met with Blanding at the Charlotte County Jail. Also present at the meeting were Mr. Ritchart and Tony Padula, an investigator with the State Attorney's Office.

Respondent was aware that Blanding was represented by Mr. Sullivan. In fact, Mr. Sullivan had previously approached Respondent to discuss the possibility of Blanding cooperating with the State Attorney's Office in exchange for a more lenient sentence. However, Respondent intentionally failed to notify Mr. Sullivan about the May 5, 1997, meeting. As a result, Mr. Sullivan was unaware that the meeting was taking place and was not present. In fact, no attorney was present as this important meeting to protect Blanding's interests. Respondent claims that Blanding told him that he had fired or was going to fire Sullivan. However, Respondent took no steps to confirm whether Blanding was still represented by Sullivan.

During this meeting, Respondent, Blanding, and Ritchart negotiated the terms of an agreement between Blanding and the State Attorney's Office. As a result of this meeting a stipulation was drafted which concerned sentencing matters on which Blanding was represented by Mr. Sullivan. Specifically, paragraph 8 of the stipulation provides for an agreement that the State would recommend that Blanding be sentenced as a habitual felony offender. (TFB Exh. 1). Respondent did not inform Mr. Sullivan that the meeting had occurred or that a Stipulation would be drafted.

On the evening of May 5, 1997, Mr. Sullivan visited Blanding in jail to discuss the sentencing hearing which was to occur the following day. During this meeting, Blanding eventually revealed that he had met with Mr. Feinberg earlier in the day and discussed

his case. Blanding told Sullivan that he had worked out a deal with Respondent and the DEA whereby he would be released prior to sentencing and would receive a sentence of house arrest.

At the sentencing hearing of the following morning, Sullivan appeared on behalf of Blanding. Thus, it was clear to Respondent that Blanding was still represented by Sullivan. However, Respondent, who attended the hearing took no steps to inform Sullivan about his meeting with Blanding. Instead, Respondent moved to continue the sentencing hearing. His purported reason for requesting the continuance was to allow the state extra time to acquire paperwork the state needed in order to request that Blanding be sentenced as a habitual felony offender. Blanding insisted on agreeing to the continuance against a bewildered Sullivan's advice. Respondent failed to tell Sullivan or the court that he had met with Blanding the previous day and would be drafting a stipulation which included provisions requiring that Blanding be sentenced as a habitual felony offender.

Sullivan, who was not sure whether to believe Blanding, over the next few weeks repeatedly asked Respondent whether he had met with Blanding. Respondent repeatedly denied having met with Blanding. Meanwhile, Respondent met with Blanding again on May 20, 1997, without notifying Sullivan, at which time the stipulation was executed.

On or about May 27, 1997, Respondent and Sullivan met in chambers with Judge

Darryl C. Casanueva. During this meeting, Respondent refused to answer Sullivan when asked whether Respondent had met with Blanding. However, subsequently, Respondent met with Sullivan and another local attorney, Thomas Marryott. During this meeting, Respondent confessed to Sullivan that he had met with Blanding on two occasions and stated "Well, you know, Paul, once in awhile as attorneys we have to lie to one another." (TT p.169; ROR p. 5).

STATEMENT OF THE CASE

On March 26, 1998, the Twentieth Judicial Circuit Grievance Committee "D" found probable cause as to violations of the following Rules: Rule 4-4.1(a); Rule 4-4.2; Rule 4-8.4(a); Rule 4-8.4(c); and Rule 4-8.4(d). The Florida Bar filed a Complaint in this matter on June 4, 1998. By order dated June 12, 1998, The Honorable Andrew D. Owens, Jr. was designated to appoint a referee in this matter. Judge Owens subsequently appointed The Honorable Charles E. Williams as Referee.

The Final Hearing in this matter was held on May 10, 1999, and May 27th, 1999. On June 21, 1999, the Referee issued a Report of Referee finding Respondent guilty of violating Rules 4-4.1(a) and 4-4.2 and not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d). The Referee recommended that Respondent receive a public reprimand. The Referee also recommended that costs be taxed against Respondent and that Respondent be required to write a letter of apology to Mr. Sullivan acknowledging the Referee's findings and sanctions imposed, and write a letter to the State Attorney of the Twentieth Circuit acknowledging the Referee's findings and sanctions and acknowledging lying to a fellow member of the bar regarding a pending case. The Referee recommended that Respondent provide copies of this acknowledgment letter to all Assistant State Attorneys in the Twentieth Circuit, all Assistant Public Defenders in the Twentieth Circuit, all attorneys in Charlotte County, all judges in the Twentieth Circuit, and all witnesses who

testified on Respondent's behalf.

The Referee's report was considered by the Board of Governors of The Florida Bar at its meeting which ended August 20, 1999, at which time the Board voted to file a Petition for Review of the Referee's report. The Florida Bar filed a Petition for Review of the Referee's report with this Court on or about August 30, 1999.

SUMMARY OF ARGUMENT

The Referee's finding that Respondent is not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) is clearly contradicted by the record evidence and the Referee's own findings of fact. The Referee's recommendation of a public reprimand is inappropriate. A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's conduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions.

ARGUMENT

ISSUE I: The Referee's finding that Respondent is not guilty of violating Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) is clearly contradicted by the record evidence and the Referee's own findings of fact.

The Referee states that "the Bar counsel in its Memorandum of Law for Sanctions appears only to request the Court to consider sanctions for [Rule 4-4.1(a)] and [Rule 4-4.2]." (ROR p. 7). However it may have appeared to the Referee, it was certainly not the Bar's intent to limit the Referee's consideration in such a way. Nowhere within the Bar's memorandum was it requested that the Referee consider sanctions only for Rules 4-4.1(a) and 4-4.2. Furthermore, the Bar's Complaint in this matter specifically alleges violation of Rules 4-4.1(a), 4-4.2, 4-8.4(a),4-8.4(c) and 4-8.4(d). (Bar's Complaint para. 30). Clearly, The Bar's memorandum of law is not a charging document. The memorandum was provided to the Referee as a courtesy in hope that it would assist him in making his decision regarding the appropriate sanction.

In attorney disciplinary proceedings "[a] referee's findings of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support of the record.... The party contending that the referee's findings of fact and conclusions of guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly

contradicts the conclusions." The Florida Bar v. Cox, 718 So.2d 788, 792 (Fla. 1998). In the instant case, the Referee's conclusions of guilt as to Rules 4-8.4(a), 4-8.4(c), and 4-8.4(d) are clearly contradicted by the record evidence and the Referee's own findings.

The Referee found Respondent not guilty of violating Rules 4-8.4(a) (violate or attempt to violate the Rules), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). These findings are clearly contradicted by the record before this Court and the Referee's own finding of fact and guilt as to Respondent's violation of Rules 4-4.1(a) (truthfulness in statements to others) and Rule 4-4.2 (communication with person represented by counsel).

The Report of Referee notes the following findings as to Rule 4-4.1(a):

> [t]he Respondent has admitted to **lying** to Attorney Sullivan at least on one occasion, and the record is clear, at best the Respondent **deceived** Attorney Sullivan in reference to contact with his client on several other occasions. The **deception** either direct or indirect is evidenced by the fact that on May 6, 1997, after it was clear that Blanding had not dismissed Sullivan, and a day after Respondent made contact with Blanding, Respondent, upon seeing Sullivan in Court with Blanding, and conversing with Sullivan regarding Blanding, did not advise Sullivan of the May 5, 1997, contact, and later **denied** any improper contact with Blanding. **The record supports the Referee's contention that the Respondent did indeed lie to Attorney Sullivan, and perpetuated that lie by continued denials and continued contact with Sullivan without revelation of Respondent's contact with Blanding**.

(ROR p. 6.) (emphasis added).

As to Rule 4-4.2 the Referee found that "clearly the May 20th, 1997 meeting was

a **blatant disregard of Rule 4-4.2** since Respondent was on actual notice that Sullivan was evidently still representing Blanding." (ROR p. 6) (emphasis added).

The Referee states that his findings made as to Rules 4-4.1(a) and 4-4.2 apply to Rules 4-8.4(a), 4-8.4(c), and 4-8.4(d).

Despite his findings that Respondent lied to and intentionally deceived Sullivan regarding his contacts with Blanding and that Respondent blatantly disregarded Rule 4-4.2, the Referee incongruously concluded that Respondent was not guilty of violating Rules 4-8.4(a) (violate or attempt to violate the Rules), 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4(d) (conduct prejudicial to the administration of justice). This conclusion is clearly erroneous and is contradicted by the record and the Referee's own findings.

In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the necessary element of intent must be shown by clear and convincing evidence. The Florida Bar v. Lanford, 691 So.2d 480,481 (Fla.1997). To satisfy the element of intent, it must only be shown that the conduct was deliberate and knowing. The Florida Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla.1999). Respondent has admitted that he deliberately lied to Sullivan. Whatever motives Respondent may have had for doing so, do not negate the fact Respondent deliberately and knowingly lied to Sullivan. These lies lead to the Referee's conclusion that Respondent violated Rule 4-

4.1(a) (truthfulness in statements to others). The same lies must lead to the conclusion that Respondent violated Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). Furthermore, the Referee's findings that Respondent lied to Sullivan and blatantly disregarded Rule 4-4.2 by meeting with Blanding show a clear violation of Rule 4-8.4(a)(violate or attempt to violate the Rules). Finally, the Referee's findings regarding Respondent's misconduct in this matter clearly describe conduct prejudicial to the administration of justice, a violation of Rule 4-8.4(d).

A referee's legal conclusions are subject to broader review by this Court than are findings of fact. The Florida Bar v. Beach, 675 So.2d 106 (Fla. 1996). Upon review, this Court will find that the Referee's conclusions of guilt as to Rules 4-8.4(a), 4-8.4(c) and 4-8.4(d) are clearly erroneous and contradicted by the record and the Referee's own findings of fact.

ISSUE II: A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's misconduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions.

In Suarez v. State, 481 So.2d 1201 (Fla. 1985), this Court found that it was a violation of the former Disciplinary Rule prohibiting communication on the subject of

representation with a represented party for a prosecuting attorney to interview a defendant represented by counsel without notice to defense counsel. The Court found this to be true even when the defendant requests or acquiesces to the interview. Id. at 1206. The prohibition on communication with represented parties recognizes the inherent disadvantage of a layperson conducting negotiations with opposing counsel.

> Indeed, it can be argued that the prohibition against communication with a represented individual is even more important in the criminal context than in civil cases. A prosecutor 'has more direct power over the lives, property and reputations of those in [his] jurisdiction than anyone else in this nation...'. In light of the prosecutor's tremendous power and the fundamental individual rights at stake in criminal prosecutions, 'the character, quality, efficiency of the whole [criminal justice] system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.'

United States v. Lopez, 765 F. Supp. 1433, 1449 (1991)(alterations in original)(footnotes omitted).

The discipline imposed on Respondent must correspond the serious nature of his misconduct and serve as a deterrent to others who might be inclined towards this sort of misconduct. In The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla.1983), the Florida Supreme Court defined the objectives of Bar discipline as follows:

> "Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the 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 the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same

> time encourage reformation and rehabilitation. Third, **the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations**." (Court's emphasis).

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar Counsel, referees, and the Supreme Court to determine the appropriate sanction in attorney disciplinary matters.

Standard 5.11(f) provides that absent aggravating and mitigating circumstances,"[d]isbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice." Standard 5.22 provides that absent aggravating or mitigating circumstances, suspension is appropriate when "a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process." Standard 6.11(b) provides that absent aggravating and mitigating circumstances disbarment is appropriate when a lawyer "improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." Standard 6.12 provides that absent aggravating or mitigating circumstances, suspension is appropriate "when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action." Standard 6.32

provides that absent aggravating or mitigating circumstances, suspension is appropriate when "a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding." Standard 7.1 provides that absent aggravating and mitigating circumstances,"[d]isbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system." Standard 7.2 provides that absent aggravating or mitigating circumstances, "suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system."

Standard 9.22 lists several aggravating factors which may justify an increase in the degree of discipline to be imposed. However, this list is not exclusive. Standard 9.21 defines aggravation or aggravating circumstances as "any considerations or factors that may justify an increase in the degree of discipline to be imposed." The Referee found no aggravating factors in the instant case. The Bar submits that upon review this Court may find that the following aggravating factors apply:

(d) multiple offenses;

(i) substantial experience in the practice of law; and

Standard 9.3 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. The Referee in the instant case considered the following factors in mitigation:

(b) absence of selfish motive;
(g) character or reputation; and
(l) remorse

In addition, the Referee considered that Respondent lacked guidance and support from his supervisor.

The Referee's recommended discipline of a public reprimand is insufficient considering the serious nature of Respondent's misconduct. This Court has held that "a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent."The Florida Bar v. Schultz, 712 So.2d 386, 388 (Fla. 1998). This is not such a case. The Referee found that Respondent blatantly disregarded Rule 4-4.2 by meeting with a person known to be represented by counsel and then deliberately deceived and lied to that counsel regarding the meeting. The Referee found that Respondent's lies were deliberate, not neglectful. Furthermore, this was not a minor lapse of judgment. In fact, the Referee found that Respondent blatantly disregarded Rule 4-4.2 at a time when he was on actual notice that

Blanding was represented by counsel. (ROR p. 6). Respondent's conduct warrants suspension.

In The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997), Hmielewski received a three (3) year suspension for making deliberate misrepresentations regarding the location of medical records in a medical malpractice action. Hmielewski's client told Hmielewski that he had taken the medical records from the Mayo clinic. Because Hmielewski's client had taken the records, the clinic could not produce them when Hmielewski asked for these same records during pretrial discovery. Id. at 219. Hmielewski then made misrepresentations concerning the clinic's inability to produce the records when all along he knew his client had taken the records. Id. at 220. Hmielewski's deception came to light during a pretrial deposition of his client. Id.

Like Hmielewski, Respondent made a series of misrepresentations to opposing counsel. Respondent attempted to conceal his meetings with Blanding, instructing Blanding not to tell Sullivan about them. When Sullivan repeatedly inquired if Respondent had met with his client, Respondent repeatedly denied having such meetings. The court never approved Respondent's clandestine meetings with Blanding. In fact, Respondent failed to advise the court of the meetings when given the opportunity to do so.

In Hmielewski, the court found that "Hmielewski improperly allowed what he

perceived as his duty to his client to overshadow his duty to the justice system when he made deliberate misrepresentations of material fact to the Mayo Clinic and the Minnesota trial court. Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a member of The Florida Bar." Id. The Court in Hmielewski further noted that were it not for Hmielewski's lack of a selfish motive, extremely strong character evidence and his relatively unblemished record that "this Court would have no hesitation in imposing disbarment." Id. at 221.

Like Hmielewski, Respondent's actions were unethical and made a mockery of the justice system. As a prosecutor, Respondent has a heightened duty to protect our justice system. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Rules Regulating The Florida Bar, Rule 4-3.8 cmt. (1993) Respondent allowed his zeal for criminal investigation to overcome his ethical duties and responsibilities as an officer of the court.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), Broida received a one-year suspension after continuously misrepresenting facts to the court, failing to properly notify the opposing party of hearings and filing frivolous pleadings in order to delay proceedings. Id. at 86. By circumventing the Rules of Civil Procedure, Broida was able to secure ex parte orders when the opposition failed to appear at hearings. The referee also found that Broida personally attacked the integrity of lawyers and judges with whom

she came in contact. Id. The court found that Broida's experience and knowledge made her actions inexcusable, stating that " [h]er tenure in the legal profession does not afford her the privilege or right to unilaterally decide when the rules should apply and when they should not; that is within the province of the court."Id. at 87.

Like Broida, Respondent ignored the rules governing his situation and engaged in ex parte meetings with an accused party known to be represented by counsel. Anti-contact rules exist in order to protect persons in Blanding's situation from overreaching by prosecutors. Like Broida, Respondent's experience and position does not afford him the privilege to unilaterally violate rules of ethics which are in place to prevent this very type of behavior.

In The Florida Bar v. Rood, 569 So.2d 750 (Fla. 1990), Rood received a one-year suspension for concealing the existence of an expert's memorandum from the opposing party. Rood also prepared and caused his clients to file false and incomplete answers to interrogatories. Id. at 752. The existence of the memo came to be known as the result of discovery in a related case. Id. at 751.

Like Rood, Respondent purposefully deceived opposing counsel by repeatedly denying that he had met with Blanding. Furthermore, Respondent advised Blanding not to tell Sullivan about the meeting. Respondent confessed to meeting with Blanding only after he realized he could no longer keep the meetings a secret. Like Rood, Respondent

should be suspended.

In The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994), Niles received a one-year suspension for lying to prison officials, denying receipt of compensation from the television program "A Current Affair", and failing to obtain his client's consent for a planned interview with the same program. Nile's client had plead guilty to first degree murder and had received the death penalty. Id. at 505. Department of Correction rules prohibited interviews of such inmates during their initial orientation. Niles got around these rules by telling the correctional superintendent that the prosecutor and judge had requested videotaped testimony of the client concerning a co-defendant. Id. Like Niles, Respondent blatantly disregarded rules governing his situation and lied about it in order to accomplish his own goals

In The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990), Colclough received a six-month suspension for making misrepresentations to the court and to opposing counsel. Colclough misrepresented to the court and substituting counsel that a hearing on costs had been held and that a money judgment had been obtained when in fact no hearing had taken place and no such judgment had been obtained. Id. at 1149. Respondent took advantage of the substituting counsel's lack of knowledge concerning the history of the case. The Supreme Court imposed a six-month suspension rather than the one-year suspension recommended by the referee due to an absence of a prior

disciplinary record and numerous affidavits and letters attesting to his honesty and credibility. Id.

In the instant case, Respondent also purposefully left the court and opposing counsel in the dark about important information concerning the resolution of a case. In fact, Respondent misled the court by giving incomplete information regarding his need and request for a continuance. In addition, Respondent asked the defendant to conceal meetings and a signed stipulation concerning sentencing matters from defendant's counsel. Furthermore, when confronted on more than one occasion and asked by defendant's counsel whether these meetings had occurred, Respondent lied. Respondent's misconduct is more egregious than Colclough's and he should receive a longer suspension.

In The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), Shapiro received a 91 day suspension for communicating an offer of settlement directly to an adverse party, engaging in trust account violations, engaging in a law practice under a trade name, and paying a contingent salary to an employee of his corporation, and electing a nonlawyer as secretary to his corporation and being too mentally unstable to practice law. In considering discipline, the court considered Shapiro's psychiatric, personal, and emotional problems as mitigating factors. Id. at 1186. The court also noted that these conditions had improved by the time of the hearing. Id.

The strong mitigating factors present in Shapiro are absent in the instant case. As a prosecutor, Respondent knew that he was violating The Rules Regulating The Florida Bar when he engaged in ex parte communications with the defendant. His guilty knowledge is evidenced by his attempts to conceal these violations from the court and his lies to opposing counsel. Respondent's actions are more egregious than those of Shapiro and he should receive a harsher sanction.

In The Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995), Burkich represented her husband Burell in a personal injury matter. Through her own inaction Burkich assisted her husband in withholding information in answers to interrogatories which was relevant to the issue of damages. Id. at 1083. In mitigation, the court considered evidence that Burkich's husband was an alcoholic who mentally and physically abused her, her inexperience, and her lack of a prior disciplinary record. Id. In consideration of the unique facts and mitigation involved, the court suspended Burkich for thirty days. Id. at 84.

Like Burkich, Respondent lacks a prior disciplinary record. Unlike Burkich, Respondent is an experienced attorney and prosecutor and has produced no evidence that anyone coerced him into engaging in prohibited communications with Blanding, misleading the court, or lying to Sullivan. Therefore, Respondent's actions warrant more severe discipline.

In The Florida Bar v. Nunes, 661 So.2d 1202 (Fla. 1995), Nunes received a ten-day suspension and eighteen months of supervised probation for knowingly communicating with a represented person without the consent of opposing counsel. In Nunes, Nunes accomplished this communication by copying a letter he wrote to opposing counsel to the opposing counsel's clients. In this letter, Nunes criticized opposing counsel's handling of a foreclosure matter and stated that he believed that opposing counsel had breached the ethical standards of The Florida Bar. Id. at 1203.

Respondent's actions are much more egregious than those of Nunes. Respondent did not merely copy opposing counsel's clients with a disparaging letter. Respondent secretly met with a represented person, concealed this meetings from opposing counsel and then lied to opposing counsel when asked whether the meetings had occurred. Thereafter, Respondent conducted yet another secret meeting with Respondent. Respondent's actions are more egregious than Nunes' and his discipline should be much more severe.

In The Florida Bar v. Kravitz., 694 So.2d 725 (Fla. 1997), Kravitz made a series of misrepresentations to the court and opposing counsel. These misrepresentations regarded the identity of the manager of the restaurant he was representing and whether, a misrepresentation to the manager that he could be arrested if he did not pay $4000 to Kravitz, and a misrepresentation to opposing counsel that his trust fund contained

sufficient funds to cover settlement. Id. at 726. Kravitz received a thirty-day suspension. In imposing thirty days rather than the ninety-one days recommended by the Bar, the court considered the absence of prior disciplinary record and the fact that the referee had recommended one year probation.

Respondent's activities are more egregious than those of Kravitz and he should receive a more severe sanction. As a prosecutor, Respondent had a heightened duty to protect the justice system. Instead, he blatantly disregarded the Rules regarding communication with a criminal defendant known to be represented by counsel and then lied on more than one occasion in an attempt to conceal his improper dealings with the defendant.

CONCLUSION

In conclusion, Respondent, an Assistant State Attorney, knowingly violated Rules 4-4.1(a), 4-4.2, 4-8.4(a), 4-8.4(c), and Rule 4-8.4(d) of The Rules Regulating The Florida Bar. Respondent met and communicated with a defendant known to be represented by counsel concerning the subject of that representation. These clandestine meetings were accomplished outside the presence of and without notice to defendant's counsel. Respondent then lied to defendant's counsel on more than one occasion, denying that the meetings had occurred. It is the Bar's position that Respondent's misconduct warrants no

less than a three (3) year suspension from the practice of law and an assessment of the Bar's costs in these proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial 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, FL 32399-1927; a true and correct copy by regular U. S. Mail to Arthur I. Jacobs, Esq., Counsel for Respondent, at Post Office Box 1110, Fernandina Beach, Florida 32035-1110; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 22nd day of September, 1999.

CERTIFICATION OF FONT SIZE AND STYLE

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

_____

Stephen Christopher Whalen
Assistant Staff Counsel