IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RAFAEL A. CENTURION,

Respondent.
_____/

Supreme Court Case
No. 93,523

The Florida Bar Case No.
97-70,971(11H), 97-71,161(11H),
97-71,380(11H), 97-71,817(11H) and
97-71,906(11H)

Complainant's Initial Brief on Cross Petition for Review and Answer Brief On Petition for Review

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I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point Type.

_____
CYNTHIA ANN LINDBLOOM
Bar Counsel

STATEMENT OF THE CASE AND OF THE FACTS

A final hearing was held on January 22, 1999, before Judge Leon Firtel who was appointed to serve as Referee. Five cases involving the Respondent were consolidated for purposes of the hearing.

One of the counts was based upon the complaint of Donnarae Flamm. Flamm had retained Respondent on or about February or March of 1995 and Respondent filed a suit on her behalf. (T. 97). However, the Respondent took no further action and the case was dismissed for lack of prosecution in April of 1996. (T. 99).

Flamm was unable to obtain any information regarding the progress of her case from the Respondent, but learned of the dismissal from the Clerk's office. (T. 99). Despite the dismissal in April of 1996, Respondent advised Flamm in November 1996, that the case was proceeding and that Respondent was waiting for a new trial date. (T. 102).

In the same case, the opposing party, the U.S. Government, failed to respond to the complaint on a timely basis. Respondent promised to seek a default. (T. 109). He failed to do so. Similar conduct was described by Ms. Flamm at the final hearing:

> A. I called Rafael and asked him why we hadn't done depositions, etcetera, prior to the order even setting trial.
>
> He said in his experience, orders for setting trial didn't come out that fast from the Federal Court and that you didn't need to adhere to anything that was set on the order setting trial in Federal Court. You

> didn't need to mark exhibits. You didn't need to have any witness lists or depositions or anything prior to a trial.
>
> Calendar call was scheduled for October 8th. That afternoon of October 8, 1996, and/or the following day, I was able to reach Mr. Centurion. He told me he appeared at calendar call and the case was rolled over.
>
> Q. Do you know whether or not, in fact, he appeared at the calendar call on October the 8th?
>
> A. I know for a fact he did not because the case was already dismissed. So there would have been no need for him to be there. (T. 112-113).

Ms. Flamm suffered permanent injuries and outstanding medical bills in the amount of $28,000 (T. 110). She was unable to recover any funds to pay the bills as a result of the dismissal of the case. The statute of limitations bars further proceedings. (T. 117).

In respect to Flamm, the Referee found that Respondent violated Rule 4-1.1 (Competence), Rule 4-1.3 (Diligence), Rule 4-1.4 (Failing to keep the client informed), and Rule 4-8.4(c) (Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) of the Rules of Professional Conduct.

Another client, Daniel Bernard, retained the Respondent to pursue an adoption. (T. 27). In September of 1996, Respondent informed Bernard of a scheduled final hearing. Bernard and his wife went to court, but the Respondent did not appear (T. 29-30). Respondent told Bernard that he would reschedule the hearing. (T. 30).

Bernard was advised by the court that some necessary documents had not been filed. (T. 30). Bernard forwarded the required documents to the Respondent. Thereafter, Bernard did not hear from Respondent (T. 31). As a result of Respondent's conduct, Bernard complained to The Florida Bar.

After the Bar complaint was filed, in January of 1997, Respondent advised Bernard that a special hearing was set for May, 1997. (T. 32). Shortly before the date of the hearing, Bernard was notified that it was canceled (T. 32).

Bernard went to Respondent's office after the cancellation and was advised by Respondent that he would straighten out the matter. (T. 34). Bernard never heard from Respondent thereafter. (T. 34). Furthermore, during the course of representation, Bernard had called Respondent many times, sometimes as often as four times a day. Respondent returned calls only once or twice. (T. 47).

In relation to Respondent's representation of Bernard, the Referee found that the Respondent violated Rule 4-1.3 (Diligence) and Rule 4-1.4(a) (Failure to keep the client informed) of the Rules of Professional Conduct.

Leon Smith was another client who filed a complaint against the Respondent. Although Smith retained him to do so, Respondent never filed a suit on his behalf (T. 169). Between October 12, 1996, and March, 1997, Smith attempted to contact the Respondent. When he was unable to reach the Respondent, Smith called the Clerk of

the Circuit Court and learned that the Respondent had not filed the suit as he had been expected to do. After Smith filed a complaint, Respondent failed to respond to inquiries from the Bar. (TFB's Exh. 17).

The Referee found that Respondent violated Rule 4-1.3 (Diligence), Rule 4-1.4 (Failing to keep the client informed) and Rule 4-8.4(g) (Failure to respond to an inquiry from an investigatory agency) of the Rules of Professional Conduct.

Count four of the Bar's complaint involved Respondent's representation of the Raval family. Sunali Raval testified regarding her family's experiences with the Respondent. She and her family had retained Respondent to handle three different legal matters. (T. 52). After they retained Respondent, they were rarely able to make contact with him. (T. 56). Respondent assured Ms. Raval and her family that he was proceeding with at least two of the three cases presented to him. (T. 61). Ultimately, the Ravals discovered that his office was closed permanently. (T. 62). Mrs. Raval testified that Respondent did not finalize any of the cases that he had claimed were in progress although he did obtain a default in one of them. (T. 89, 95).

The Referee found that Respondent violated Rule 4-1.3 (Diligence) of the Rules of Professional Conduct.

Natalia Ortiz was another client of the Respondent who retained the Respondent to represent her in a bankruptcy matter. (T. 127). She enlisted his

services on November 9, 1996, but did not receive any information from him. At the end of January, 1997, she attempted to call him at his office at that time, but was unsuccessful. (T. 130).

Ortiz reached Respondent at his home on February 7, 1997. Respondent explained that the reason for the delay was that the paperwork was piled up on his desk. (T. 131). Ortiz was notified that the meeting of creditors was to take place on March 27, 1997. Ortiz advised Respondent that she had a conflict and Respondent told her that he would reschedule the matter. The following day, Respondent assured her that the meeting had been rescheduled. (T. 134).

By April 14, 1997, when Ortiz had not heard about a rescheduled meeting, she called the court and learned that her case had been dismissed because no one had appeared at the creditor's meeting, and no request for a continuance had been filed. (T. 135).

Ortiz called Respondent. He assured her that he would take care of the matter. Respondent called Ortiz on April 15, 1997, and assured her that he had filed a motion for a new meeting of the creditors. Repeated calls to Respondent provided no new information (T. 136). During June, 1997, Ortiz retained another attorney who discovered that Ortiz' pending case had been dismissed on April 7, 1997. (T. 136-137).

The Referee found that the Respondent violated Rule 4-1.3 (Diligence), Rule 4-1.4(a) (Failing to keep a client reasonably informed), and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct.

SUMMARY

The Bar's Cross Appeal is predicated upon acceptance of the Referee's factual findings. The sole issue raised by the Bar is whether a suspension for two years is a more appropriate discipline than the recommended suspension for one year.

In reviewing several of this Court's decisions, we are lead to conclude that a two year suspension is a consistent with this Court's previous rulings. In addition, a two year suspension is consistent with the purposes of discipline set forth in the Florida Standards for Imposing Lawyer Sanctions, and by this Court.

Respondent submitted two points on appeal. The first point asserts the existence of errors regarding factual findings and findings of guilt. The second point asserts that the recommended discipline was excessive.

Respondent argues that the Referee's finding regarding former client Donnarae Flamm was incorrect and infected the proceedings. The finding, however, was correct, namely that Respondent had sought to shift the burden of pursuing the case to his client.

Respondent also complained that two of his former clients did not testify. He cited no authority which requires their testimony. Ample proof was presented by the Bar to establish guilt without the benefit of the former clients, Leon Smith and Suhani Raval. The proof by the Bar determined by the Referee to be clear and convincing, in

the form of both live and documentary evidence.

Respondent also raises for the first time the claim that the administration of the oath to former client Natalie Ortiz was invalid. However, at the trial, Respondent stipulated to the procedure for swearing in the out of town witness, thereby waiving objections on appeal. Furthermore, the procedure was not violative of Florida Statute 90.25 or related cases. The case cited by Respondent articulates that the strict rules applied to civil proceedings do not apply to Bar proceedings and further, that error in regard to the oath can be considered harmless.

In the second point on appeal, Respondent cites numerous cases for the claim that the discipline was excessive. Two of the cases resemble the facts of the instant case.

The first one entailed a forty-five day suspension, but was the result of a *consent judgment*. The second case involved a thirty day suspension. However, in that case, this Court stated that the discipline would be entered in deference to the Referee although such discipline was in conflict with a case, The Florida Bar v. Palmer, which resulted in an eight month suspension for one misrepresentation to one client.

The remaining cases cited by Respondent are clearly inapplicable and not on point factually. The distinctions pertaining to those cases are set forth in the Bar's

argument below.

ARGUMENT

I

RESPONDENT SHOULD BE SUSPENDED FOR TWO YEARS. (Issue presented by the Bar's Cross Petition)

The Bar agrees with the Referee's findings of fact. The Bar also agrees with the imposition of probation and related conditions. However, the Bar submits that a suspension of two years is more appropriate than a suspension of one year in view of the facts of this case as related to the purposes of lawyer discipline.

In Florida Standards for Imposing Lawyer Sanctions, it is stated:

> 1.1 PURPOSE OF LAWYER DISCIPLINE PROCEEDINGS
>
> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly.

This Court has also set forth the purposes:

> An attorney disciplinary proceeding must serve three purposes. First, the discipline must be fair to society. Second, it must be fair to the attorney. Third, the discipline must be severe enough to deter other attorneys from similar misconduct. Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994); Florida Bar v. Stark, 616 So.2d 41(Fla. 1993).

Wide latitude is applied in this Court's review of disciplinary recommendations. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

Respondent's conduct constitutes a serious breach of the public trust on a

number of occasions. In several instances, the Respondent lied to his clients about the progress of their cases. In order to attempt to cover up his own negligence, Respondent indulged in outrageous fictions. He advised clients that their non-existent or dismissed cases were alive and progressing.

Donnarae Flamm, the complainant in count one of the Bar's complaint, retained Respondent to file a federal tort action. A complaint was filed during June of 1995. Service of process was completed and an answer filed on or about December 1, 1995. (TFB's Exh. 11). From June, 1995, until the latter part of 1996, Flamm sought to discover the status of her case. She encountered constant difficulties in that regard. However, on November 8, 1996, in a telephone conversation, Respondent simply lied to his client to hide the very significant truth that the case had been dismissed for lack of prosecution. (T. 102-103).

The Respondent's actions revealed an attorney who did virtually nothing to carry out his contractual obligations and then lied about that fact. Respondent represented to Flamm that the case was proceeding properly. Respondent's lies undermined the fundamental trust required in the attorney-client relationship. Further, the practical result of Respondent's inaction and lies was the expiration of the statute of limitations in the Flamm case. (T. 122).

Fairness to the public suggests that Respondent be given an ample suspension

based on the Flamm case alone. However, Flamm was not the only client to whom the Respondent had lied.

Similar deception is evident in the bankruptcy matter in which Respondent represented Natalie Ortiz. After the preliminary papers were filed, Ortiz was notified of a creditor's meeting scheduled for March 27, 1997. She told Respondent of her inability to attend on that date. Respondent assured his client that he would seek a continuance, but did not do so. The result was a dismissal of Ortiz' petition. (T. 136-137, 156).

Again, Respondent failed to tell the truth. He conveyed the powerful message that a client could not trust his lawyer to do that which was promised. His repeated falsehoods undermined confidence in the attorney-client relationship and the judicial system.

Respondent also submitted false assurances to client, Daniel Bernard. The court had notified Bernard that some required documents had not been filed in his case. (T. 31). Bernard, in turn, notified Respondent of that fact.

The Respondent asked Bernard to fax the documents to his office and assured Bernard that the matter would be taken care of. (T. 31). In fact, the Respondent did not file the documents with the court. (T. 31).

Bernard filed a complaint with The Florida Bar. Subsequently, the Respondent

advised Bernard that he was seeking a special hearing with the judge in the adoption case. (T. 33). In fact, Respondent had done nothing and Bernard learned that the court had advised Respondent by mail that dismissal would be forthcoming within thirty days. (T. 33). Bernard concluded his case pro se, without any assistance from the Respondent. (T. 34).

Leon Smith retained the Respondent to pursue a civil matter on his behalf. (T. 165, 167). Respondent neglected to file the suit. (T. 169). When the issue of apparent neglect arose, Respondent offered the excuse that Smith had not paid the filing fee. It was clear from the retainer agreement, however, that the client was obligated to *reimburse* Respondent for any court costs. (T. 169).

Respondent was found guilty of multiple violations in regard to the five counts of the Bar's complaint. These included five violations of Rule 4-1.3 (Diligence), four violations of Rule 4-1.1 (Competence), two violations of Rule 4-8.4(c) (Engaging in conduct involving dishonesty, fraud, deceit, or misrepre-sentation), one violation of Rule 4-1.4 (Communication), one violation of Rule 4-8.4(d) (Engaging in conduct that is prejudicial to the administration of justice), and one violation of Rule 4-8.4(g) (Failing to respond in writing to a disciplinary agency which is conducting an investigation) of the Rules of Professional Conduct.

In The Florida Bar v. Provost, 323 So.2d 578 (Fla. 1975), the Respondent was

found to be guilty of neglect in four cases. His disciplinary history included similar violations in two additional instances. The facts reported in those instances included only one lie to a client to cover up neglect. The disciplinary suspension imposed was for a period of three years. In the instant case, there are a similar number of cases of neglect, numerous lies to clients, and several violations in addition to neglect.

The Florida Bar v. Pincus, 327 So.2d 29 (Fla. 1976), resulted in a one year suspension for three cases of neglect. The conduct of Pincus was devoid of the falsehoods and misrepresentation involved in this case. The number and kind of violations is greater in Respondent's case than in Pincus.

Three cases of neglect were reported in The Florida Bar v. Fath, 386 So.2d 787 (Fla. 1980), and The Florida Bar v. Fath, 368 So.2d 357 (Fla. 1979). The earlier case resulted in a three month suspension. The later case resulted in a two year suspension. Fath's violations were fewer in number and kind that those of the Respondent.

The instant facts when compared to the foregoing cases establish that the number of violations involved in Respondent's case and the serious nature of his violations call for a penalty of greater duration than one year. This Court has held that cumulative misconduct should result in more severe penalties. The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979). The instant facts demonstrate that greater

severity is necessary to send the proper message to the public and potential violators. The Respondent's conduct which resulted in denial of a hearing on the merits for several of his client outweighs any potential unfairness to the Respondent.

II

THE REFEREE DID NOT ERR IN MAKING FINDINGS AND RECOMMENDATIONS AS TO GUILT (The Bar's Response to Issue I of Respondent's Initial Brief)

Respondent alleges error in regard to count one of the Bar's complaint. Specifically, he challenges a statement in the Referee's Report:

> 3. Furthermore, the Respondent's suggestion that the Complainant might still have filed a separate case for breach of oral contract without supplying any written documentation advising her of that possibility, if in fact it was or still is one, is outright offensive especially when this statement is offered with the excuse that Ms. Flamm was an experienced paralegal, to wit, that for some reason she should have had knowledge. (P. 4, ROR).

Respondent adds that the Referee's erroneous impression prejudiced his findings.

The Referee's statement is factually correct. Further, even if in error, any harm is clearly outweighed by the substantive transgressions of the Respondent.

The Referee's finding was correct; the Respondent improperly sought to shift the obligation to his client to pursue the case under a new legal theory (breach of contract) in order to avoid the problem of the statute of limitations. He sought to transfer his responsibilities to the client (T. 122, 124) solely because his client was a paralegal. Even if that conduct was appropriate, Respondent never explained in writing why his proposed breach of contract theory could survive a challenge under the statute of limitations.

The Referee's reaction to Respondent' argument was correct and clearly appropriate in light of the fact that the Respondent had never advised his client that he was no longer representing her. (T. 124). Therefore, is only logical that the Respondent could not expect Flamm to assume responsibility for the case. Respondent had promised Flamm in a May 12, 1995, letter that he would pursue the breach of contract theory. (TFB's Exh. 12). For more than a year he neglected to do so. He did not respond to calls, he ignored inquiries, and he falsely advised his client that her case was progressing. After his reprehensible conduct, he wrote in response to the Bar complaint in a letter dated February 17, 1997, that he believed that a breach of contract action was still viable. In addition to being somewhat tardy, he provided no details or documentation.

Respondent claims that this particular act alone prejudiced the Referee. Respondent's reprehensible conduct in relation to five clients, discussed in this brief, is sufficient to lead the referee to properly conclude the existence of guilt and the need for substantial discipline. The violations ruled upon in the report are clearly based upon a largely undisputed record, an indication of the proper findings unaffected by any prejudice.

Respondent also claims that there is error inherent in the fact that Leon Smith did not testify. Respondent cites no case in support of the proposition that live

testimony from the complainant witness is crucial to proving a violation of the Rules of Professional Conduct.

The Bar's case against the Respondent was established through documentary evidence (TFB's Exh. 17) as well as testimony from the Respondent himself. (T. 165-166, 206). There was clear and convincing evidence to establish that Respondent was not diligent, failed to communicate with his client, and failed to respond in writing to the Bar. Where there is competent substantial evidence, the findings of the Referee should be upheld. The Florida Bar v. Bechimol, 681 So.2d 663 (Fla. 1996).

The Bar's file was admitted without objection. (T. 163). Said file contained no response to the Bar's inquiries. (TFB's Exh. 17). His client's complaint was based, in part, on the fact that Respondent had not filed the suit for which he had been retained, a fact to which the Respondent testified. (T. 169). Respondent did not recall responding to the Bar, nor did he provide the requested documentation. (T. 176-179).

Respondent excused his lack of diligence upon his client's failure to pay the filing fee "up front." (T. 169). However, despite repeated inquiries from the Bar, Respondent provided no documentation that he requested payment of the fee as a precondition to filing the suit. The retainer agreement stated that the fee was to be paid after recovery. (T. 165-166, Exh. 17).

The foregoing evidence established Respondent's guilt without Smith's

testimony. Referees are authorized to consider any evidence that they deem relevant to resolving fact issues in Bar disciplinary proceedings. The Florida Bar v. Rood, 620 So.2d 1252 (Fla. 1993). The Respondent does not possess a right to confront witnesses face to face. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986).

Respondent presents some arguments regarding count four of the Bar's complaint. The Referee found that Respondent lacked diligence in pursuit of a judgment against an insurance company. Respondent argues that "two other matters" (paragraph 42, Bar's Complaint) brought up at trial created surprise. That argument is faulty. First, the Referee did not find any violations regarding those two other matters; therefore the argument is immaterial. Second, Respondent was aware of the two other matters and testified as to both at the final hearing (T. 54-55). Respondent raised no objection of surprise at the hearing, and in failing to do so, he waived his right to argue against the consideration of said matters 3 Fla.Jur. 2d, "Appellate Review" §592. Further, Respondent did not seek additional details regarding the two other matters through either motion practice or discovery.

Respondent asserts that error exists because the Bar did not call Suhani Raval as a witness. However, there is no authority cited by Respondent for the proposition that Suhani Raval's testimony was required in order to prove a violation. The Bar provided substantial competent evidence through the testimony of other live witnesses

and documentary evidence. The complaint identified Suhani Raval as a client, and the Respondent represented the Raval family in the matters for which they sought counsel. Respondent cannot argue surprise. Respondent testified that he had conferred with Suhani Raval (T. 60), in addition to he other Ravals, regarding the case. He did not object to the testimony of Sunali and Mayuri at the final hearing in this cause.

In respect to count five, Respondent takes issue with the oath taken by Natalie Ortiz. Respondent states that the act of swearing in the witness must take place where the witness is testifying. No such issue was raised below at the final hearing, at the time of the live telephonic testimony. (T. 125, 126). In fact, the Respondent stipulated to the procedure followed.

The Referee: Are you satisfied that its Miss Ortiz?

Respondent: Yes.

The Referee: We can proceed in accordance with 90.250 (sic.).

Respondent: Yes.

The Referee: Without the formalities of 90.250 (sic.).

Respondent: Yes. (T. 127-128).

Even if there was no stipulation and even if Respondent had not waived the issue, there is no authority which requires the oath be administered where the witness

is testifying. F.S. 90.25. Florida Statute contains no such requirement, nor does the case cited by the Respondent, The Florida Bar v. Clement, 662 So.2d 690 (Fla. 1995).

The following portions of the holding in Clement are also indications of its inapplicability to this case:

> Florida courts have held in criminal cases that an unsworn witness is not competent to testify. See, e.g., Houck v. State, 421 So.2d 113, 115 (Fla. 1st DCA 1982). An affidavit that is not executed in accordance with the requirements of section 92.50(3) is not competent evidence in a civil case. Hamilton v. Alexander Proudfoot Co. World Headquarters, 576 So.2d 1339, 1341 (Fla. 4th DCA 1991).
>
> Bar disciplinary hearings, however, are neither civil nor criminal, but are quasi judicial. Rules Regulating Florida Bar 3-7.6(e)(1). While Clement's attorney objected to the procedure by which Tisseaux was sworn, he did not contest whether Tisseaux actually testified. Although bar disciplinary proceedings are not governed by technical rules of evidence, see The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986), it would be a better practice to comply with section 92.50(3). But, under the circumstances of this case, we find no error in the referee's failure to comply with that provision. (At 698. Emphasis added).

III

SUSPENSION FOR ONE YEAR IS CLEARLY NOT EXCESSIVE
(The Bar's Response to Issue II, Respondent's Initial Brief)

Respondent suggests that a number of cases indicate that a one year suspension is excessive. Before considering those cases, it is important to consider the violations found by the Referee.

Respondent was found to be guilty of multiple violations in regard to the five counts of the complaint. These included five violations of Rule 4-1.3 (Diligence), four violations of Rule 4-1.1 (Competence), two violations of Rule 4-8.4(c) (Conduct involving dishonesty, fraud, deceit, or misrepresentation), one violation of Rule 4-1.4 (Communication), one violation of Rule 4-8.4(d) (Engaging in conduct that is prejudicial to the administration of lunch), and one violation of Rule 4-8.4(g) (Failing to respond in writing to a disciplinary agency which is conducting an investigation) of the Rules of Professional Conduct . The violation of Rule 4-8.4(c) of the Rules of Professional Conduct found in relation to count one, pertaining to Donnarae Flamm, encompassed multiple misrepresentations.

The cases cited by the Respondent in support of his argument are not comparable to the instant case in terms of the quantity and nature of the Respondent's violations. As discussed in detail in the Cross Appeal of the Bar, the most egregious

conduct Respondent engaged in involves misrepresentations to clients.

The Florida Bar v. Griggs, 522 So.2d 24 (Fla. 1988), is one of the few cases cited by the Respondent that involves multiple misrepresentations. Griggs, however, is not an appropriate reference insofar as it was the result of a *consent judgment.* The short suspension (forty-five days) was influenced by the facts reported by this Court that:

> "Respondent testified he found himself confronted in all three cases with problems he could not easily resolve as a new lawyer. Instead of conferring with his senior partners for advice, he floundered and ended up in this situation." (At 26).

Respondent also relies upon The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). In that case, the Court found the attorney guilty of four rule violations. There was no finding that the attorney had violated Rule 4-8.4(c) (Engaging in conduct involving dishonesty, fraud, deceit or misrepresentation) or Rule 4-8.4(d) (A lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct, a clear distinction form the Respondent's case.

In regard to discipline, this Court explained that:

> [2, 3] As to discipline, we note that the referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations -such as a Respondent's degree of culpability and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation). Accordingly, we will not second guess

> referee's recommended discipline as long as that discipline has a reasonable basis in existing case law. In the present case, however, we find the recommended discipline to be in conflict with The Florida Bar v. Palmer, 502 So.2d 752 (Fla. 1987), wherein we suspended the attorney for eight months for conduct that was similar in many ways to Lecznar's. Based on Palmer, on the one hand, and the referee's recommended discipline, on the other, we find a ninety day suspension appropriate on the record. (At 1288, emphasis added).

Palmer was guilty of one misrepresentation to one client. The discipline was eight months. As the Bar submits in its Cross Appeal, a two year suspension would be more suitable based upon these facts.

The remaining cases cited by the Respondent simply do not apply to this case. Those cases are:

1. The Florida Bar v. Barcus, 697 So.2d 91 (Fla. 1997). The inapplicability of that case is obvious from this Court's conclusions:

> We find this to be a case of an attorney who ineptly handled a difficult situation. There is no evidence that he purposefully neglected their case or tried to disadvantage them. We specifically note that there was no finding by the referee as to Counts I, II, or V of any harm to the Mases. To the contrary, the actions of Barcus reflected a concern for the Mases' financial plight to the extent that he spent many hours counseling them and used money the Mases paid to him to cover costs of the lawsuit rather than his legal fees.

2. The Florida Bar v. Garcia, 485 So.2d 1254 (Fla. 1986). This case does

not involve with multiple misrepresentations, but rather with incompetence. A short time in practice was deemed to be a mitigating factor. Trust account problems were partially attributed to criminal acts of employees.

3. The Florida Bar v. Graves, 508 So.2d 344 (Fla. 1987). This case does not involve any misrepresentations and was the result of a consent judgment.

4. The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987). This case is irrelevant. It involves one instance of threats to a party represented by counsel as well as directed to the opposing counsel.

5. The Florida Bar v. Nowack, 697 So.2d 828 (Fla. 1997). This case encompasses four instances of neglect and inadequate communication and one instance of failure to pay an employee. It does not involve any lies to a client.

6. The Florida Bar v. Stein, 471 So.2d 36 (Fla. 1985). This case was a consolidation of one consent judgment and two other matters. No misrepresentations are involved. Competence and neglect were the subjects of this opinion. The attorney "presented character evidence that he is a competent and trustworthy lawyer." (At 37). No comparison to this case is apparent, particularly in view of the evidence of untrustworthiness of the Respondent.

7. The Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987). Weed was guilty of neglect in a number of appellate matters and offered a false defense for doing so.

Weed does not involve misrepresentations to clients.

Respondent submits that the discipline was imposed without adequate notice, citing The Florida Bar v. Carricarte, 24 F.L.W. 16 (Fla. April 16, 1999). As quoted in Carricarte, this Court in The Florida Bar v. Cruz, 490 So.2d 48, 49 (Fla. 1986), stated that "due process requires that the attorney be permitted to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed."

There was a separate hearing in the Respondent's case as to discipline on March 5, 1999. The Respondent had an opportunity to offer evidence in mitigation at that hearing. The recommended mental health examination is appropriate in light of the fact the Respondent repeatedly failed to respond to letters from the Bar (T. 171, 172, 177, 179) and offered no explanation for failing to follow up with his client Ortiz (T. 205). No explanation was offered for the pattern of negligence and deception of other clients either. Discipline which includes an examination of Respondent's mental health is clearly appropriate.

Further, Respondent has not established that a reference to "someone names 'Bruce Crown'" prejudiced him in any way.

Respondent failed to establish his objection to investigative fees listed as costs pursuant to Rule 3-7.6(k)(2), nor has he cited any authority for the proposition that

fees are exclusive of investigative costs.

Finally, the Respondent has offered no authority in support of his position that the absence of any finding of mitigation constitutes error by the Referee.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee's recommendations as to factual findings and conditions of suspension should be approved. However, Respondent's suspension should be increased to a term of two years.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Complainant's Initial Brief on Cross Petition for Review and Answer Brief on Petition for Review was forwarded Via Airborne Express to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed by certified mail return receipt requested (#Z 229 381 989) to Rafael A. Centurion, Respondent, at his record Bar address of Dept. of Highway Safety, 2515 West Flagler Street, Miami, Florida 33135, on this _____ day of _____, 1999.

_____
CYNTHIA ANN LINDBLOOM
Bar Counsel